

## **Special Appellate Division Panel for Emergent Environmental Appeals C Directive; Order**

Directive #8-89  
Issued by:

August 14, 1989  
Chief Justice Robert N. Wilentz

### **1. Special Environmental Panel**

There is hereby designated a Special Environmental Panel consisting of three judges regularly assigned to the Appellate Division, to be appointed by the Chief Justice, to consider all appellate matters to which this directive is applicable.

### **2. Applicability**

This directive applies to every matter in which a trial judge denies the application of a governmental entity for an injunction or restraining order or for immediate enforcement of such an order which the governmental entity has sought for the purpose of eliminating or ameliorating substantial environmental damage or an imminent threat of such damage.

### **3. Procedure**

A governmental entity aggrieved by the action of the trial court shall forthwith file a notice of appeal or notice of motion for leave to appeal, as appropriate, directly with the judges of the Special Environmental Panel, together with a motion for such emergent relief as it deems necessary to protect the environment from substantial damage or the imminent threat thereof. The motion shall have annexed thereto the order of the trial judge appealed from or the court's endorsement on a form of order of its refusal to enter it and shall be supported by an affidavit of a member of the entity's professional staff or other environmental expert certifying that protection of the environment from substantial damage requires immediate appellate review of the trial court's action. The affidavit shall specify with particularity the nature of the environmental problem, the person or persons alleged to be responsible therefor, the precise relief sought by the entity from the trial court, the legal basis for such relief, the action taken by the trial court, the precise relief sought from the appellate court, and such other matters as will enable the appellate court to evaluate the scope and nature of the environmental danger. If the Panel is satisfied that the certification meets the applicability standard of this directive, it shall forthwith enter a preliminary order granting interim relief pending disposition of the application, if appropriate, and prescribing the time and manner of the panel's review of the order appealed from, the time and mode of service on all parties, a briefing schedule, the content of the record on appeal, and such other matters as it deems appropriate. If the Panel is not so satisfied, it shall enter an order declining to entertain the appeal pursuant to this directive, stating therein with specificity its reasons for so concluding. Except as herein otherwise provided or as may be provided in the preliminary order, the procedures prescribed by the rules of court for the taking of interlocutory appeals and the seeking of emergent appellate relief shall apply.

#### 4. Panel Review

The Panel shall consider the matter on its merits as promptly as is consistent with the public necessity and the right of the parties to be heard on the record and may, in its discretion, make findings of fact pursuant to its original jurisdiction, remand to the trial court for emergent fact finding, or take such other action as is necessary to determine the nature, degree or gravity of the asserted environmental damage or threat thereof, and it shall enter such orders as it deems necessary to protect the environment from substantial damage or the threat thereof.

#### 5. Supreme Court Review

In the event the Special Panel either declines to enter a preliminary order for the entertaining of the emergent appeal pursuant to this directive or in the event it entertains the appeal but fails to accord the governmental entity the full scope of the relief it has sought, the governmental entity may forthwith seek emergent relief from the Supreme Court in accordance with the rules of court.

#### 6. Effective Date

This directive shall take effect immediately. It is nevertheless intended as an interim measure only, pending completion of a full review of the Judiciary's handling, at all levels, trial and appellate, of environmental matters.

### **Addendum**

This directive, referred to in the Statement of the Chief Justice relating to the recent environmental disaster affecting Route I-78, is intended to provide a mechanism whereby a governmental agency may obtain immediate appellate intervention when it is of the view that any action of a trial court or its refusal to act jeopardizes the public's right to protection from substantial environmental damage.

The emergent procedures presently available both in the Appellate Division and Supreme Court are generally adequate to enable both prompt invocation of appellate jurisdiction and prompt review by the appellate court. This directive emphasizes the availability of emergent relief in matters of this kind, which it intends to make even more accessible by the establishment of a special appellate panel to consider emergent environmental matters.

Paragraph 1 of the directive authorizes the appointment of the Special Environmental panel, to consist of three regularly assigned judges of the Appellate Division. The Panel members, as well as the Presiding Judge among them, are to be designated from time to time by the Chief Justice.

Paragraph 2 defines applicability. The procedures of the directive are intended to be available only to an aggrieved governmental agency or entity, not to a property owner or other person who is charged with the responsibility for creating or perpetuating the environmental problem and against whom the injunctive relief is sought. Persons against whom relief is sought who are aggrieved by the trial judge's action may seek appellate review through the presently available emergent and leave to appeal procedures.

The directive refers in terms only to the denial by the trial court of an injunction or restraining order or its declination to require immediate enforcement of any order which it may have entered. The directive should, however, be understood to subsume any action of a trial court, however denominated, which is tantamount to denying a governmental agency the full scope of immediate relief which it seeks in order to protect the public interest from

substantial environmental damage or imminent threats thereto. As is made clear in paragraph 3 of the directive, the trial court must memorialize its action, if only by endorsing its refusal to act affirmatively, on a submitted form of order. This is the technique presently provided for by *Rule 4:52-5* (denial of application for injunction or restraining order).

While the directive does not undertake to define governmental entity, that term should be understood in its broadest possible connotation to include any officer, office or agency of any level of government having responsibility or authority to take legal action to protect the environment.

Paragraph 3 of the directive augments the presently prescribed procedures for seeking emergent relief in the Appellate Division. It requires, as presently, the filing of a notice of appeal or notice of motion for leave to appeal but directs the filing thereof with the judges of the Special Panel rather than the Clerk's Office. The Special Panel will itself thereafter enter appropriate orders prescribing the mechanical details for the initiation, perfecting, and processing of the appeal.

In order to ensure that the matter is one which qualifies for the special handling provided for by the directive, the appellant is required to accompany the motion for emergent relief with the affidavit of a professional explaining in detail the nature and magnitude of the environmental problem with the specificity described in the directive. While the directive itself does not so expressly require, the affidavit, should it be practicable for it to do so, should explain from the professional point of view the nature and basis of the trial court's asserted error. While the professional status of the affiant is not described, it is intended that the affiant be a person with appropriate professional qualifications in engineering, chemistry, or such other discipline as is relevant in the circumstances.

After reviewing the motion papers and most particularly the professional affidavit, the Special Panel will make a preliminary determination of whether the matter is one to which the directive is applicable. If it decides that it is, it will enter a preliminary order dealing with all appellate processing and perfection details necessary for the prompt hearing and disposition of the appeal, and may, in its discretion, grant interim relief as well. If it decides that the affidavit is not adequate to demonstrate eligibility under the directive, it shall enter an order so stating, together with its reasons for having so concluded, and a party aggrieved thereby may then seek prompt emergent relief from the Supreme Court.

Paragraph 4 of the directive requires the Panel to consider and dispose of the emergent appeal as soon as possible.

It will be within the Panel's discretion to make findings of fact pursuant to *R. 2:10-5*, to temporarily remand to the trial court, or to take any other appropriate action as will assist in its prompt disposition of the emergent application.

The directive does not intend to require the Special Panel to decide the ultimate plenary appeal in every matter in which it has entered a preliminary order. Its intended function rather is to constitute an identifiable and available forum for the prompt review on an emergent basis of a trial judge's failure to accord a governmental unit the injunctive or other relief it deems essential in the public's need for a safe environment.

Paragraph 5 of the directive is intended to serve as a reminder to an aggrieved governmental agency that the emergent processes of the Supreme Court should be resorted to if it is not satisfied that it has obtained the full scope of relief it regards as necessary to protect the public interest.

This directive is to take effect immediately, the Chief Justice having by separate

order named Judge Herman D. Michels, Presiding, and Judges Sylvia B. Pressler and Stephen Skillman to the Special Panel. The directive is, nevertheless, intended as an interim measure only, pending completion of the study and review referred to in the Chief Justice's Statement.

#### **EDITOR-S NOTE**

No change has been made to the text of the directive or to the official commentary.