

SENATE BILL 210

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P2

2001 Regular Session
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By: **The President (Administration) and Senators Blount, Conway, Currie,
Exum, Hollinger, Kelley, Lawlah, Mitchell, and Teitelbaum**

Introduced and read first time: January 22, 2001

Assigned to: Economic and Environmental Affairs

Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: March 9, 2001

CHAPTER_____

1 AN ACT concerning

2 **Procurement - Minority Business Participation**

3 FOR the purpose of continuing until a certain date the provisions of the State
4 Procurement Law relating to procurement from minority businesses; altering
5 the percentage of the total dollar value of procurement by units of State
6 government that is made directly or indirectly from certified minority
7 businesses which units of State government are to seek to achieve; altering
8 certain provisions relating to the structure of procurement procedures by units
9 of State government; defining certain terms; altering certain definitions;
10 authorizing ~~a certain certification agency~~ the Board of Public Works to adopt
11 certain regulations; requiring the Board of Public Works to adopt regulations
12 under certain circumstances; altering certain reporting requirements; requiring
13 a certain study and the issuance of a certain report by a certain date; requiring
14 the Board of Public Works to study and report on the establishment of a certain
15 process for creating certain incentives for achieving greater minority business
16 participation in private-sector contracts; making provisions of this Act
17 severable; and generally relating to minority business participation in State
18 procurement.

19 BY repealing and reenacting, with amendments,
20 Article - State Finance and Procurement
21 Section 14-301, 14-302, 14-303, 14-305, and 14-309
22 Annotated Code of Maryland
23 (1995 Replacement Volume and 2000 Supplement)

24 BY repealing and reenacting, without amendments,

1 Article - State Finance and Procurement
2 Section 14-304, 14-307, and 14-308
3 Annotated Code of Maryland
4 (1995 Replacement Volume and 2000 Supplement)

5 BY repealing and reenacting, with amendments,
6 Chapter 116 of the Acts of the General Assembly of 1995, as amended by
7 Chapters 495 and 496 of the Acts of the General Assembly of 2000
8 Section 2

9 Preamble

10 WHEREAS, In January 1989, the Supreme Court of the United States, in City
11 of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) held that state and local minority
12 business programs should be narrowly tailored to remedy the effects of past
13 discrimination;

14 WHEREAS, In compliance with the requirements of Chapters 495 and 496 of
15 the 2000 Session of the General Assembly, the Maryland Department of
16 Transportation entered into a contract with National Economic Research Associates,
17 Inc., to conduct a Minority Business Utilization Study;

18 WHEREAS, The report prepared by National Economic Research Associates,
19 Inc. has come before the General Assembly of Maryland, hearings have been held, and
20 the General Assembly has considered the report and all evidence upon which
21 National Economic Research Associates, Inc. relied in reaching its findings and
22 conclusions regarding the Minority Business Enterprise Program;

23 WHEREAS, The General Assembly finds that there is a history in Maryland of
24 discrimination against African Americans, Hispanics, Asians, American Indians, and
25 women;

26 WHEREAS, The General Assembly finds that in the State marketplace,
27 businesses owned and controlled by African Americans, Hispanics, Asians, American
28 Indians, and women are underutilized, and this disparity taken with other evidence
29 demonstrates that this underutilization is the product of current, continuing
30 discrimination against such persons in the State marketplace;

31 WHEREAS, The General Assembly finds that the Maryland Minority Business
32 Enterprise Program has not eradicated the impact of past discrimination or precluded
33 ongoing discrimination;

34 WHEREAS, The General Assembly finds that race-neutral and gender-neutral
35 measures of assisting minority firms to date have been not been effective; and

36 WHEREAS, The General Assembly concludes that continuation of a narrowly
37 tailored program, which meets the requirements of Croson and later decisions, and
38 continuation of race-neutral and gender-neutral means of assisting minority firms
39 are essential to the ultimate achievement of a marketplace in which minority firms

1 will not be subject to discrimination and will be able to obtain a fair share of private
2 and public contract expenditures without the aid of the Minority Business Enterprise
3 Program; now, therefore,

4 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
5 MARYLAND, That the Laws of Maryland read as follows:

6 **Article - State Finance and Procurement**

7 14-301.

8 (a) In this subtitle the following words have the meanings indicated.

9 (b) "Certification" means the determination that a legal entity is a minority
10 business enterprise for the purposes of this subtitle.

11 (c) "Certification agency" means the agency designated by the Board of Public
12 Works under § 14-303(b) of this subtitle to certify and decertify minority business
13 enterprises.

14 (d) "Certified minority business enterprise" means a minority business
15 enterprise that holds a certification.

16 (E) "ECONOMICALLY DISADVANTAGED INDIVIDUAL" MEANS A SOCIALLY
17 DISADVANTAGED INDIVIDUAL WHOSE ABILITY TO COMPETE IN THE FREE
18 ENTERPRISE SYSTEM HAS BEEN IMPAIRED DUE TO DIMINISHED CAPITAL AND
19 CREDIT OPPORTUNITIES AS COMPARED TO OTHERS IN THE SAME OR SIMILAR LINE
20 OF BUSINESS WHO ARE NOT SOCIALLY DISADVANTAGED.

21 [(e)] (F) (1) "Minority business enterprise" means any legal entity, except a
22 joint venture, that is:

23 (i) organized to engage in commercial transactions; [and]

24 (ii) at least 51% owned and controlled by 1 or more individuals who
25 are [members of a group that is disadvantaged] socially [or] AND economically
26 DISADVANTAGED[, including:

27 1. African Americans;

28 2. American Indians;

29 3. Asians;

30 4. Hispanics;

31 5. women; or

32 6. physically or mentally disabled individuals]; AND

1 (III) MANAGED BY, AND THE DAILY BUSINESS OPERATIONS OF
2 WHICH ARE CONTROLLED BY, ONE OR MORE OF THE SOCIALLY AND ECONOMICALLY
3 DISADVANTAGED INDIVIDUALS WHO OWN IT.

4 (2) "Minority business enterprise" includes a not for profit entity
5 organized to promote the interests of physically or mentally disabled individuals.

6 (G) (1) ~~SUBJECT TO PARAGRAPH~~ PARAGRAPHS (2) AND (3) OF THIS
7 SUBSECTION, "PERSONAL NET WORTH" MEANS THE NET VALUE OF THE ASSETS OF
8 AN INDIVIDUAL REMAINING AFTER TOTAL LIABILITIES ARE DEDUCTED.

9 (2) "PERSONAL NET WORTH" INCLUDES THE INDIVIDUAL'S SHARE OF
10 ASSETS HELD JOINTLY OR AS COMMUNITY PROPERTY WITH THE INDIVIDUAL'S
11 SPOUSE.

12 ~~(2)~~ (3) "PERSONAL NET WORTH" DOES NOT INCLUDE:

13 (I) THE INDIVIDUAL'S OWNERSHIP INTEREST IN THE APPLICANT
14 OR A CERTIFIED MINORITY BUSINESS ENTERPRISE; OR

15 (II) THE INDIVIDUAL'S EQUITY IN HIS OR HER PRIMARY PLACE OF
16 RESIDENCE; ~~OR.~~

17 ~~(III) THE INDIVIDUAL'S SHARE OF ASSETS HELD JOINTLY OR AS~~
18 ~~COMMUNITY PROPERTY WITH THE INDIVIDUAL'S SPOUSE.~~

19 ~~(H) "RACE-CONSCIOUS MEASURE" MEANS A METHOD THAT IS FOCUSED~~
20 ~~SPECIFICALLY ON ASSISTING ONLY MINORITY INDIVIDUALS.~~

21 ~~(H)~~ (H) "RACE-NEUTRAL MEASURE" MEANS A METHOD THAT IS OR CAN BE
22 USED TO ASSIST ALL SMALL BUSINESSES.

23 ~~(H)~~ (I) (1) SUBJECT TO PARAGRAPHS (2) AND (3) OF THIS SUBSECTION,
24 "SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL" MEANS A CITIZEN
25 OR LAWFULLY ADMITTED PERMANENT RESIDENT OF THE UNITED STATES WHO IS:

26 (I) IN ANY OF THE FOLLOWING MINORITY GROUPS:

27 1. AFRICAN AMERICAN - AN INDIVIDUAL HAVING ORIGINS
28 IN ANY OF THE BLACK RACIAL GROUPS OF AFRICA;

29 2. AMERICAN INDIAN/NATIVE AMERICAN - AN INDIVIDUAL
30 HAVING ORIGINS IN ANY OF THE ORIGINAL PEOPLES OF NORTH AMERICA AND WHO
31 IS A DOCUMENTED MEMBER OF A NORTH AMERICAN TRIBE, BAND, OR OTHERWISE
32 HAS A SPECIAL RELATIONSHIP WITH THE UNITED STATES OR A STATE THROUGH
33 TREATY, AGREEMENT, OR SOME OTHER FORM OF RECOGNITION. THIS INCLUDES AN
34 INDIVIDUAL WHO CLAIMS TO BE AN AMERICAN INDIAN/NATIVE AMERICAN AND WHO
35 IS REGARDED AS SUCH BY THE AMERICAN INDIAN/NATIVE AMERICAN COMMUNITY
36 OF WHICH THE INDIVIDUAL CLAIMS TO BE A PART, BUT DOES NOT INCLUDE AN
37 INDIVIDUAL OF ESKIMO OR ALEUTIAN ORIGIN;

1 3. ASIAN - AN INDIVIDUAL HAVING ORIGINS IN THE FAR
2 EAST, SOUTHEAST ASIA, OR THE INDIAN SUBCONTINENT, AND WHO IS REGARDED AS
3 SUCH BY THE COMMUNITY OF WHICH THE PERSON CLAIMS TO BE A PART;

4 4. HISPANIC - AN INDIVIDUAL OF MEXICAN, PUERTO RICAN,
5 CUBAN, CENTRAL OR SOUTH AMERICAN, OR OTHER SPANISH CULTURE OR ORIGIN,
6 REGARDLESS OF RACE, AND WHO IS REGARDED AS SUCH BY THE COMMUNITY OF
7 WHICH THE PERSON CLAIMS TO BE A PART;

8 5. PHYSICALLY OR MENTALLY DISABLED - AN INDIVIDUAL
9 WHO HAS AN IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE MAJOR LIFE
10 ACTIVITY, WHO IS REGARDED GENERALLY BY THE COMMUNITY AS HAVING SUCH A
11 DISABILITY, AND WHOSE DISABILITY HAS SUBSTANTIALLY LIMITED HIS OR HER
12 ABILITY TO ENGAGE IN COMPETITIVE BUSINESS; OR

13 6. WOMEN - A WOMAN, REGARDLESS OF RACE OR
14 ETHNICITY, UNLESS SHE IS ALSO A MEMBER OF AN ETHNIC OR RACIAL MINORITY
15 GROUP AND ELECTS THAT CATEGORY IN LIEU OF THE GENDER CATEGORY; OR

16 (II) OTHERWISE FOUND BY THE CERTIFICATION AGENCY TO BE A
17 SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL.

18 (2) THERE IS A REBUTTABLE PRESUMPTION THAT AN INDIVIDUAL WHO
19 IS A MEMBER OF A MINORITY GROUP UNDER PARAGRAPH (1)(I) OF THIS SUBSECTION
20 IS SOCIALLY AND ECONOMICALLY DISADVANTAGED.

21 (3) AN INDIVIDUAL WHOSE PERSONAL NET WORTH EXCEEDS \$750,000
22 MAY NOT BE FOUND TO BE ECONOMICALLY DISADVANTAGED.

23 ~~(K)~~ (J) "SOCIALLY DISADVANTAGED INDIVIDUAL" MEANS AN INDIVIDUAL
24 WHO HAS BEEN SUBJECTED TO RACIAL OR ETHNIC PREJUDICE OR CULTURAL BIAS
25 WITHIN AMERICAN SOCIETY BECAUSE OF MEMBERSHIP IN A GROUP AND WITHOUT
26 REGARD TO INDIVIDUAL QUALITIES. SOCIAL DISADVANTAGE MUST STEM FROM
27 CIRCUMSTANCES BEYOND THE CONTROL OF THE INDIVIDUAL.

28 14-302.

29 (a) (1) Except for leases of real property and except as provided in
30 paragraphs (2) and (3) of this subsection, each unit shall structure procurement
31 procedures, consistent with the purposes of this subtitle, to try to achieve the [result
32 that a minimum of 14% of the unit's total dollar value of procurement contracts is
33 made directly or indirectly from certified minority business enterprises in accordance
34 with this section.] FOLLOWING RESULTS:

35 (I) A MINIMUM OF 7% OF THE UNIT'S TOTAL DOLLAR VALUE OF
36 PROCUREMENT CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM
37 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION
38 AGENCY AS AFRICAN AMERICAN-OWNED BUSINESSES;

1 (II) A MINIMUM OF 10% OF THE UNIT'S TOTAL DOLLAR VALUE OF
2 PROCUREMENT CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM
3 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION
4 AGENCY AS WOMEN-OWNED BUSINESSES; AND

5 (III) AN OVERALL MINIMUM OF 25% OF THE UNIT'S TOTAL DOLLAR
6 VALUE OF PROCUREMENT CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY
7 FROM ALL CERTIFIED MINORITY BUSINESS ENTERPRISES.

8 (2) (I) Except as provided in paragraph (3) of this subsection, in
9 procurement for construction, each unit shall:

10 (i)] structure procurement procedures, consistent with the purposes
11 of this subtitle, to try to achieve the [result that a minimum of 14% of the unit's total
12 dollar value of construction contracts is made directly or indirectly from certified
13 minority business enterprises; and] FOLLOWING RESULTS:

14 1. A MINIMUM OF 7% OF THE UNIT'S TOTAL DOLLAR VALUE
15 OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM
16 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION
17 AGENCY AS AFRICAN AMERICAN-OWNED BUSINESSES;

18 2. A MINIMUM OF 10% OF THE UNIT'S TOTAL DOLLAR VALUE
19 OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM
20 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION
21 AGENCY AS WOMEN-OWNED BUSINESSES; AND

22 3. AN OVERALL MINIMUM OF 25% OF THE UNIT'S TOTAL
23 DOLLAR VALUE OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR
24 INDIRECTLY FROM ALL CERTIFIED MINORITY BUSINESS ENTERPRISES.

25 (ii) THE UNIT SHALL:

26 1. consider the practical severability of the construction
27 projects; AND

28 2. IMPLEMENT A PROGRAM THAT WILL ENABLE THE UNIT
29 TO EVALUATE EACH CONTRACT TO DETERMINE THE APPROPRIATENESS OF THE
30 GOAL.

31 (3) With respect to the Maryland Department of Transportation, the
32 provisions of paragraph (2)(i) of this subsection shall apply only to construction
33 contracts in excess of \$50,000.

34 (4) EACH UNIT SHALL MEET THE MAXIMUM FEASIBLE PORTION OF THE
35 GOALS STATED IN PARAGRAPHS (1), (2), AND (3) OF THIS SUBSECTION BY USING
36 RACE-NEUTRAL MEASURES TO FACILITATE MINORITY BUSINESS ENTERPRISE
37 PARTICIPATION IN THE PROCUREMENT PROCESS.

1 (5) To achieve the result specified in paragraph (1) or (2) of this
2 subsection, a contractor, INCLUDING A CONTRACTOR THAT IS A CERTIFIED MINORITY
3 BUSINESS ENTERPRISE, shall:

4 (i) identify specific work categories appropriate for subcontracting;

5 (ii) at least 10 days before bid opening, solicit minority business
6 enterprises, through written notice that:

7 1. describes the categories of work under item (i) of this
8 subparagraph; and

9 2. provides information regarding the type of work being
10 solicited and specific instructions on how to submit a bid;

11 (iii) attempt to make personal contact with the firms in item (ii) of
12 this paragraph;

13 (iv) assist minority business enterprises to fulfill bonding
14 requirements or to obtain a waiver of those requirements;

15 (v) in order to publicize contracting opportunities to minority
16 business enterprises, attend prebid meetings or other meetings scheduled by the unit;
17 and

18 (vi) upon acceptance of a bid, provide the unit with a list of minority
19 businesses with whom the contractor negotiated, including price quotes from
20 minority and nonminority firms.

21 [(5)] (6) (i) The unit shall make a finding whether the contractor
22 complied, in good faith, with paragraph [(4)] (5) of this subsection.

23 (ii) If the unit finds the contractor complied with paragraph [(4)]
24 (5) of this subsection, the unit may not require the contractor to renegotiate any
25 subcontract in order to achieve a different result.

26 (b) (1) The provisions of §§ [14-301(e)] 14-301(F) and 14-303 of this subtitle
27 and subsection (a) of this section are inapplicable to the extent that any unit
28 determines the provisions to be in conflict with any applicable federal program
29 requirement.

30 (2) The determination under this subsection shall be included with the
31 report required under § 14-305 of this subtitle.

32 14-303.

33 (a) (1) In accordance with Title 10, Subtitle 1 of the State Government
34 Article, the Board shall adopt regulations consistent with the purposes of this
35 Division II to carry out the requirements of this subtitle.

1 (2) The regulations shall establish procedures to be followed by units,
2 prospective contractors, and successful bidders or offerors to maximize notice to, and
3 the opportunity to participate in the procurement process by, a broad range of
4 minority business enterprises.

5 (b) These regulations shall include:

6 (1) provisions designating one agency to certify and decertify minority
7 business enterprises for all units through a single process that meets applicable
8 federal requirements;

9 (2) a requirement that the solicitation document accompanying each
10 solicitation set forth the expected degree of minority business enterprise participation
11 based, in part, on:

12 (i) the potential subcontract opportunities available in the prime
13 procurement contract; and

14 (ii) the availability of certified minority business enterprises to
15 respond competitively to the potential subcontract opportunities;

16 (3) a requirement that the unit provide a current list of certified
17 minority business enterprises to each prospective contractor;

18 (4) provisions to ensure the uniformity of requests for bids on
19 subcontracts;

20 (5) provisions relating to the timing of requests for bids on subcontracts
21 and of submission of bids on subcontracts;

22 (6) provisions designed to ensure that a fiscal disadvantage to the State
23 does not result from an inadequate response by minority business enterprises to a
24 request for bids;

25 (7) provisions relating to joint ventures, under which a bidder may count
26 toward meeting its minority business enterprise participation goal, the minority
27 business enterprise portion of the joint venture;

28 (8) consistent with [§ 14-302(a)(4)] § 14-302(A)(5) of this subtitle,
29 provisions relating to any circumstances under which a unit may waive obligations of
30 the contractor relating to minority business enterprise participation;

31 (9) provisions requiring a monthly submission to the unit by minority
32 business enterprises acknowledging all payments received in the preceding 30 days
33 under a contract governed by this subtitle;

34 (10) a requirement that a unit shall verify and maintain data concerning
35 payments received by minority business enterprises, including a requirement that,
36 upon completion of a project, the unit shall compare the total dollar value actually

1 received by minority business enterprises with the amount of contract dollars initially
2 awarded, and an explanation of any discrepancies therein;

3 (11) a requirement that a unit verify that minority business enterprises
4 listed in a successful bid are actually participating to the extent listed in the project
5 for which the bid was submitted;

6 (12) provisions establishing a graduation program based on the financial
7 viability of the minority business enterprise, using annual gross receipts or other
8 economic indicators as may be determined by the Board; and

9 (13) other provisions that the Board considers necessary or appropriate to
10 encourage participation by minority business enterprises and to protect the integrity
11 of the procurement process.

12 (c) The regulations adopted under this section shall specify that a unit may
13 not allow a business to participate as if it were a certified minority business
14 enterprise if the business's certification is pending.

15 14-304.

16 (a) In the same manner and with the same fees as provided by law in civil
17 cases, in a matter regarding the decertification of a certified minority business
18 enterprise, the certification agency may:

19 (1) subpoena witnesses;

20 (2) administer oaths; and

21 (3) compel the production of records, books, papers, and other
22 documents.

23 (b) If a person fails to comply with a subpoena issued under subsection (a) of
24 this section, or fails to produce documents or other evidence, on petition of the
25 certification agency, a court of competent jurisdiction may pass an order directing
26 compliance with the subpoena or compelling the production of documents or other
27 evidence.

28 14-305.

29 (a) (1) Within 90 days after the end of the fiscal year, each unit shall report
30 to the Governor's Office of Minority Affairs AND THE CERTIFICATION AGENCY.

31 (2) A report under this subsection shall for the preceding fiscal year:

32 (i) state the total number and value of procurement contracts
33 between the unit and certified minority business enterprises, by specific category of
34 minority business enterprise;

1 (ii) indicate the percentage that those procurement contracts
2 represent, by specific category of minority business enterprise, of the total number
3 and value of procurement contracts; and

4 (iii) contain other such information as required by the Governor's
5 Office of Minority Affairs AND THE CERTIFICATION AGENCY and approved by the
6 Board.

7 (3) A report under this subsection shall be in a form prescribed by the
8 Governor's Office of Minority Affairs AND THE CERTIFICATION AGENCY and approved
9 by the Board.

10 (b) (1) On or before December 31 of each year, the Governor's Office of
11 Minority Affairs shall submit to the Board of Public Works and, subject to § 2-1246 of
12 the State Government Article, to the Legislative Policy Committee a report
13 summarizing the information the Office receives under subsection (a) of this section.

14 (2) This report may be prepared in conjunction with the annual report
15 required under § 9-306 of the State Government Article.

16 14-307.

17 The Legislative Policy Committee shall direct at least 1 standing committee of
18 the House of Delegates and at least 1 standing committee of the State Senate to
19 review annually the performance of units as reported under § 14-305 of this subtitle.
20 14-308.

21 (a) (1) A person may not:

22 (i) fraudulently obtain, hold, or attempt to obtain or hold
23 certification;

24 (ii) aid another person in performing an act prohibited under item
25 (i) of this paragraph;

26 (iii) willfully obstruct, impede, or attempt to obstruct or impede a
27 State official or employee investigating the qualifications of a business entity that has
28 requested certification;

29 (iv) fraudulently obtain, attempt to obtain, or aid another person in
30 fraudulently obtaining or attempting to obtain, public moneys to which the person is
31 not entitled under this subtitle; or

32 (v) in any minority business enterprise matter administered under
33 this subtitle:

34 1. willfully falsify, conceal, or cover up a material fact by any
35 scheme or device;

36 2. make a false or fraudulent statement or representation; or

38 SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this
39 Act is held invalid for any reason in a court of competent jurisdiction, and any
40 remaining valid portions of this Act are held to be incomplete and incapable of being

1 executed in accordance with legislative intent, the Board of Public Works shall adopt
2 regulations governing the administration of this Act, to be applied in a manner that is
3 consistent with the court's opinion.

4 SECTION 4. AND BE IT FURTHER ENACTED, That for the purpose of
5 creating incentives for achieving greater minority business participation in
6 private-sector contracts, the Board of Public Works shall study establishing a process
7 for awarding credits or points in the award of State procurement contracts for the
8 achievement of minority business participation in a prime contractor's private-sector
9 projects that do not have minority business goals or requirements. The Board of
10 Public Works shall submit a report on the study, including its findings and
11 recommendations, to the Legislative Policy Committee prior to December 1, 2001 so
12 that the General Assembly may review the report and recommendations before the
13 2002 Session.

14 ~~SECTION 4.~~ 5. AND BE IT FURTHER ENACTED, That this Act shall take
15 effect July 1, 2001.