Unofficial Copy M1 2004 Regular Session 4lr0779 CF 4lr0778

By: Delegate Frush (Chairman, Joint Committee on the Chesapeake and Atlantic Coastal Bays Critical Area) and Delegates Cadden, James, Owings, Walkup, Barkley, Barve, Bobo, Bronrott, Brown, Busch, Cane, V. Clagett, Conroy, Cryor, Doory, Dumais, Feldman, Gaines, Gilleland, Glassman, Goldwater, Gordon, Griffith, Healey, Holmes, Howard, Hubbard, Hurson, Jennings, Jones, King, Lee, Leopold, Madaleno, Malone, Mandel, McConkey, McIntosh, McKee, Menes, Moe, Montgomery, Morhaim, Murray, Nathan-Pulliam, Niemann, Parker, Patterson, Pendergrass, Petzold, Proctor, Quinter, Ramirez, Ross, Shank, Simmons, Sophocleus, Sossi, Stern, Stull, Taylor, F. Turner, V. Turner, Vallario, Vaughn, and Weir

Introduced and read first time: February 12, 2004

Assigned to: Environmental Matters

A BILL ENTITLED

| 1 | AN | ACT | concerning |
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| | | | |

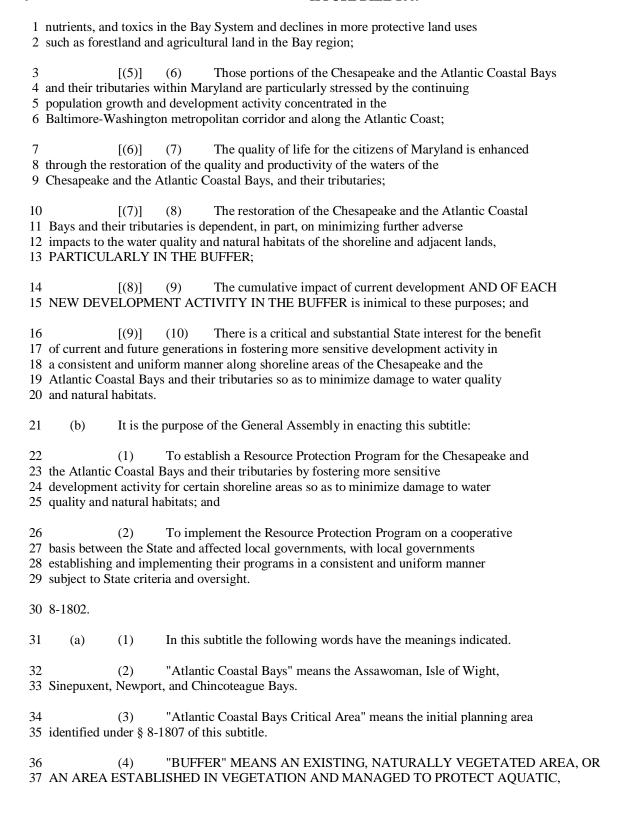
| 2 | Chesapeake and Atlantic Coastal Bays Critical Area Protection Program - |
|---|---|
| 3 | Miscellaneous Enforcement Provisions |

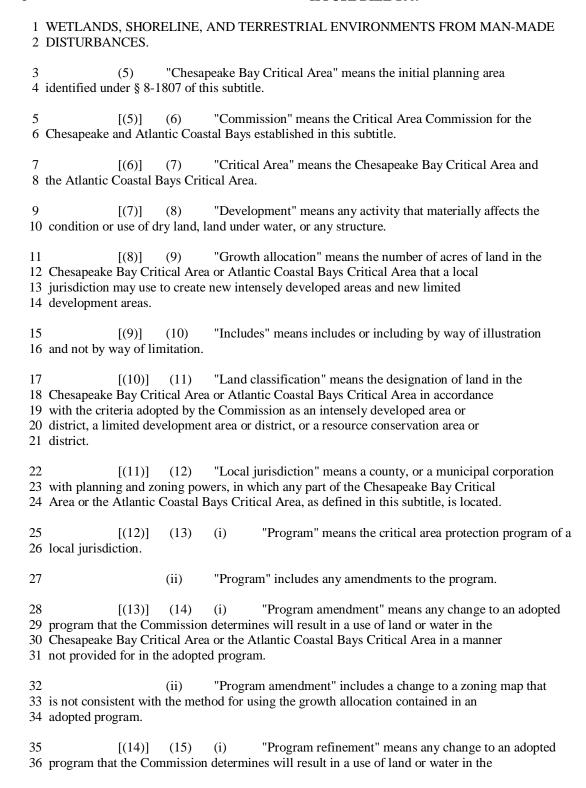
- 4 FOR the purpose of requiring a local jurisdiction to make a certain presumption when
- 5 considering a variance application under the Chesapeake and Atlantic Coastal
- 6 Bays Critical Area Protection Program; establishing certain burdens of proof
- 7 and persuasion in an application for a certain variance; requiring a local
- 8 jurisdiction to make certain findings and authorizing the findings to be based on
- 9 certain evidence and testimony; authorizing a local jurisdiction to consider
- 10 certain facts when making certain findings; requiring a local jurisdiction's
- critical area program to include certain buffer requirements and penalty
- provisions; authorizing a local jurisdiction under certain circumstances to
- request certain enforcement assistance from the Chairman of the Chesapeake
- and Atlantic Coastal Bays Critical Area Commission or the Attorney General;
- declaring and clarifying certain findings of the General Assembly; altering the
- application of a certain defined term; providing for the application of this Act;
- and generally relating to the enforcement of the Chesapeake and Atlantic
- 18 Coastal Bays Critical Area Protection Program.
- 19 BY repealing and reenacting, with amendments,
- 20 Article Natural Resources
- 21 Section 8-1801, 8-1802(a), 8-1808, 8-1808.5(a), 8-1815, and 8-1815.1
- 22 Annotated Code of Maryland
- 23 (2000 Replacement Volume and 2003 Supplement)

1 Preamble

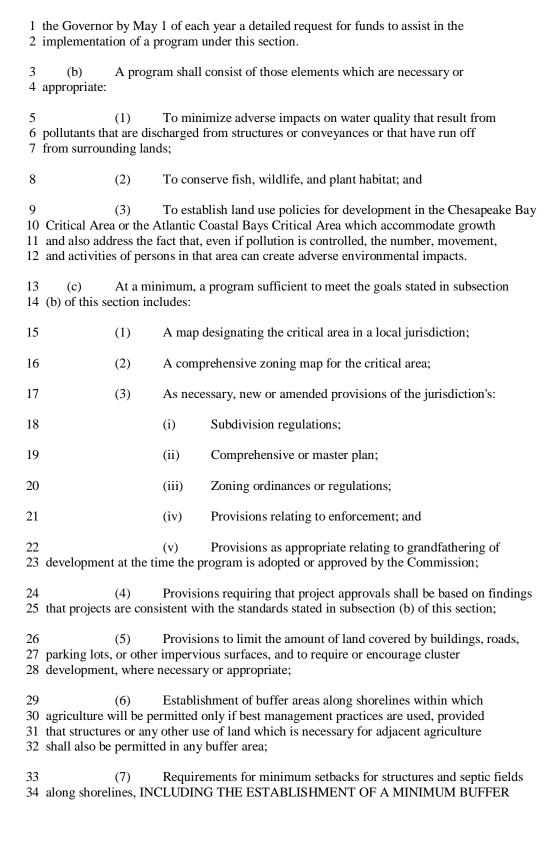
- WHEREAS, With the enactment of the Chesapeake Bay Critical Area
- 3 Protection Act in 1984, State lawmakers recognized the major detrimental impact of
- 4 development activity along the shoreline of the Chesapeake Bay and its tributaries,
- 5 an area that is pivotal to the preservation and protection of water quality and natural
- 6 habitat; and
- WHEREAS, Two years later, in approving the State Critical Area program and
- 8 its criteria, the General Assembly specified the need for a shoreline buffer of at least
- 9 100 feet, and this minimum buffer has been an essential critical area component ever
- 10 since that time; and
- 11 WHEREAS, Also considered fundamental to the critical area criteria since their
- 12 inception in the mid-1980s is, under certain circumstances, the allowance of
- 13 variances to a local jurisdiction's critical area program; and
- 14 WHEREAS, In keeping with an equitable application of critical area
- 15 requirements, on average 90% or more of the variances requested each year have
- 16 been granted; and
- WHEREAS, The General Assembly has always recognized, nevertheless, that
- 18 attainment of critical area program goals necessitates a clear authority in support of
- 19 local jurisdictions when, in their discretion, a variance must be denied; and
- 20 WHEREAS, In 2002, with a particular awareness of the growing danger to
- 21 water quality and natural habitat presented by the magnitude of waterfront
- 22 development, the General Assembly expanded the application of critical area
- 23 protections so as to include the ecologically sensitive Atlantic Coastal Bays and their
- 24 tributaries; and
- 25 WHEREAS, Also in 2002, the General Assembly overruled three then-recent
- 26 decisions by the Maryland Court of Appeals that had substantially weakened the
- 27 authority of local jurisdictions' critical area programs in the denial of variances; and
- 28 WHEREAS, A recent decision by the Court of Appeals, Lewis v. Department of
- 29 Natural Resources, has: rejected the finding of the General Assembly that the
- 30 cumulative impact of development is harmful to the critical area; shifted the burdens
- 31 of proof and persuasion to local jurisdictions with respect to the denial of a critical
- 32 area variance application, thus adding burdensome requirements and unnecessary
- 33 expenses to their consideration of variance applications; and opened the door for
- 34 citizens to view unpermitted development activity in the critical area as viable due to
- 35 the lack of detrimental consequence; and
- 36 WHEREAS, The Lewis ruling is clearly contrary to the intent of the General
- 37 Assembly's enactment of both the Chesapeake Bay Critical Area Protection Act and
- 38 the Atlantic Coastal Bays Protection Act; and
- WHEREAS, Over the past two decades, despite the vigilant efforts of the State
- 40 and local critical area programs and the ongoing focus of the General Assembly, State

- 1 agencies, advocacy groups, and private citizens, the health of the Chesapeake Bay has
- 2 continued to deteriorate, as has water quality overall, and this fact has been
- 3 substantiated in dozens of studies by a variety of government and private interest
- 4 groups; and
- 5 WHEREAS, It has become readily apparent that local jurisdictions must have
- 6 more viable enforcement options available to them if their critical area programs are
- 7 to be implemented as intended by the General Assembly; and
- 8 WHEREAS, Acting out of this long-standing and consistent commitment to the
- 9 preservation of the Chesapeake and Atlantic Coastal Bays and their ecosystems,
- 10 which are among Maryland's most precious resources, it is the intent of the General
- 11 Assembly that this Act shall overrule the Lewis decision, as well as enhance the
- 12 enforcement mechanisms available to local programs in the administration of their
- 13 critical area programs; now, therefore,
- 14 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
- 15 MARYLAND, That the Laws of Maryland read as follows:
- 16 Article Natural Resources
- 17 8-1801.
- 18 (a) The General Assembly finds and declares that:
- 19 (1) The Chesapeake and the Atlantic Coastal Bays and their tributaries
- 20 are natural resources of great significance to the State and the nation;
- 21 (2) The shoreline and adjacent lands constitute a valuable, fragile, and
- 22 sensitive part of this estuarine system, where human activity can have a particularly
- 23 immediate and adverse impact on water quality and natural habitats;
- 24 (3) The capacity of these shoreline and adjacent lands to withstand
- 25 continuing demands without further degradation to water quality and natural
- 26 habitats is limited;
- 27 (4) HUMAN ACTIVITY IS ESPECIALLY HARMFUL IN THESE SHORELINE
- 28 AREAS, WHERE THE NEW DEVELOPMENT OF NONWATER-DEPENDENT STRUCTURES
- 29 OR THE ADDITION OF IMPERVIOUS SURFACES IS PRESUMED TO BE CONTRARY TO
- 30 THE PURPOSE OF THIS SUBTITLE, BECAUSE EACH ACTIVITY CAUSES ADVERSE
- 31 IMPACTS, OF BOTH AN IMMEDIATE AND A LONG-TERM NATURE, TO THE
- 32 CHESAPEAKE AND ATLANTIC COASTAL BAYS, AND THUS IT IS NECESSARY
- 33 WHEREVER POSSIBLE TO MAINTAIN A BUFFER OF AT LEAST 100 FEET LANDWARD
- 34 FROM THE MEAN HIGH WATER LINE OF TIDAL WATERS, TRIBUTARY STREAMS, AND
- 35 TIDAL WETLANDS:
- 36 (5) National studies have documented that the quality and productivity
- 37 of the waters of the Chesapeake Bay and its tributaries have declined due to the
- 38 cumulative effects of human activity that have caused increased levels of pollutants,

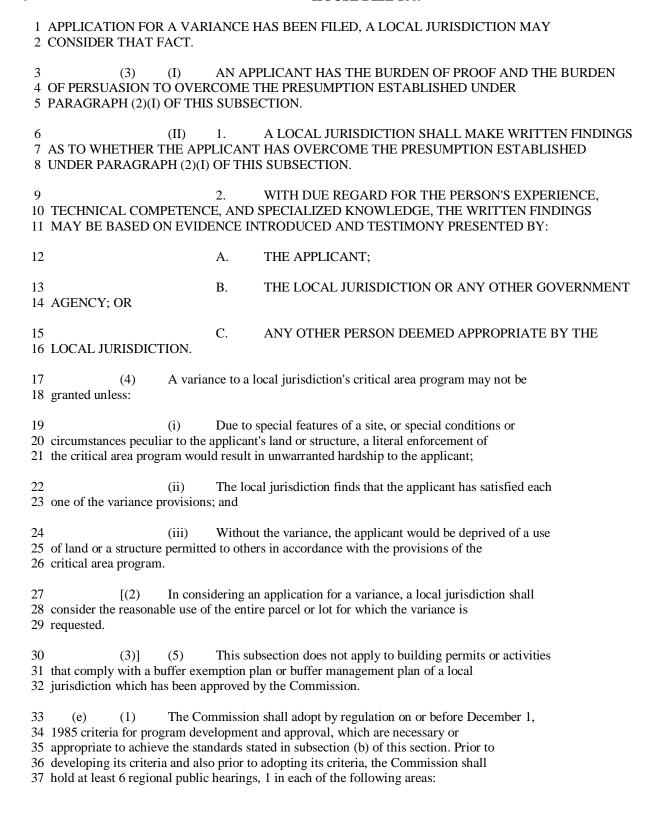




| | Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner consistent with the adopted program. | | | | | |
|----------|---|------------|-----------------|---|--|--|
| 3 | | (ii) | "Program | m refinement" includes: | | |
| 4 5 | development area des | ignation | 1. of an ado | A change to a zoning map that is consistent with the pted program; and | | |
| 6 7 | adopted program. | | 2. | The use of the growth allocation in accordance with an | | |
| 10 | [(15)] (16) (i) "Project approval" means the approval of development, other than development by a State or local government agency, in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local approval authority. | | | | | |
| 12 | | (ii) | "Project | approval" includes: | | |
| 13 | | | 1. | Approval of subdivision plats and site plans; | | |
| 14 | | | 2. | Inclusion of areas within floating zones; | | |
| 15 16 | use permits; and | | 3. | Issuance of variances, special exceptions, and conditional | | |
| 17 | | | 4. | Approval of rezoning. | | |
| 18 | | (iii) | "Project | approval" does not include building permits. | | |
| 19 | 8-1808. | | | | | |
| | (a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission. | | | | | |
| | (2) (i) The Governor shall include in the budget a sum of money to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program under this section. | | | | | |
| | (ii) Each local jurisdiction shall submit to the Governor a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section. | | | | | |
| 31 | | | s to reimb | vernor shall include in the fiscal year 2003 budget a sum purse local jurisdictions in the Atlantic Coastal osts of developing a program under this | | |
| | _ | assist loc | al jurisdi | all include in the budget annually a sum of money to ctions with the reasonable costs of tion. Each local jurisdiction shall submit to | | |



- 1 LANDWARD FROM THE MEAN HIGH WATER LINE OF TIDAL WATERS, TRIBUTARY 2 STREAMS, AND TIDAL WETLANDS.
- 3 (8) Designation of shoreline areas, if any, that are suitable for parks,
- 4 hiking, biking, wildlife refuges, scenic drives, public access or assembly, and
- 5 water-related recreation such as boat slips, piers, and beaches;
- 6 (9) Designation of shoreline areas, if any, that are suitable for ports,
- 7 marinas, and industries that use water for transportation or derive economic benefits
- 8 from shore access:
- 9 (10) Provisions requiring that all harvesting of timber in the Chesapeake
- 10 Bay Critical Area or the Atlantic Coastal Bays Critical Area be in accordance with
- 11 plans approved by the district forestry board;
- 12 (11) Provisions establishing that the controls in a program which are
- 13 designed to prevent runoff of pollutants will not be required on sites where the
- 14 topography prevents runoff from directly or indirectly reaching tidal waters;
- 15 (12) Provisions for reasonable accommodations in policies or procedures
- 16 when the accommodations are necessary to avoid discrimination on the basis of
- 17 physical disability, including provisions that authorize a local jurisdiction to require
- 18 removal of a structure that was installed or built to accommodate a physical disability
- 19 and require restoration when the accommodation permitted by this paragraph is no
- 20 longer necessary; [and]
- 21 (13) Except as provided in subsection (d) of this section, provisions for
- 22 granting a variance to the local jurisdiction's critical area program, in accordance
- 23 with regulations adopted by the Commission concerning variances set forth in
- 24 COMAR 27.01.11; AND
- 25 (14) PENALTY PROVISIONS ESTABLISHING THAT, IN ADDITION TO ANY
- 26 OTHER PENALTY APPLICABLE UNDER STATE OR LOCAL LAW, A PERSON WHO
- 27 VIOLATES A PROVISION OF THIS SUBTITLE OR OF A PROGRAM IS SUBJECT TO A FINE
- 28 NOT EXCEEDING \$10,000.
- 29 (d) (1) IN THIS SUBSECTION, "UNWARRANTED HARDSHIP" MEANS THAT,
- 30 WITHOUT A VARIANCE, AN APPLICANT WOULD BE DENIED REASONABLE AND
- 31 SIGNIFICANT USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS
- 32 REQUESTED.
- 33 (2) (I) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL
- 34 JURISDICTION SHALL PRESUME THAT ANY NEW DEVELOPMENT ACTIVITY IN THE
- 35 CRITICAL AREA FOR WHICH A VARIANCE IS REQUIRED DOES NOT CONFORM WITH
- 36 THE LOCAL PROGRAM.
- 37 (II) IF THE VARIANCE REQUEST IS BASED ON CONDITIONS OR
- 38 CIRCUMSTANCES THAT ARE THE RESULT OF ACTIONS BY THE APPLICANT,
- 39 INCLUDING THE COMMENCEMENT OF DEVELOPMENT ACTIVITY BEFORE AN



In this section [the following words have the meanings indicated.

"Buffer" means an existing, naturally vegetated area, or an area

"Community], "COMMUNITY pier" means a boat docking facility

"Community pier" does not include a private pier or a

25 established in vegetation and managed to protect aquatic, wetlands, shoreline, and

28 associated with a subdivision or similar residential area, or with condominiums,

(2)

23

24

27

30

31 mooring.

(a)

(1)

26 terrestrial environments from man-made disturbances.

29 apartments, or other multiple-family dwelling units.

[(ii)]

- 1 8-1815.
- 2 (a) Violators of the provisions of programs approved or adopted by the
- 3 Commission shall be subject to prosecution or suit by local authorities, who may
- 4 invoke the sanctions and remedies afforded by State or local law.
- 5 (2) A LOCAL AUTHORITY MAY REQUEST:
- 6 (I) ASSISTANCE FROM THE COMMISSION IN AN ENFORCEMENT
- 7 ACTION; OR
- 8 (II) THAT THE CHAIRMAN REFER AN ENFORCEMENT ACTION TO
- 9 THE ATTORNEY GENERAL.
- 10 (b) Whenever the chairman has reason to believe that a local jurisdiction is
- 11 failing to enforce the requirements of a program applicable to a particular
- 12 development, the chairman shall serve notice upon the local enforcement authorities.
- 13 If within 30 days after service of the notice, the local authorities have failed to initiate
- 14 an action to remedy or punish the violation, the chairman may refer the matter to the
- 15 Attorney General.
- 16 (c) Upon referral of an alleged violation under subsection (A) OR (b) of this
- 17 section, the Attorney General may invoke any sanction or remedy available to local
- 18 authorities, in any court of competent jurisdiction in which the local authorities would
- 19 be authorized to prosecute or sue the violator.
- 20 (d) In addition to any other sanction or remedy available, the Attorney
- 21 General may bring an action in equity to compel compliance or restrain
- 22 noncompliance with the requirements of approved project plans, and to compel
- 23 restoration of lands or structures to their condition prior to any modification which
- 24 was done in violation of approved project plans.
- 25 (e) Notwithstanding any other provision of this section, whenever a
- 26 development in the Critical Area is proceeding in violation of approved project plans
- 27 and threatens to immediately and irreparably degrade the quality of tidal waters or
- 28 fish, wildlife, or plant habitat, the Attorney General, upon request of the chairman,
- 29 may bring an action to restrain the violation and, as appropriate, to compel
- 30 restoration of any land or water areas affected by the development.
- 31 8-1815.1.
- 32 (a) (1) The provisions of this section are in addition to any other sanction,
- 33 remedy, or penalty provided by law.
- 34 (2) This section does not apply to any cutting or clearing of trees that is
- 35 allowed under regulations adopted by the Commission under this subtitle.
- 36 (b) If a person cuts or clears or plans to cut or clear trees within the
- 37 Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in violation of
- 38 AN APPROVED LOCAL CRITICAL AREA PROGRAM OR OF regulations adopted by the

- 1 Commission, the local jurisdiction may bring an action OR REQUEST THAT THE 2 CHAIRMAN OF THE COMMISSION REFER THE MATTER TO THE ATTORNEY GENERAL 3 TO BRING AN ACTION: 4 To require the person to replant trees where the cutting or clearing (1)5 occurred in accordance with a plan prepared by the State Forester, a registered 6 professional forester, or a registered landscape architect; 7 (2) To restrain the planned violation; or 8 (3) For damages: 9 To be assessed by a circuit court in an amount equal to the 10 estimated cost of replanting trees; and 11 (ii) To be paid to the Department by the person found to have 12 violated the provisions of this subsection. 13 If the Chairman of the Commission has reason to believe that the local (c) 14 jurisdiction is failing to enforce the requirements of subsection (b) of this section, the 15 Chairman shall refer the matter to the Attorney General as provided under § 8-1815 16 (b) of this subtitle. 17 On the Chairman of the Commission's referral of an alleged violation (d) 18 under subsection (c) of this section to the Attorney General, the Attorney General may 19 invoke the remedies available to the local jurisdiction under subsection (b) of this 20 section in any court of competent jurisdiction in which the local jurisdiction would be 21 authorized to prosecute or sue. 22 (e) On the request of a local jurisdiction or the Chairman of the Commission, 23 the State Forester, a registered professional forester, or a registered landscape 24 architect may prepare, oversee, and approve the final implementation of a plan to: 25 Replant trees in any part of the Chesapeake Bay Critical Area where (1) 26 trees in the Chesapeake Bay Critical Area are cut or cleared in violation of subsection 27 (b) of this section; and Replant trees in any part of the Atlantic Coastal Bays Critical Area 28 29 where trees in the Atlantic Coastal Bays Critical Area are cut or cleared in violation 30 of subsection (b) of this section. SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be 31 32 construed to apply only prospectively and may not be applied or interpreted to have 33 any effect on or application to any dwelling unit in existence or for which all necessary
- 34 permits for construction had been issued before the effective date of this Act.
- 35 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take
- 36 effect June 1, 2004.