

HOUSE BILL 1569

M3

9lr3475

By: **Delegate McIntosh**

Rules suspended

Introduced and read first time: March 18, 2009

Rules suspended

Assigned to: Environmental Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Standing – Miscellaneous Environmental Protection Proceedings and**
3 **Judicial Review**

4 FOR the purpose of repealing certain contested case hearing provisions related to
5 permitting decisions by the Department of the Environment; authorizing
6 judicial review of certain permitting and license decisions by the Department at
7 the request of certain persons who meet certain federal standing requirements
8 and participate in a certain public participation process; establishing that under
9 certain circumstances judicial review is available and a contested case hearing
10 is prohibited; providing for the scope of judicial review; requiring a certain
11 petition for judicial review to be filed with a certain circuit court; establishing
12 procedures for filing a petition for judicial review; altering certain temporary
13 stay provisions; establishing the contents of a certain record; requiring a certain
14 extension of certain public comment periods on a certain request; authorizing
15 certain persons who meet certain federal standing requirements to participate
16 in a certain proceeding and certain judicial actions regarding variances to
17 certain Critical Area requirements; providing for the application of this Act;
18 making the provisions of this Act severable; providing for a delayed effective
19 date; making conforming changes; and generally relating to standing in certain
20 environmental protection proceedings and certain judicial actions.

21 BY repealing and reenacting, without amendments,
22 Article – Environment
23 Section 1–101(b) and 16–202(a), (b), and (c)(1)
24 Annotated Code of Maryland
25 (2007 Replacement Volume and 2008 Supplement)

26 BY repealing and reenacting, with amendments,
27 Article – Environment

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 Section 1–601, 1–603(d)(1), 1–605, 5–204, 14–105(b), 15–810(e), 15–813(g),
2 16–204, and 16–307(d)
3 Annotated Code of Maryland
4 (2007 Replacement Volume and 2008 Supplement)

5 BY repealing
6 Article – Environment
7 Section 1–606
8 Annotated Code of Maryland
9 (2007 Replacement Volume and 2008 Supplement)

10 BY adding to
11 Article – Environment
12 Section 1–606
13 Annotated Code of Maryland
14 (2007 Replacement Volume and 2008 Supplement)

15 BY repealing and reenacting, with amendments,
16 Article – Natural Resources
17 Section 8–1808(d)
18 Annotated Code of Maryland
19 (2007 Replacement Volume and 2008 Supplement)

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

22 **Article – Environment**

23 1–101.

24 (b) “Contested case hearing” means an adjudicatory hearing in accordance
25 with the contested case procedures of Subtitle 2 of the Maryland Administrative
26 Procedure Act.

27 1–601.

28 (a) Permits issued by the Department under the following sections shall be
29 issued in accordance with this subtitle:

30 (1) Air quality control permits to construct subject to § 2–404 of this
31 article;

32 (2) Permits to install, materially alter or materially extend landfill
33 systems, incinerators for public use or rubble landfills subject to § 9–209 of this article;

34 (3) Permits to discharge pollutants to waters of the State issued
35 pursuant to § 9–323 of this article;

1 (4) Permits to install, materially alter or materially extend a structure
2 used for storage or distribution of any type of sewage sludge issued, renewed, or
3 amended pursuant to § 9–234.1 or § 9–238 of this article;

4 (5) Permits to own, operate, establish or maintain a controlled
5 hazardous substance facility issued pursuant to § 7–232 of this article;

6 (6) Permits to own, operate, or maintain a hazardous material facility
7 issued pursuant to § 7–103 of this article; and

8 (7) Permits to own, operate, establish or maintain a low-level nuclear
9 waste facility issued pursuant to § 7–233 of this article.

10 (b) Notwithstanding any other provision of law to the contrary, [the
11 Department is not required to provide an opportunity for] a contested case hearing [to
12 any party other than the applicant] **MAY NOT BE PROVIDED** in connection with any
13 permit issued pursuant to this article [except the permits] **THAT IS** listed in
14 subsection (a) of this section.

15 (c) **A FINAL DETERMINATION BY THE DEPARTMENT ON THE ISSUANCE,
16 RENEWAL, OR REVISION OF ANY PERMIT LISTED UNDER SUBSECTION (A) OF
17 THIS SECTION IS SUBJECT TO JUDICIAL REVIEW AT THE REQUEST OF ANY
18 PERSON THAT:**

19 (1) **MEETS THE THRESHOLD STANDING REQUIREMENTS UNDER
20 FEDERAL LAW RELATING TO FEDERAL ENVIRONMENTAL PERMITS; AND**

21 (2) **PARTICIPATED IN A PUBLIC PARTICIPATION PROCESS
22 THROUGH THE SUBMISSION OF WRITTEN OR ORAL COMMENTS, UNLESS AN
23 OPPORTUNITY FOR PUBLIC PARTICIPATION WAS NOT PROVIDED.**

24 (d) **FOR PERMITS LISTED UNDER SUBSECTION (A) OF THIS SECTION, A
25 CONTESTED CASE HEARING MAY NOT OCCUR.**

26 (e) **JUDICIAL REVIEW SHALL BE ON THE ADMINISTRATIVE RECORD
27 BEFORE THE DEPARTMENT AND LIMITED TO OBJECTIONS RAISED DURING THE
28 PUBLIC COMMENT PERIOD, UNLESS THE PETITIONER DEMONSTRATES THAT:**

29 (1) **THE OBJECTIONS WERE NOT REASONABLY ASCERTAINABLE
30 DURING THE COMMENT PERIOD; OR**

31 (2) **GROUND FOR THE OBJECTIONS AROSE AFTER THE
32 COMMENT PERIOD.**

1 **(F) UNLESS OTHERWISE REQUIRED BY STATUTE, A PETITION FOR**
2 **JUDICIAL REVIEW BY A PERSON THAT MEETS THE REQUIREMENTS OF**
3 **SUBSECTION (C) OF THIS SECTION SHALL BE FILED WITH THE CIRCUIT COURT**
4 **FOR THE COUNTY WHERE THE APPLICATION FOR THE PERMIT STATES THAT THE**
5 **PROPOSED ACTIVITY WILL OCCUR.**

6 **(G) ON MOTION BY A PARTY PETITIONING FOR JUDICIAL REVIEW, THE**
7 **COURT MAY GRANT A TEMPORARY STAY OF THE ISSUANCE OF THE PERMIT**
8 **PENDING A FINAL DECISION ON THE PETITION, PROVIDED THAT:**

9 **(1) THE PARTIES TO THE PROCEEDING HAVE BEEN NOTIFIED AND**
10 **GIVEN AN OPPORTUNITY TO BE HEARD ON A REQUEST FOR THE TEMPORARY**
11 **STAY;**

12 **(2) THE PARTY REQUESTING THE TEMPORARY STAY SHOWS THAT**
13 **THERE IS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF**
14 **ISSUES TO BE PRESENTED IN THEIR PETITION FOR JUDICIAL REVIEW; AND**

15 **(3) THE TEMPORARY STAY WILL NOT ADVERSELY AFFECT THE**
16 **PUBLIC HEALTH OR SAFETY OR CAUSE SIGNIFICANT, IMMINENT**
17 **ENVIRONMENTAL HARM TO LAND, AIR, OR WATER RESOURCES.**

18 **[(c)] (H) (1) When this article requires more than one public**
19 **informational meeting[,]** **OR public hearing[, or contested case hearing],** the
20 Department may consolidate some or all of the meetings or hearings for the proposed
21 facility with similar meetings or hearings.

22 **(2) The Department shall hold public informational meetings and**
23 **public hearings at a location in the political subdivision and in close proximity to the**
24 **location where the individual permit applies.**

25 1-603.

26 **(d) (1) The Department may require the applicant to attend an**
27 **informational meeting or public [or contested case] hearing and present information**
28 **concerning the application.**

29 1-605.

30 **(a) A person [may request a contested case hearing to appeal a final**
31 **determination if the person makes factual allegations] PETITIONING FOR JUDICIAL**
32 **REVIEW IN ACCORDANCE WITH § 1-601 OF THIS SUBTITLE OR § 5-204 OR §**
33 **16-204 OF THIS ARTICLE SHALL ALLEGE FACTS** with sufficient particularity to
34 demonstrate that:

1 (1) The person [is aggrieved by the final determination] **SATISFIES**
2 **THE REQUIREMENTS OF § 1-601(C) OF THIS SUBTITLE;** and

3 (2) The final determination is:

4 (i) Legally inconsistent with any provisions of law applicable to
5 the final determination being challenged; or

6 (ii) Based upon an incorrect determination of a relevant and
7 material fact.

8 (b) [(1)] A party [requesting a contested case hearing] **SUBMITTING A**
9 **PETITION FOR JUDICIAL REVIEW** shall [submit a written request for adjudication]
10 **FILE THE PETITION** within 15 days after publication of a notice of final
11 determination.

12 [(2) The Department shall transmit a request for a contested case
13 hearing to the Office of Administrative Hearings within 5 business days after the
14 Department receives the request.]

15 (c) The [request for adjudication] **PETITION** shall set forth the basis for the
16 request with sufficient particularity to assure that the issues to be raised are within
17 the scope of subsection (a) of this section [and that the person is aggrieved by the final
18 determination].

19 (d) A party **TO THE JUDICIAL REVIEW ACTION** may not[, in a contested
20 case hearing,] challenge a facility's compliance with zoning and land use requirements
21 or conformity with a county plan issued under Title 9, Subtitle 5 of this article.
22 However, nothing in this subtitle shall prevent a party from challenging whether the
23 Department has complied with §§ 2-404(b)(1)(ii) and 9-210(a)(3) of this article, when
24 applicable, nor does this subtitle prevent a party from contesting the compliance of the
25 facility with zoning and land use or county plan requirements in any proceeding
26 brought in accordance with and under any applicable local laws.

27 [(e) A contested case hearing shall be conducted in accordance with Subtitle 2
28 of Title 10 of the State Government Article.

29 (f) (1) The contested case hearing shall be concluded, and the record shall
30 be closed:

31 (i) Within 6 months following receipt of the request for a
32 contested case hearing by the Office of Administrative Hearings; or

33 (ii) If a motion is filed under § 1-606(a) of this subtitle, within 8
34 months following receipt of the request for a contested case hearing by the Office of
35 Administrative Hearings.

1 (2) The deadlines in this subsection may be extended by agreement of
2 the parties and with the concurrence of the administrative law judge.

3 (g) (1) The administrative law judge shall issue the proposed decision
4 within 90 days following the close of the record in the contested case hearing.

5 (2) The deadline in this subsection may be extended, at the discretion
6 of the administrative law judge, for an additional period not to exceed 30 days.

7 (h) (1) Once a proposed decision is issued by the administrative law judge
8 if an exception is not filed with the Department, the proposed decision shall become
9 final upon expiration of the time period for filing an exception.

10 (2) Once a proposed decision is issued by the administrative law judge
11 if an exception is filed with the Department, the final decision shall be rendered
12 within 120 days following issuance of the proposed decision.

13 (i) The deadlines in this section shall be considered mandatory and not
14 directory.]

15 [1-606.

16 (a) Upon motion of any party, the administrative law judge shall dismiss all
17 or any part of a request for a contested case hearing if the administrative law judge
18 determines that the person making the request has failed to make the demonstration
19 required by § 1-605 of this subtitle, including the failure to make factual allegations
20 with sufficient particularity to demonstrate that the person is aggrieved by the final
21 determination.

22 (b) (1) The administrative law judge shall rule on any motion filed under
23 subsection (a) of this section within 60 days following receipt of the motion.

24 (2) The deadline in this subsection may be extended by agreement of
25 the parties and with the concurrence of the administrative law judge.

26 (c) A decision under subsection (a) of this section that dismisses fewer than
27 all of the issues in an action, or that adjudicates issues concerning fewer than all of
28 the parties to an action is not immediately appealable unless the administrative law
29 judge determines that there is no just reason for delay, and directs the entry of a
30 decision as to one or more, but fewer than all of the issues or parties.

31 (d) Except as provided under subsection (c) of this section, a decision by the
32 administrative law judge on a motion in accordance with subsection (a) of this section
33 is a final agency decision and shall be appealable in the same manner as a final
34 decision by the Department after a contested case hearing.

1 (e) The deadlines in this section shall be considered mandatory and not
2 directory.]

3 **1-606.**

4 (A) **THIS SECTION APPLIES TO:**

5 (1) **A PERMIT LISTED UNDER § 1-601(A) OF THIS SUBTITLE;**

6 (2) **A PERMIT LISTED UNDER § 5-204(F) OF THIS ARTICLE; OR**

7 (3) **A LICENSE ISSUED UNDER § 16-204 OF THIS ARTICLE.**

8 (B) **ANY JUDICIAL REVIEW OF A DEPARTMENT PERMIT DECISION**
9 **PROVIDED FOR IN ACCORDANCE WITH § 1-601 OF THIS SUBTITLE OR § 5-204 OR**
10 **§ 16-204 OF THIS ARTICLE SHALL BE LIMITED TO A RECORD COMPILED BY THE**
11 **DEPARTMENT AND SHALL CONSIST OF:**

12 (1) **ANY PERMIT APPLICATION AND ANY DATA SUBMITTED TO THE**
13 **DEPARTMENT IN SUPPORT OF THE APPLICATION;**

14 (2) **ANY DRAFT PERMIT ISSUED BY THE DEPARTMENT;**

15 (3) **ANY NOTICE OF INTENT FROM THE DEPARTMENT TO DENY**
16 **THE APPLICATION OR TO TERMINATE THE PERMIT;**

17 (4) **A STATEMENT OR FACT SHEET EXPLAINING THE BASIS FOR**
18 **THE DETERMINATION BY THE DEPARTMENT;**

19 (5) **ALL DOCUMENTS REFERENCED IN THE STATEMENT OR FACT**
20 **SHEET EXPLAINING THE BASIS FOR THE DETERMINATION BY THE DEPARTMENT;**

21 (6) **ALL DOCUMENTS CONTAINED IN THE SUPPORTING FILE FOR**
22 **ANY DRAFT PERMIT;**

23 (7) **ALL COMMENTS SUBMITTED TO THE DEPARTMENT DURING**
24 **THE PUBLIC COMMENT PERIOD, INCLUDING COMMENTS MADE ON THE DRAFT**
25 **APPLICATION;**

26 (8) **ANY TAPE OR TRANSCRIPT OF ANY PUBLIC HEARINGS HELD**
27 **ON THE APPLICATION; AND**

28 (9) **ANY RESPONSE TO ANY COMMENTS SUBMITTED TO THE**
29 **DEPARTMENT.**

1 **(C) (1) WHEN A DRAFT PERMIT OR TENTATIVE DETERMINATION IS**
2 **ISSUED BY THE DEPARTMENT, THE DEPARTMENT SHALL:**

3 **(I) MAKE AVAILABLE FOR INSPECTION AND COPYING:**

4 **1. ALL PERMIT APPLICATIONS;**

5 **2. DOCUMENTS SUBMITTED WITH A PERMIT**
6 **APPLICATION; AND**

7 **3. ALL DOCUMENTS RELIED ON BY THE**
8 **DEPARTMENT IN MAKING THE TENTATIVE DETERMINATION; AND**

9 **(II) EXTEND ANY EXISTING COMMENT PERIOD BY 60 DAYS**
10 **ON REQUEST BY A PERSON.**

11 **(2) A REQUEST SUBMITTED TO THE DEPARTMENT UNDER**
12 **PARAGRAPH (1)(II) OF THIS SUBSECTION SHALL BE:**

13 **(I) SUBMITTED IN WRITING TO THE DEPARTMENT; AND**

14 **(II) MADE BEFORE THE EXPIRATION OF THE ORIGINAL**
15 **COMMENT PERIOD.**

16 5-204.

17 (a) (1) It is the intent of the General Assembly to establish consolidated
18 procedures and notice and hearing requirements for Title 5, Subtitles 5 and 9 and
19 Titles 14, 15, and 16 of this article in order to ensure efficient review and consistent
20 decision making.

21 (2) Notwithstanding any provision of the State Government Article,
22 public notice on pending applications provided in accordance with the provisions of
23 this section shall be the only notice required by law.

24 (b) (1) Applicants shall ascertain the names and addresses of all current
25 owners of property contiguous to the parcel upon which the proposed activity will
26 occur and personally or by certified mail serve notice upon each owner.

27 (2) Applicants shall serve personally or by certified mail appropriate
28 local officials.

29 (3) Applicants shall provide the Department with certification that
30 notice has been served on all contiguous property owners and appropriate local
31 officials.

1 (4) Upon substantial completion of an application the Department
2 shall draft a public notice that includes:

3 (i) The name and address of the applicant;

4 (ii) A description of the location and nature of the activity for
5 which application has been made;

6 (iii) The name, address, and telephone number of the office
7 within the Department from which information about the application may be obtained;

8 (iv) A statement that any further notices about actions on the
9 application will be provided only by mail to those persons on a mailing list of
10 interested persons;

11 (v) A description of how persons may submit information or
12 comments about the application, request a public informational hearing, or request to
13 be included on the mailing list of interested persons; and

14 (vi) A deadline for the close of the public comment period by
15 which information, comments, or requests must be received by the Department.

16 (5) The Department shall prepare a public notice to be published for at
17 least 1 business day in a newspaper of general circulation in the area where the
18 proposed activity would occur. At its discretion, the Department shall:

19 (i) Publish the public notice; or

20 (ii) Direct the applicant to publish the public notice.

21 (6) The applicant shall bear the cost of the newspaper notice.

22 (7) The Department shall mail public notices to a general subscription
23 mailing list.

24 (8) Comments on an application or requests for a public informational
25 hearing must be forwarded in writing to the Department prior to the close of the
26 public comment period specified in the public notice.

27 (9) The Department shall compile an interested persons list
28 containing the names of all contiguous property owners, appropriate local officials, and
29 individuals that comment on, request hearings, or make inquiries about an application
30 during any phase of the Department's review.

31 (10) No further notice will be provided except to persons on the
32 interested persons list.

1 (c) The Department shall hold a public informational hearing if it receives a
2 timely written request in accordance with the following provisions:

3 (1) The request shall be received prior to the close of the public
4 comment period.

5 (2) A public informational hearing shall be held within 45 calendar
6 days of the close of the public comment period.

7 (3) The Department shall specify the date, time, and location of the
8 public hearing.

9 (4) The Department shall mail notice of the date, time, and location of
10 any public informational hearing on an application to those persons on the interested
11 persons list no later than 14 calendar days prior to the hearing.

12 (5) The Department may extend the official record of a public
13 informational hearing.

14 (d) Following the application review and comment period and within 30
15 calendar days after the close of the public informational hearing record, the
16 Department shall issue, modify, or deny the permit or license unless extenuating
17 circumstances justify an extension of time.

18 (e) The Department shall mail notice of a decision to issue, modify, or deny a
19 permit or license to the applicant and to those persons on the interested persons list.

20 [(f) When opportunity for a contested case hearing on the Department's
21 decision to issue, modify, or deny a permit or license is provided by law, the
22 Department shall provide all persons on the interested persons list and the applicant
23 an opportunity to make a written request for a contested case hearing within 14
24 calendar days of the mailing date of the notice of decision.

25 (g) Upon written request the Department shall grant a contested case
26 hearing if it determines that:

27 (1) The requester has a specific right, duty, privilege, or interest which
28 is or may be adversely affected by the permit determination or license decision and
29 which is different from that held by the general public;

30 (2) The requester raises adjudicable issues which are within the scope
31 of the permit authority; and

32 (3) The request is timely.]

33 **(F) (1) A FINAL DECISION BY THE DEPARTMENT ON THE ISSUANCE,**
34 **RENEWAL, OR REVISION OF ANY PERMIT ISSUED UNDER TITLE 5, SUBTITLE 5**

1 OR SUBTITLE 9, § 14–105, § 15–810, § 15–813, OR § 16–307 OF THIS ARTICLE IS
2 SUBJECT TO JUDICIAL REVIEW AT THE REQUEST OF ANY PERSON THAT:

3 (I) MEETS THE THRESHOLD STANDING REQUIREMENTS
4 UNDER FEDERAL LAW PERTAINING TO FEDERAL ENVIRONMENTAL PERMITS;
5 AND

6 (II) PARTICIPATED IN A PUBLIC PARTICIPATION PROCESS
7 THROUGH THE SUBMISSION OF WRITTEN OR ORAL COMMENTS, UNLESS AN
8 OPPORTUNITY FOR PUBLIC PARTICIPATION WAS NOT PROVIDED.

9 (2) FOR PERMITS LISTED UNDER PARAGRAPH (1) OF THIS
10 SUBSECTION, A CONTESTED CASE HEARING MAY NOT OCCUR.

11 (G) A PERSON PETITIONING FOR JUDICIAL REVIEW IN ACCORDANCE
12 WITH THIS SECTION SHALL ALLEGE FACTS WITH SUFFICIENT PARTICULARITY
13 TO DEMONSTRATE THAT:

14 (1) THE PERSON SATISFIES THE REQUIREMENTS OF SUBSECTION
15 (F)(1) OF THIS SECTION; AND

16 (2) THE FINAL DETERMINATION IS:

17 (I) LEGALLY INCONSISTENT WITH ANY PROVISIONS OF LAW
18 APPLICABLE TO THE FINAL DETERMINATION BEING CHALLENGED; OR

19 (II) BASED ON AN INCORRECT DETERMINATION OF A
20 RELEVANT AND MATERIAL FACT.

21 (H) JUDICIAL REVIEW SHALL BE ON THE ADMINISTRATIVE RECORD
22 BEFORE THE DEPARTMENT AND LIMITED TO OBJECTIONS RAISED DURING THE
23 PUBLIC COMMENT PERIOD, UNLESS THE PETITIONER DEMONSTRATES THAT:

24 (1) THE OBJECTIONS WERE NOT REASONABLY ASCERTAINABLE
25 DURING THE COMMENT PERIOD; OR

26 (2) GROUNDS FOR THE OBJECTIONS AROSE AFTER THE
27 COMMENT PERIOD.

28 (I) (1) UNLESS OTHERWISE REQUIRED BY STATUTE, A PETITION FOR
29 JUDICIAL REVIEW BY A PERSON WHO MEETS THE REQUIREMENTS OF
30 SUBSECTION (F) OF THIS SECTION SHALL BE FILED WITH THE CIRCUIT COURT
31 FOR THE COUNTY WHERE THE APPLICATION FOR THE PERMIT STATES THAT THE
32 PROPOSED ACTIVITY WILL OCCUR.

1 **(2) A PETITION FOR JUDICIAL REVIEW FILED UNDER THIS**
2 **SECTION SHALL BE FILED IN ACCORDANCE WITH TITLE 1, SUBTITLE 6 OF THIS**
3 **ARTICLE.**

4 ~~[(h)]~~ **(J)** Upon motion by a party [to a contested case hearing]
5 **PETITIONING FOR JUDICIAL REVIEW**, the [Department] **COURT** may grant a
6 temporary stay of the issuance of the permit pending a final decision [in the contested
7 case] **ON THE PETITION**, provided that:

8 (1) The parties to the proceeding have been notified and given an
9 opportunity to be heard on a request for the temporary stay;

10 (2) The party requesting the temporary stay shows that there is a
11 substantial likelihood of prevailing on the merits of issues to be presented [during the
12 contested case proceeding;] **IN THE PARTY'S PETITION FOR JUDICIAL REVIEW; AND**

13 (3) The temporary stay will not adversely affect the public health or
14 safety or cause significant, imminent environmental harm to land, air, or water
15 resources[; and

16 (4) The conditions and criteria for granting a temporary stay as
17 provided in regulations for contested case hearings adopted by the Department have
18 been met].

19 14–105.

20 (b) The Department shall provide public notice, public informational
21 hearings, and [contested case hearings] **JUDICIAL REVIEW** in accordance with the
22 provisions of § 5–204 of this article.

23 15–810.

24 (e) Public notice, informational hearings, and [contested case hearings]
25 **JUDICIAL REVIEW** shall be conducted in accordance with the provisions of § 5–204 of
26 this article.

27 15–813.

28 (g) The Department shall provide opportunity for [a contested case hearing]
29 **JUDICIAL REVIEW** in accordance with the provisions of § 5–204 of this article.

30 16–202.

31 (a) A person may not dredge or fill on State wetlands without a license.

1 (b) The Secretary shall assist the Board in determining whether to issue a
2 license to dredge or fill State wetlands. The Secretary shall submit a report indicating
3 whether the license should be granted and, if so, the terms, conditions, and
4 consideration required after consultation with any interested federal, State, and local
5 unit, and after issuing public notice, holding any requested hearing, and taking any
6 evidence the Secretary thinks advisable.

7 (c) (1) Upon receipt of a report by the Secretary, the Board shall decide if
8 issuance of the license is in the best interest of the State, taking into account the
9 varying ecological, economic, developmental, recreational, and aesthetic values each
10 application presents. If the Board decides to issue the license, the issuance of the
11 license shall be for consideration and on terms and conditions the Board determines.
12 Every license shall be in writing.

13 16–204.

14 (A) Any [party to the proceedings aggrieved by the decision of the Board,]
15 **PERSON THAT SATISFIES SUBSECTION (B) OF THIS SECTION** may petition the
16 circuit court in the county where the land is located within 30 days after receiving the
17 decision **OF THE BOARD**. The appeal shall be heard on the record compiled before the
18 Board.

19 (B) **A PARTY HAS STANDING TO FILE A PETITION UNDER SUBSECTION**
20 **(A) OF THIS SECTION IF THE PARTY:**

21 (1) **MEETS THE THRESHOLD STANDING REQUIREMENTS UNDER**
22 **FEDERAL LAW RELATING TO FEDERAL ENVIRONMENTAL PERMITS; AND**

23 (2) **PARTICIPATED IN A PUBLIC PARTICIPATION PROCESS**
24 **THROUGH THE SUBMISSION OF WRITTEN OR ORAL COMMENTS, UNLESS AN**
25 **OPPORTUNITY FOR PUBLIC PARTICIPATION WAS NOT PROVIDED.**

26 (C) (1) **A CONTESTED CASE HEARING MAY NOT OCCUR ON A DECISION**
27 **OF THE BOARD IN ACCORDANCE WITH § 16–202 OF THIS SUBTITLE.**

28 (2) **JUDICIAL REVIEW UNDER THIS SECTION SHALL BE**
29 **CONDUCTED IN ACCORDANCE WITH TITLE 1, SUBTITLE 6 OF THIS ARTICLE.**

30 16–307.

31 (d) The Secretary shall provide opportunity for [a contested case hearing]
32 **JUDICIAL REVIEW** in accordance with the provisions of § [5–204(f) through (h)]
33 **5–204** of this article.

1 8-1808.

2 (d) (1) In this subsection, “unwarranted hardship” means that, without a
3 variance, an applicant would be denied reasonable and significant use of the entire
4 parcel or lot for which the variance is requested.

5 (2) (I) **NOTWITHSTANDING ANY OTHER PROVISION OF LAW,**
6 **THE PROVISIONS OF THIS PARAGRAPH SHALL APPLY TO A PROCEEDING THAT**
7 **INVOLVES A VARIANCE FOR A DEVELOPMENT ACTIVITY IN THE BUFFER UNDER**
8 **THE REQUIREMENTS OF:**

9 1. **THIS SUBTITLE;**

10 2. **A REGULATION ADOPTED UNDER THE AUTHORITY**
11 **OF THIS SUBTITLE; OR**

12 3. **AN APPROVED PROGRAM.**

13 (II) **IF A PERSON MEETS THE THRESHOLD STANDING**
14 **REQUIREMENTS UNDER FEDERAL LAW RELATING TO FEDERAL**
15 **ENVIRONMENTAL PERMITS, THE PERSON SHALL HAVE STANDING TO**
16 **PARTICIPATE AS A PARTY IN A LOCAL ADMINISTRATIVE PROCEEDING.**

17 (III) **A PERSON THAT HAS STANDING UNDER**
18 **SUBPARAGRAPH (II) OF THIS PARAGRAPH MAY:**

19 1. **PARTICIPATE AS A PARTY IN AN ADMINISTRATIVE**
20 **PROCEEDING AT A BOARD OF APPEALS EVEN IF THE PERSON WAS NOT A PARTY**
21 **TO THE ORIGINAL ADMINISTRATIVE PROCEEDING; AND**

22 2. **PETITION FOR JUDICIAL REVIEW AND**
23 **PARTICIPATE AS A PARTY EVEN IF THE PERSON WAS NOT A PARTY TO THE**
24 **ACTION WHICH IS THE SUBJECT OF THE PETITION.**

25 (3) (i) A local jurisdiction shall process an application for a
26 variance regarding a parcel or lot that is subject to a current violation of this subtitle,
27 a regulation adopted under the authority of this subtitle, or any provision of an order,
28 permit, plan, or local program in accordance with subsection (c)(1)(iii)15 of this section.

29 (ii) In considering an application for a variance, a local
30 jurisdiction shall presume that the specific development activity in the critical area
31 that is subject to the application and for which a variance is required does not conform
32 with the general purpose and intent of this subtitle, regulations adopted under this
33 subtitle, and the requirements of the local jurisdiction’s program.

1 (iii) If the variance request is based on conditions or
2 circumstances that are the result of actions by the applicant, a local jurisdiction shall
3 consider that fact.

4 [(3)] (4) (i) An applicant has the burden of proof and the burden
5 of persuasion to overcome the presumption established under paragraph [(2)(ii)]
6 (3)(II) of this subsection.

7 (ii) 1. Based on competent and substantial evidence, a local
8 jurisdiction shall make written findings as to whether the applicant has overcome the
9 presumption established under paragraph [(2)(i)] (3)(I) of this subsection.

10 2. With due regard for the person's experience, technical
11 competence, and specialized knowledge, the written findings may be based on evidence
12 introduced and testimony presented by:

13 A. The applicant;

14 B. The local jurisdiction or any other government
15 agency; or

16 C. Any other person deemed appropriate by the local
17 jurisdiction.

18 [(4)] (5) A variance to a local jurisdiction's critical area program may
19 not be granted unless:

20 (i) Due to special features of a site, or special conditions or
21 circumstances peculiar to the applicant's land or structure, a literal enforcement of the
22 critical area program would result in unwarranted hardship to the applicant;

23 (ii) The local jurisdiction finds that the applicant has satisfied
24 each one of the variance provisions; and

25 (iii) Without the variance, the applicant would be deprived of a
26 use of land or a structure permitted to others in accordance with the provisions of the
27 critical area program.

28 [(5)] (6) (i) Within 10 working days after a written decision
29 regarding a variance application is issued, the Commission shall receive a copy of the
30 decision from a local jurisdiction.

31 (ii) A local jurisdiction may not issue a permit for the activity
32 that was the subject of the variance application until the applicable 30-day appeal
33 period has elapsed.

1 ~~[(6)]~~ **(7)** (i) A development activity commenced without a
2 required permit, approval, variance, or special exception is a violation of this subtitle.

3 (ii) A local jurisdiction may not accept an application for a
4 variance to legalize a violation of this subtitle, including an unpermitted structure or
5 development activity, unless the local jurisdiction first issues a notice of violation,
6 including assessment of an administrative or civil penalty, for the violation.

7 (iii) If a final adjudication of a notice of violation results in a
8 determination that a violation has occurred, the person shall be liable for a penalty
9 that is twice the amount of the assessment in the notice of violation, in addition to the
10 cost of the hearing and any applicable mitigation costs.

11 (iv) Application for a variance under this paragraph constitutes
12 a waiver of the right to appeal the terms of a notice of violation and its final
13 adjudication, including the payment of any penalties and costs assessed.

14 (v) If the local jurisdiction finds that the activity or structure for
15 which a variance is requested commenced without permits or approvals and:

16 1. Does not meet each of the variance criteria under this
17 subsection, the local jurisdiction shall deny the requested variance and order removal
18 or relocation of any structure and restoration of the affected resources; or

19 2. Does meet each of the variance criteria under this
20 subsection, the local jurisdiction may grant approval to the requested variance.

21 ~~[(7)]~~ **(8)** This subsection does not apply to building permits or
22 activities that comply with a buffer exemption plan or buffer management plan of a
23 local jurisdiction which has been approved by the Commission.

24 ~~[(8)]~~ **(9)** Notwithstanding any provision of a local law or ordinance,
25 or the lack of a provision in a local law or ordinance, all of the provisions of this
26 subsection shall apply to, and shall be applied by, a local jurisdiction in the
27 consideration, processing, and decision on an application for a variance.

28 SECTION 2. AND BE IT FURTHER ENACTED, That, for purposes related to
29 the processing of an application for a variance under § 8–1808(d) of the Natural
30 Resources Article, as enacted under Section 1 of this Act, the provisions of this Act
31 may not be construed to have any effect on or application to a variance application
32 filed with a local Critical Area program before January 1, 2010.

33 SECTION 3. AND BE IT FURTHER ENACTED, That, it is the intent of the
34 General Assembly that references in this Act to “threshold standing requirements
35 under federal law,” be construed:

1 (a) In accordance with requirements for individual and associational
2 standing under Article III of the U.S. Constitution and pertinent case law;

3 (b) In accordance with the ruling in *Hunt v. Washington State Apple*
4 *Advertising Commission*, 432 U.S. 333 (1977), which established the essential
5 elements of an association; and

6 (c) In the context of the entire body of federal case law regarding standing,
7 as that case law exists on the effective date of this Act and as it may evolve in future
8 rulings.

9 SECTION 4. AND BE IT FURTHER ENACTED, That if any provision of this
10 Act or the application thereof to any person or circumstance is held invalid for any
11 reason in a court of competent jurisdiction, the invalidity does not affect other
12 provisions or any other application of this Act which can be given effect without the
13 invalid provision or application, and for this purpose the provisions of this Act are
14 declared severable.

15 SECTION 5. AND BE IT FURTHER ENACTED, That this Act shall take effect
16 January 1, 2010.