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As of: July 28, 2016 (1:31pm)

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\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the Energy and Telecommunications Interim Committee

A Bill for an Act entitled: "An Act establishing "The Coal-Fired Generating Unit Decommissioning and Remediation Act"; providing findings and intent; defining terms; establishing requirements for submission, review, modification, and approval of a decommissioning and remediation plan; granting the board of environmental review rulemaking authority; establishing a fee for the filing of decommissioning and remediation plans; requiring the department to enforce and administer the provisions of a plan; establishing the degree of cleanup and remediation required at the site where a coal-fired generating unit is decommissioned; requiring financial assurances for cleanup and remediation; establishing civil penalties and enforcement for failure to decommission and remediate a coal-fired generating unit in accordance with an approved plan; establishing a hearings and appeal process for a person whose interests are adversely affected by a final decision of the department to approve, modify, or disapprove a plan; establishing venue for a challenge to the plan; establishing a hearings and appeal process for an operator challenging an enforcement action or order; establishing venue for a challenge to the action or order; amending sections 75-1-1001 and 75-25-101, MCA; and providing an immediate effective date and a retroactive applicability date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Short-title.** [Sections 1 through 12] may be cited as "The Coal-Fired Generating Unit Decommissioning and Remediation Act".

NEW SECTION. **Section 2. Intent -- findings -- policy and purpose.** (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Coal-Fired Generating Unit Decommissioning and Remediation Act. It is the legislature's intent that the requirements of [sections 1 through 12] provide adequate remedies after the retirement of coal-fired generating units for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable degradation of natural resources.

(2) It is the purpose of [sections 1 through 12] to:

(a) vest in the department of environmental quality the authority to review, approve, modify, or disapprove coal-fired generating unit decommissioning and remediation plans and to exercise general administration and enforcement of [sections 1 through 12];

(b) ensure that adequate information is available to the public concerning the retirement, decommissioning, and remediation of coal-fired generating units;

(c) preserve natural resources;

(d) protect and perpetuate the taxable value of property

through remediation; and

(e) promote the health, safety, and general welfare of the people of this state.

NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 12], the following definitions apply:

(1) (a) "Affected property" means the surface area or subsurface area affected by a coal-fired generating unit, including:

(i) land or water directly affected by a coal-fired generating unit, associated impoundments, disposal and waste operations, buildings, structures, or other improvements or operations infrastructure; and

(ii) all activities necessary and incidental to the decommissioning and remediation of the coal-fired generating unit.

(b) The term does not include land or water potentially affected by:

(i) changes in climate resulting from the emission of greenhouse gases from the coal-fired generating unit; or

(ii) the mining of coal at an underground mine regulated in accordance with Title 82, chapter 4, and used at a coal-fired generating unit.

(2) "Board" means the board of environmental review provided for in 2-15-3502.

(3) "Coal-fired generating unit" means an individual unit of a coal-fired electrical generating facility located in Montana,

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where the unit has a generating capacity that is greater than or equal to 200 megawatts. It includes all of the premises, facilities, roads, and equipment used in the process of generating electricity at the unit.

(4) "Decommissioning" means the process undertaken after a coal-fired generating unit is retired to ensure that the decontamination, dismantlement, removal, and disposal of the unit, including the unit itself and affected property and any related components and materials associated with the unit and affected property, are accomplished in compliance with [sections 1 through 12] and any other state or federal requirements.

(5) "Department" means the department of environmental quality provided for in 2-15-3501.

(6) "Operator" means the person or company engaged in operating a coal-fired generating unit.

(7) "Remediation" means all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to prepare a site where a coal-fired generating unit is located and affected property for reasonably anticipated future uses following the retirement of a coal-fired generating unit.

(8) "Reasonably anticipated future uses" means likely future land or resource uses that take into consideration:

(a) local land and resource use regulations, ordinances, restrictions, or covenants;

(b) historical and anticipated uses of a site where a coal-fired generating unit is located;

(c) patterns of development in the immediate area; and

(d) relevant indications of anticipated land use from the operator, owner or owners, or both of the coal-fired generating unit and local planning officials.

(9) "Retired" or "retire" means the complete and permanent closure of a coal-fired generating unit. Retirement occurs on the date that the coal-fired generating unit ceases combustion of fuel and permanently ceases to generate electricity.

**NEW SECTION. Section 4. Decommissioning and remediation plan required.** (1) Prior to decommissioning a coal-fired generating unit, the operator of a coal-fired generating unit shall file with the department a decommissioning and remediation plan.

(2) (a) [Sections 1 through 12] do not prohibit an operator or owner of a coal-fired generating unit from retiring a coal-fired generating unit.

(b) [Sections 1 through 12] do not absolve an operator, owner or owners, or both of a coal-fired generating unit from any other liability, settlement, or penalty for decommissioning, remediation, or restoration of a coal-fired generating unit and affected land.

(c) If a change in operation of a coal-fired generating unit occurs as a result of the sale, assignment, or other transfer of ownership or operation at the coal-fired generating unit, the

operator at the time of decommissioning of the coal-fired generating unit is subject to the requirements of [sections 1 through 12].

**NEW SECTION. Section 5. Actions -- general provisions.**

[Sections 1 through 12] do not preclude or prohibit the department from exercising its authority to enforce or require remedial actions, if determined necessary, at a coal-fired generating unit or affected property in accordance with Title 75, chapter 10, part 6 or 7, any consent decree or settlement entered into by the department and the operator, owner or owners, or both, or any other environmental enforcement action undertaken by the department and authorized by Title 75.

**NEW SECTION. Section 6. Powers, duties, and functions. (1)**

The department shall:

(a) review a proposed coal-fired generating unit decommissioning and remediation plan and prepare an environmental review document pursuant to the requirements of the Montana Environmental Policy Act provided in Title 75, chapter 1, parts 1 through 3;

(b) approve, modify, or disapprove a coal-fired generating unit decommissioning and remediation plan;

(c) modify a coal-fired generating unit decommissioning and remediation plan only in accordance with the provisions of [section 9];

(d) make investigations or inspections that are considered

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necessary to ensure compliance with any provision of [sections 1 through 12] in accordance with [section 8(3)]; and

(e) enforce and administer the provisions of a coal-fired generating unit decommissioning and remediation plan and issue orders necessary to implement the provisions of [sections 1 through 12].

(2) The board shall:

(a) adopt rules that pertain to coal-fired generating unit decommissioning and remediation plans and plan enforcement in order to accomplish the purposes of [sections 1 through 12]; and

(b) conduct hearings and, for the purposes of conducting those hearings, administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, hear evidence, and require the production of any books, papers, correspondence, memoranda, agreements, documents, or other records relevant or material to the inquiry.

(3) Before January 1, 2018, the board shall adopt rules:

(a) establishing uniform procedures and fees, not to exceed \$1 million, for the filing and review of coal-fired generating unit decommissioning and remediation plans;

(b) providing procedures for the approval, modification, or disapproval of plans;

(c) establishing procedures for enforcement of coal-fired generating unit decommissioning and remediation plans; and

(d) providing other administrative requirements that the board considers necessary to implement [sections 1 through 12].

NEW SECTION. **Section 7. Decommissioning and remediation**

**plan requirements.** (1) An operator shall submit a proposed decommissioning and remediation plan in the form that the board requires under applicable rules, containing the following information:

(a) the name of the operator of the coal-fired generating unit and the names and addresses of all owners of the coal-fired generating unit; and

(b) an environmental and financial overview of the site where the unit is located, the unit itself, and affected property that includes the information required in subsections (2) through (4).

(2) The plan required in subsection (1) must outline decommissioning information, which must include:

(a) the legal description of the coal-fired generating unit and affected property and a map identifying the location and size of the unit and affected property and relevant features, such as property boundaries, surface topography, surface and subsurface structures, and utility lines;

(b) the physical characteristics of the unit and affected property and areas contiguous to the unit, including the location of any surface water bodies and ground water aquifers;

(c) the location of any wells located on the site where the unit is located or on areas within a one-half mile radius of the site where the unit is located and a description of the use of those wells;

(d) the current and reasonably anticipated future uses of



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onsite ground and surface water where the unit is located;

(e) the operational history of the unit;

(f) information on the methods and results of investigations concerning the nature and extent of any hazardous wastes as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, solid waste as defined in 75-10-203, or other potentially hazardous materials that are at the site where the unit is located or on affected property and a map showing general areas and concentrations of those substances;

(g) any sampling results or other data that characterizes the soil, air, ground water, or surface water on the site where the unit is located and on affected property;

(h) a description of potential human and environmental exposure to hazardous wastes as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, solid waste as defined in 75-10-203, or other potentially hazardous materials at the site where the unit is located or on affected property;

(i) readily available information on the environmental regulatory and compliance history of the site where the unit is located and the unit itself, including all environmental permits; and

(j) a description of the dismantling and demolition of the unit and related infrastructure, including information concerning removal of salable and salvageable equipment.

(3) The plan required in subsection (1) must outline remediation information, which must include:

(a) a detailed description of the components of the

remediation proposal, including, to the extent applicable:

(i) the proposed cleanup levels for the site where the unit is located and the unit itself;

(ii) the manner in which the remediation plan satisfies the requirements of [section 10];

(iii) identification of sampling or treatability studies;  
and

(iv) a demonstration that exposures to risk affecting the public health, safety, and welfare and the environment at the facility will be substantially mitigated by the plan;

(b) a brief comparison of the remediation proposal to reasonable alternatives;

(c) a timetable for implementing the proposal and for any necessary monitoring of the site where the unit is located or affected property after the proposed measures are completed;

(d) a statement that applicable health and safety regulations will be met during implementation of the remediation proposal;

(e) a description of how short-term disturbances during implementation of the remediation proposal will be minimized; and

(f) identification of any permits necessary to conduct the proposed remediation.

(4) The plan required in subsection (1) must outline financial information for the decommissioning and remediation of the coal-fired generating unit, which must include:

(a) an estimate of the costs associated with the decommissioning and remediation of the coal-fired generating unit

and affected property, based on an engineering report issued by a reputable third party;

(b) a plan for funding the decommissioning and remediation of the coal-fired generating unit and affected property;

(c) the accumulated reserve of the operator and owner or owners, or both for the decommissioning and remediation of the coal-fired generating unit and affected property as of the date of submission of the plan and the total amount necessary to meet the estimated decommissioning and remediation costs;

(d) a description of the stages by which decommissioning and remediation is intended to be accomplished;

(e) information concerning ownership of water rights and associated infrastructure owned by the operator and owners of the coal-fired generating unit and plans to transfer, sell, or change the water rights and infrastructure to allow for a local government unit's water supply to be maintained; and

(f) any other information related to the financing of decommissioning and remediation requested by the department.

(5) A plan required pursuant to subsection (1) may consist of a plan for up to two coal-fired generating units in combination that are both retired at the same time and planned for simultaneous decommissioning and remediation.

**NEW SECTION. Section 8. Approval of decommissioning and remediation plan -- time limits -- contents of notice -- expiration of approval.** (1) The department shall review for completeness, including adequacy and accuracy, the

decommissioning and remediation plan and shall provide a written completeness notice to the operator within 60 days of receipt. The completeness notice must note all deficiencies identified in the information submitted.

(2) (a) Once the department determines that the proposed decommissioning and remediation plan is complete, the department shall provide formal written notification of approval, modification, or disapproval within 270 days unless the operator and the department agree to an extension of the review to a date certain. The review must be limited to a review of the materials submitted by the operator, public comments, and documents or information readily available to the department. The department shall communicate with the operator during the review period to ensure that the operator has the opportunity to address the public comments.

(b) Any modification to the decommissioning and remediation plan by the department must comply with [section 9].

(3) The department may access the site where the unit is located, the unit itself, and affected property, at reasonable times and after reasonable notice to the operator, during review of the plan to confirm information provided by the operator and to verify that the remediation is being conducted consistent with the approved plan.

(4) The department shall approve a decommissioning and remediation plan if the department concludes that the plan will adequately address environmental impacts to the site where the unit is located and affected property and meets the requirements

of [section 10].

(5) If a decommissioning and remediation plan is not approved by the department, the department shall promptly provide the operator with a written statement of the reasons for denial. The denial may be appealed to the board in accordance with rules adopted by the board and [section 11].

(6) If conditions are discovered during implementation of a decommissioning and remediation plan that were not identified in the review conducted pursuant to subsection (1) that pose a risk to public health, safety, or welfare or the environment and change the scope of the approved plan, the operator shall notify the department within 10 days of discovery. The department may require the operator to submit an amendment to the approved plan to address the conditions.

(7) Departmental approval is void if the operator or the operator's agents:

(a) fail to materially comply with the plan;

(b) submit materially misleading information in the plan or during implementation of the plan; or

(c) fail to report any newly discovered information to the department during the application process or implementation of the plan regarding releases or threatened releases of hazardous wastes as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, solid waste as defined in 75-10-203, or other potentially hazardous materials within 10 days of discovery of that information.

NEW SECTION. **Section 9. Plan modifications by department.**

(1) The department only may modify the terms of a plan in compliance with this section.

(2) If the department believes, based on credible evidence, that a decommissioning and remediation plan would violate a substantive numerical or narrative state standard or regulation, fail to meet the requirements of [section 10], or otherwise violate the purpose of [sections 1 through 12], it may propose to the operator a modification to the plan.

(3) The department shall notify the operator of the proposed modification in writing. The notice must include:

(a) an identification of the existing plan;

(b) the justification for the modification, including all test results or other credible evidence that the department relied on in proposing the modification; and

(c) the text, maps, drawings, and other appropriate information that constitute the proposed modification.

(4) The modification is not effective or enforceable until 30 days following the issuance of the department's modification notice.

(5) If the operator requests a hearing on the proposed modification, the modification is not effective and enforceable until completion of a contested case process.

NEW SECTION. **Section 10. Degree of cleanup required -- financial assurance.** (1) A coal-fired generating unit decommissioning and remediation plan must attain a degree of

cleanup that ensures protection of public health, safety, and welfare and of the environment.

(2) In approving a decommissioning and remediation plan under [sections 1 through 12], the department:

(a) except as provided in subsection (4), shall require cleanup consistent with applicable state or federal environmental requirements, criteria, legal settlements, or other limitations;

(b) may consider substantive state or federal environmental requirements, criteria, legal settlements, or other limitations that are relevant to the site conditions; and

(c) shall select remediation, considering present and reasonably anticipated future uses, giving due consideration to institutional controls, that:

(i) demonstrate acceptable mitigation of exposure to risks to the public health, safety, and welfare and the environment;

(ii) are effective and reliable in the short term and the long term;

(iii) are technically practicable and implementable;

(iv) use treatment technologies or resource recovery technologies if practicable, giving due consideration to engineering controls; and

(v) are cost-effective.

(3) In approving a decommissioning and remediation plan, the department shall consider the acceptability of the remediation to the affected community, as indicated by community members and the local government.

(4) The department may select decommissioning and

remediation that does not meet an applicable state environmental requirement, criteria, or limitation under any one of the following circumstances:

(a) The decommissioning or remediation is an interim measure and will become part of a total, overall remediation plan that will attain the applicable requirement, criteria, or limitation.

(b) Compliance with the applicable requirement, criteria, or limitation will result in greater risk to human health and the environment than other remediation alternatives.

(c) Compliance with the applicable requirement, criteria, or limitation is technically impracticable from an engineering perspective.

(d) The decommissioning and remediation will attain a standard of performance that is equivalent to that required under the otherwise applicable requirement, criteria, or limitation through use of another method or approach.

(e) Compliance with the requirement would not be cost-effective.

(5) For purposes of this section, cost-effectiveness must be determined through an analysis of incremental costs and incremental risk reduction and other benefits of alternatives considered, taking into account the total anticipated short-term and long-term costs of remedial action alternatives considered, including the total anticipated cost of operation and maintenance activities.

(6) The department may require financial assurance from



operator, owner or owners, or both of a coal-fired generating unit in an amount that the department determines will ensure the completion of a decommissioning and remediation plan. The operator, owner or owners, or both shall provide the financial assurance by any one method or combination of methods satisfactory to the department, including but not limited to insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer, or other demonstration of financial capability.

**NEW SECTION. Section 11. Decommissioning and remediation plan hearing -- appeal -- venue.** (1) (a) Subject to subsection (1)(b), a person whose interests are or may be adversely affected by a final decision of the department to approve, modify, or disapprove a coal-fired decommissioning and remediation plan under [sections 1 through 12] is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

(b) A person must have either submitted comments to the department on a decommissioning and remediation plan or submitted comments at a public meeting held in accordance with Title 75, chapter 1, during the environmental review conducted in accordance with [section 6(1)].

(2) An operator may request a hearing before the board on a final decision or a modification by the department to a plan by submitting a request for a hearing within 15 days of receipt of

notice of the decision or modification.

(3) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.

(4) A petition for judicial review of a board decision made to approve, modify, or disapprove a plan must be brought in the county in which the coal-fired generating unit decommissioning and remediation plan is proposed to occur or is occurring or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County.

(5) If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs incurred in defending the action.

**NEW SECTION. Section 12. Enforcement of decommissioning and remediation plan -- civil penalties -- appeal -- venue.** (1) If the department believes that an operator or the operator's agents have failed to implement an approved decommissioning and remediation plan or a rule adopted in order to enforce a decommissioning and remediation plan, it may serve written notice of the violation, by certified mail, on the operator. The notice must specify the provision of [sections 1 through 12] or the rule alleged to have been violated and the facts alleged to constitute a violation. The notice must include an order to take necessary corrective action within a reasonable period of time. The time

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period must be stated in the order. Service by mail is complete on the date of filing.

(2) If the operator does not request a hearing before the board within 30 days of the date of service, the order becomes final.

(3) If the operator requests a hearing before the board within 30 days of the date of service, the board shall schedule a hearing. After the hearing is held, the board may:

(a) affirm or modify the department's order issued under subsection (1) if the board finds that a violation has occurred; or

(b) rescind the department's order if the board finds that a violation has not occurred.

(4) An order issued by the department or the board may set a date by which the violation must cease and set a time limit for action to correct a violation.

(5) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing conducted under this section.

(6) (a) An operator who violates any provision of an approved decommissioning and remediation plan or a rule adopted in order to enforce a decommissioning and remediation plan is subject to a civil penalty not to exceed \$10,000 for each violation. Each day of each violation constitutes a separate violation. The department may institute and maintain in the name of the state any enforcement proceedings under this section. Upon request of the department, the attorney general or the county

attorney of the county of violation shall petition the district court to impose, assess, and recover the civil penalty.

(b) Penalties assessed under this subsection (6) must be determined in accordance with the penalty factors in 75-1-1001.

(7) Action under subsection (1) is not a bar to enforcement of a rule, order, or action made or issued under [sections 1 through 12] by injunction or other appropriate civil remedies.

(8) Money collected under this section must be deposited in the alternative energy revolving loan account established in 75-25-101.

(9) This section does not prevent the board or department from making efforts to obtain voluntary compliance through warning, conference, or any other appropriate means.

(10) A petition for judicial review of a board decision to affirm, modify, or rescind an order under this section must be brought in the county in which the decommissioning and remediation plan is being implemented or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County.

**Section 13.** Section 75-1-1001, MCA, is amended to read:

**"75-1-1001. Penalty factors.** (1) In determining the amount of an administrative or civil penalty to which subsection (4) applies, the department of environmental quality or the district court, as appropriate, shall take into account the following factors:

(a) the nature, extent, and gravity of the violation;

(b) the circumstances of the violation;

(c) the violator's prior history of any violation, which:

(i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(ii) must be documented in an administrative order or a judicial order or judgment issued within 3 years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(iii) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;

(d) the economic benefit or savings resulting from the violator's action;

(e) the violator's good faith and cooperation;

(f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and

(g) other matters that justice may require.

(2) After the amount of a penalty is determined under subsection (1), the department of environmental quality or the district court, as appropriate, may consider the violator's financial ability to pay the penalty and may institute a payment schedule or suspend all or a portion of the penalty.

(3) The department of environmental quality may accept a supplemental environmental project as mitigation for a portion of the penalty. For purposes of this section, a "supplemental

environmental project" is an environmentally beneficial project that a violator agrees to undertake in settlement of an enforcement action but which the violator is not otherwise legally required to perform.

(4) This section applies to penalties assessed by the department of environmental quality or the district court under Title 75, chapters 2, 5, 6, 11, and 20; Title 75, chapter 10, parts 2, 4, 5, and 12; [sections 1 through 12] and Title 76, chapter 4.

(5) The board of environmental review and the department of environmental quality may, for the statutes listed in subsection (4) for which each has rulemaking authority, adopt rules to implement this section."

{ *Internal References to 75-1-1001:*

75-2-401	75-2-413	75-2-514	75-2-515
75-5-611	75-5-631	75-6-109	75-6-114
75-10-228	75-10-417	75-10-424	75-10-542
75-10-1222	75-10-1223	75-11-223	75-11-516
75-11-525	75-20-408		}

**Section 14.** Section 75-25-101, MCA, is amended to read:

**"75-25-101. Alternative energy revolving loan account.** (1)

There is a special revenue account called the alternative energy revolving loan account to the credit of the department of environmental quality.

(2) The alternative energy revolving loan account consists of money deposited into the account from air quality penalties from 75-2-401 and 75-2-413, penalties from [section 12]; and money from any other source. Any interest earned by the account

and any interest that is generated from a loan repayment must be deposited into the account and used to sustain the program.

(3) Funds from the alternative energy revolving loan account may be used to provide loans to individuals, small businesses, units of local government, units of the university system, and nonprofit organizations for the purpose of building alternative energy systems, as defined in 15-32-102:

- (a) to generate energy for their own use;
- (b) for net metering as defined in 69-8-103; and
- (c) for capital investments by those entities for energy conservation purposes, as defined in 15-32-102, when done in conjunction with an alternative energy system.

(4) The amount of a loan may not exceed \$40,000, and the loan must be repaid within 10 years."

{ *Internal References to 75-25-101:*  
75-2-401      75-2-413 }

**NEW SECTION. Section 15. {standard} Codification instruction.** [Sections 1 through 12] are intended to be codified as an integral part of Title 75, and the provisions of Title 75 apply to [sections 1 through 12].

**NEW SECTION. Section 16. {standard} Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 17. {standard} Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 18. {standard} Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 19. {standard} Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to coal-fired generating units retired on or after January 1, 2017.

- END -

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