AN ACT ESTABLISHING THE COAL-FIRED GENERATING UNIT REMEDIATION ACT; PROVIDING FINDINGS AND INTENT; DEFINING TERMS; ESTABLISHING REQUIREMENTS FOR SUBMISSION, REVIEW, AND APPROVAL OF A REMEDIATION PLAN; ALLOWING THE DEPARTMENT TO RECOVER ADMINISTRATIVE COSTS; ESTABLISHING THE DEGREE OF REMEDIATION REQUIRED; ESTABLISHING AN APPEALS PROCESS FOR A PERSON WHOSE INTERESTS ARE ADVERSELY AFFECTED BY A FINAL DECISION OF THE DEPARTMENT TO APPROVE OR MODIFY A PLAN; ESTABLISHING VENUE FOR A CHALLENGE TO A PLAN; ESTABLISHING AN APPEAL PROCESS FOR AN OWNER OR PERSON CHALLENGING AN ENFORCEMENT ACTION OR ORDER; ESTABLISHING VENUE AND A STANDARD OF REVIEW FOR A CHALLENGE TO THE ACTION OR ORDER; PROVIDING FOR ENFORCEMENT OF A PLAN; AMENDING SECTIONS 75-1-1001 AND 75-10-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 9] may be cited as the "Coal-Fired Generating Unit Remediation Act".

Section 2. Findings -- intent. (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 Remediation Act.

(2) It is the legislature's intent that the requirements of [sections 1 through 9] ensure that appropriate remedies are in place when a coal-fired generating unit is retired to ensure the protection of the environmental life support systems from degradation and to provide adequate remedies to prevent unreasonable degradation of natural resources.

Section 3. Definitions. As used in [sections 1 through 9], the following definitions apply:

(1) (a) "Affected property" means the property owned by or under the control of an owner that is affected by a coal-fired generating unit, including:

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

(ii) areas affected by activities necessary to the closure and dismantling of the coal-fired generating unit.

(b) The term does not include:

(i) land, water, or air affected or potentially affected by emissions from the operation of a coal-fired generating unit; or

(ii) the mining of coal at an underground or strip mine and used at the coal-fired generating unit.

(2) "Applicable legal obligations" means any applicable state or federal environmental laws, including but not limited to the Montana Water Quality Act, rules regarding disposal of coal combustion residuals from electric utilities, the Montana Major Facility Siting Act, and other applicable laws administered by the department in accordance with Title 75. The term includes any consent order or settlement entered into by the department and an operator or owner imposing obligations to undertake remediation actions at the coal-fired generating unit or affected property.

(3) "Coal-fired generating unit" means an individual unit of a coal-fired electrical generating facility located in Montana, where the unit has a generating capacity that is greater than or equal to 200 megawatts.

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

(5) "Operator" means the person engaged in operating or undertaking remediation actions at a coal-fired generating unit. An operator may or may not be an owner.

(6) "Owner" means a person who has a legal or equitable interest in property subject to [sections 1 through 9] or the person's legal representative.

(7) "Person" means an individual, partnership, corporation, association, or other legal entity or any political subdivision of the state or federal government.

(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 an operator or owner, or both, of a coal-fired generating unit, affected property owners, and local planning officials.

(9) "Remediation" means all actions required by an applicable legal obligation directed exclusively toward achieving a degree of cleanup required in accordance with [section 7].

(10) "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.

Section 4. Integration -- construction in event of conflict. (1) To avoid unnecessary duplication, the department shall integrate the provisions of [sections 1 through 9] with applicable legal obligations.

(2) If [sections 1 through 9] or any action taken by the department in accordance with [sections 1 through 9] conflicts with applicable legal obligations, the applicable legal obligations supersede the provisions of [sections 1 through 9].

Section 5. Remediation plan. (1) No later than 3 months after a coal-fired generating unit is retired and no earlier than 5 years prior to a coal-fired generating unit's planned retirement, an owner shall submit a proposed remediation plan that contains:

(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;

(b) a general overview of the site where the unit is located, the unit itself, and affected property;

(c) the current and reasonably anticipated future uses of affected property; and

(d) remediation information, including:

(i) a list of reports, studies, or other evaluations related to remediation and specific remediation measures already completed or under way pursuant to any applicable legal obligation; and

(ii) the manner in which the remediation measures satisfy the requirements of [section 7] and a description of how the owner will comply.

(2) (a) If a coal-fired generating unit has more than one owner, the owners may jointly submit a remediation plan in accordance with [sections 1 through 9].

(b) If the owners are unable to submit a joint plan, then each owner of the coal-fired generating unit that is being retired or is retired is responsible for meeting the requirements of [sections 1 through 9]. If separate plans are filed, the department shall ensure that the plans detail legal obligations. If there is a conflict in the plans, the department shall reconcile the conflict to ensure that the plans are consistent with existing law and legal obligations.

(3) A plan required pursuant to subsection (1) may consist of a plan for more than one unit that is retired at the same time and planned for simultaneous remediation.

(4) The filing of a plan is not a commitment to retire a coal-fired generating unit on any particular date that is not otherwise required by an applicable legal obligation.

Section 6. Approval of plan -- time limits -- contents and expiration. (1) (a) The department shall review for completeness a remediation plan and provide a written completeness notice to an owner within 60 days of receipt of the remediation plan and within 30 days of receipt of responses to notices of deficiencies. The initial completeness notice must include all deficiencies identified in the information submitted.

(b) Review of the plan is not subject to Title 75, chapter 1, parts 1 through 3.

(c) During the review period provided in subsection (5), an owner may respond in writing to the comments received by the department during the public comment period.

(2) The department shall provide formal written notification of approval or modification within 120 days of determining a proposed remediation plan is complete, unless the owner and the department agree to an extension of the review to a date certain. Any modification by the department is limited to a modification necessary to conform the plan to applicable legal obligations.

(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 owner, during review of the plan to confirm information provided by the owner and is consistent with the proposed plan.

(4) The department shall approve a remediation plan if the department concludes that the plan meets the requirements of [sections 1 through 9].

(5) Within 10 days of the date the department determines that a proposed remediation plan is complete, the department shall publish a notice and brief summary of the proposed remediation plan in a daily newspaper of general circulation in the area affected and make the plan available to the public. The department also shall

post the notice on its website. The notice must provide 45 days for submission of written comments to the department regarding the plan. The notice must also advise the public of the time and place of a public meeting at or near the coal-fired generating unit site regarding the proposed remediation plan. The meeting must be held within 45 days of the date that written notice of the department's completeness determination is provided to the owner or operator. To the extent there is any conflict between the public notice provisions of this section and those contained in any applicable legal obligation, the provisions of the applicable legal obligation supersede the requirements of this subsection.

(6) If a remediation plan is modified by the department, the department shall promptly provide the public with notice through its website and the owner with notice through a written statement of the reasons for modification. A modification may be appealed in accordance with [section 8].

(7) To the extent costs are not recovered or recoverable under other applicable legal obligations, the department may recover its actual costs, including administrative costs, for its review of a plan and for its monitoring, inspection, and enforcement activities related to the approved plan. Recovered costs must be deposited in the environmental quality protection fund established in 75-10-704.

Section 7. Degree of cleanup required. A remediation plan must attain a degree of cleanup of the affected property consistent with, but not more stringent than, applicable legal obligations, giving consideration to reasonably anticipated future uses of affected property.

Section 8. Remediation plan -- appeal -- venue. (1) (a) Subject to subsection (1)(b), an owner or any person whose interests are or may be materially adversely affected by a final decision of the department to approve or modify a remediation plan under [sections 1 through 7] may file for judicial review of the department's decision. The request for judicial review and a statement of the basis for the review must be filed with the court within 30 days of the department's decision.

(b) In order for a person to file a request for review under subsection (1)(a), a person must have either submitted comments to the department on a remediation plan or submitted comments at a public meeting held in accordance with [section 6(5)], or the person must be challenging a change made by the department between the draft and final plan.

(2) An owner may appeal the department's decision on a plan by submitting a request for judicial review.

The request for judicial review and the statement of the basis for the review must be filed with the court within 30 days of the department's decision.

(3) In considering a request for review under this part, the court shall uphold the decision made by the department unless the objecting person can demonstrate, on the administrative record, that the department's decision was arbitrary and capricious or otherwise not in accordance with the law.

(4) A petition for judicial review under this section must be brought in the first judicial district, Lewis and Clark County.

Section 9. Enforcement of plan -- penalty. (1) If the department finds that an owner has failed to file a plan or implement an approved plan, it may serve written notice of the violation, by certified mail, on the owner. The notice must specify the provisions of [sections 1 through 9] 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 period must be stated in the order. Service by mail is complete on the date of mailing.

(2) The department's order becomes final unless, within 30 days after notice of the department's decision or determination, the owner submits to the department a written request for a hearing specifying the grounds for the appeal.

(3) (a) An action initiated under this section may include an administrative penalty determined by the department for each day of a violation. If an order issued by the department under this section requires the payment of an administrative civil penalty, the department shall state findings and conclusions describing the basis for its penalty assessment.

(b) Administrative penalties collected under this section must be deposited in the environmental quality protection fund established in 75-10-704.

(c) In determining the amount of penalty to be assessed for an alleged violation under this section, the department shall consider the penalty factors in 75-1-1001.

(d) The department may bring a judicial action to enforce a final administrative order issued pursuant to this subsection (3). The action must be filed in the district court of the first judicial district, Lewis and Clark County.

Section 10. 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, and [sections 1 through 9]; Title 75, chapter 10, parts 2, 4, 5, and 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."

Section 11. Section 75-10-704, MCA, is amended to read:

"75-10-704. Environmental quality protection fund. (1) Subject to legislative fund transfers, there is in the state special revenue fund an environmental quality protection fund to be administered as a revolving fund by the department. The department is authorized to expend amounts from the fund necessary to carry out the purposes of this part.

(2) The fund may be used by the department only to carry out the provisions of this part and for remedial actions taken by the department pursuant to this part in response to a release of hazardous or deleterious substances.

(3) The department shall:

(a) except as provided in subsection (7), establish and implement a system, including the preparation of a priority list, for prioritizing sites for remedial action based on potential effects on human health and the environment; and

(b) investigate, negotiate, and take legal action, as appropriate, to identify liable persons, to obtain the participation and financial contribution of liable persons for the remedial action, to achieve remedial action, and to recover costs and damages incurred by the state.

(4) There must be deposited in the fund:

(a) all penalties, forfeited financial assurance, natural resource damages, and remedial action costs recovered pursuant to 75-10-715;

(b) all administrative penalties assessed pursuant to 75-10-714 and all civil penalties assessed pursuant to 75-10-711(5);

(c) funds allocated to the fund by the legislature;

(d) proceeds from the resource indemnity and ground water assessment tax as authorized by 15-38-106;

(e) funds received from the interest income of the resource indemnity trust fund pursuant to 15-38-202;

(f) funds received from the interest income of the fund;

(g) funds received from settlements pursuant to 75-10-719(7);

(h) funds received from the interest paid pursuant to 75-10-722; ~~and~~

(i) costs recovered pursuant to [section 6(7)] and penalties recovered pursuant to [section 9]; and

~~(i)~~(j) funds transferred from the orphan share account pursuant to 75-10-743(10). The full amount of

these funds must be dedicated each fiscal year as follows:

(i) 50% to the state's contribution for cleanup and long-term operation and maintenance costs at the Libby asbestos superfund site; and

(ii) 50% to metal mine reclamation projects at abandoned mine sites, as provided in 82-4-371. This subsection ~~(4)(i)(ii)~~ (4)(j)(ii) does not apply to exploration or mining work performed after March 9, 1971. Projects funded under this subsection ~~(4)(i)(ii)~~ (4)(j)(ii) are not subject to the requirements of Title 75, chapter 10, part 7.

(5) Whenever a legislative appropriation is insufficient to carry out the provisions of this part and additional money remains in the fund, the department shall seek additional authority to spend money from the fund through the budget amendment process provided for in Title 17, chapter 7, part 4.

(6) Whenever the amount of money in the fund is insufficient to carry out remedial action, the department may apply to the governor for a grant from the environmental contingency account established pursuant to 75-1-1101.

(7) (a) There is established a state special revenue account for all funds donated or granted from private parties to remediate a specific release at a specific facility. There must be deposited into the account the interest income earned on the account. A person is not liable under 75-10-715 solely as a result of contributing to this account.

(b) Funds donated or granted for a specific project pursuant to this subsection (7) must be accumulated in the fund until the balance of the donated or granted funds is sufficient, as determined by the department, to remediate the facility pursuant to the requirements of 75-10-721 for which the funds are donated.

(c) If the balance of the fund created in this subsection (7), as determined by the department pursuant to the requirements of 75-10-721, is not sufficient to remediate the facility within 1 year from the date of the initial contribution, all donated or granted funds, including any interest on those donated or granted funds, must be returned to the grantor.

(d) If the balance for a specific project is determined by the department to be sufficient to remediate the facility pursuant to the requirements of 75-10-721, the department shall give that site high priority for remedial action, using the funds donated under this subsection (7).

(e) This subsection (7) is not intended to delay, to interfere with, or to diminish the authority or actions of the department to investigate, negotiate, and take legal action, as appropriate, to identify liable persons, to obtain the participation and financial contribution of liable persons for the remedial action, to achieve remedial

action, and to recover costs and damages incurred by the state.

(f) The department shall expend the funds in a manner that maximizes the application of the funds to physically remediating the specific release.

(8) (a) A person may donate in-kind services to remediate a specific release at a specific facility pursuant to subsection (7). A person who donates in-kind services is not liable under 75-10-715 solely as a result of the contribution of in-kind services.

(b) A person who donates in-kind services with respect to remediating a specific release at a specific facility is not liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness, loss of or damage to property, or economic loss.

(c) Immunity from liability, pursuant to subsection (8)(b), does not apply in the case of a release that is caused by conduct of the entity providing in-kind services that is negligent or grossly negligent or that constitutes intentional misconduct.

(d) When a person is liable under 75-10-715 for costs or damages incurred as a result of a release or threatened release of a hazardous or deleterious substance, the person may not avoid that liability or responsibility under 75-10-711 by subsequent donations of money or in-kind services under the provisions of subsection (7) and this subsection (8).

(e) Any donated in-kind services that are employed as part of a remedial action pursuant to this subsection (8) must be approved by the department as appropriate remedial action. (Subsection ~~(4)(i)~~ (4)(j) terminates June 30, 2027--sec. 5, Ch. 387, L. 2015.)"

Section 12. Notification to tribal governments. The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell Chippewa tribe.

Section 13. Codification instruction. [Sections 1 through 9] are intended to be codified as an integral part of Title 75, and the provisions of Title 75 apply to [sections 1 through 9].

Section 14. Coordination instruction. If both Senate Bill No. 37 and [this act] are passed and

approved, then Senate Bill No. 37 is void.

Section 15. 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].

Section 16. 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.

Section 17. Effective date. [This act] is effective on passage and approval.

Section 18. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to a coal-fired generating unit retired on or after January 1, 2017.

- END -

I hereby certify that the within bill,

SB 0339, originated in the Senate.

President of the Senate

Signed this _____ day

of _____, 2017.

Secretary of the Senate

Speaker of the House

Signed this _____ day

of _____, 2017.

SENATE BILL NO. 339

INTRODUCED BY D. ANKNEY

BY REQUEST OF THE SENATE NATURAL RESOURCES STANDING COMMITTEE

AN ACT ESTABLISHING THE COAL-FIRED GENERATING UNIT REMEDIATION ACT; PROVIDING FINDINGS AND INTENT; DEFINING TERMS; ESTABLISHING REQUIREMENTS FOR SUBMISSION, REVIEW, AND APPROVAL OF A REMEDIATION PLAN; ALLOWING THE DEPARTMENT TO RECOVER ADMINISTRATIVE COSTS; ESTABLISHING THE DEGREE OF REMEDIATION REQUIRED; ESTABLISHING AN APPEALS PROCESS FOR A PERSON WHOSE INTERESTS ARE ADVERSELY AFFECTED BY A FINAL DECISION OF THE DEPARTMENT TO APPROVE OR MODIFY A PLAN; ESTABLISHING VENUE FOR A CHALLENGE TO A PLAN; ESTABLISHING AN APPEAL PROCESS FOR AN OWNER OR PERSON CHALLENGING AN ENFORCEMENT ACTION OR ORDER; ESTABLISHING VENUE AND A STANDARD OF REVIEW FOR A CHALLENGE TO THE ACTION OR ORDER; PROVIDING FOR ENFORCEMENT OF A PLAN; AMENDING SECTIONS 75-1-1001 AND 75-10-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.