H-2071.1

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**SECOND SUBSTITUTE HOUSE BILL 1278**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** House General Government & Information Technology (originally sponsored by Representatives Fitzgibbon, Dunshee, Farrell, S. Hunt, Peterson, Fey, and Tarleton)

AN ACT Relating to building energy use disclosure requirements; amending RCW 19.27A.140, 19.27A.170, 43.21B.110, and 43.21B.110; adding new sections to chapter 19.27A RCW; creating a new section; prescribing penalties; providing an effective date; and providing an expiration date.

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

NEW SECTION. **Sec.**  (1) The legislature finds that reducing the energy use of buildings is an important component of the state's effort to meet its greenhouse gas emissions reduction obligations required by state law. Recent analysis considered by the 2014 climate change task force established by executive order indicates that more than one-third of the state's greenhouse gas emissions are attributable to sources that are associated with building energy use: Electricity generation and residential, commercial, and industrial uses of oil, coal, and natural gas.

(2) The establishment of meaningful, enforceable requirements for buildings to disclose their energy use data creates an important signal to building owners, prospective building owners, tenants, and others in real estate markets about the true environmental and financial costs associated with the use of that building. The disclosure of this information allows real estate market participants to make decisions that will save them money by lowering their utility bills and can provide an important incentive for real estate market participants to invest in emissions-reducing and energy-saving upgrades. Real-world experience confirms that the addition of building energy use information to real estate markets provides incentive for buildings to lower their energy use and associated greenhouse gas emissions: Analysis by the United States environmental protection agency has shown that commercial buildings that participate in a benchmarking program achieve a seven percent reduction in energy use over their first three years in the program. By simply providing information to real estate markets through required disclosure, the state will achieve substantial greenhouse gas emission reductions by reducing the energy use of buildings.

(3) In 2009, the legislature established requirements that certain nonresidential building owners maintain information about their building energy use at the time of sale. In the years following the 2009 legislature's enactment of the current building energy use disclosure requirements, local governments in Washington and elsewhere have built upon the lessons learned from the state's implementation of its groundbreaking benchmarking efforts. These jurisdictions have been able to introduce more complete benchmarking information across their real estate markets by requiring procedures to support the consistent submission of building energy use information, including the establishment of penalties for violations of energy use disclosure requirements.

(4) In recognition of the benefits of establishing compliance mechanisms to accompany benchmarking requirements, the state energy strategy recommends improvements to the state's benchmarking law. This strategic energy report includes a recommendation that the state receive energy benchmarking data to assess the impact of the program and to better ensure statewide compliance with building energy benchmarking requirements. This act moves the state towards meeting the goals laid out in the state energy strategy by encouraging market-wide participation in the energy benchmarking program and by encouraging the consideration of building energy use information during market transactions.

NEW SECTION. **Sec.**  A new section is added to chapter 19.27A RCW to read as follows:

(1)(a) The proprietor of each reporting building shall establish a United States environmental protection agency portfolio manager account and shall request that a qualifying utility servicing the reporting building provide the proprietor with energy consumption and energy cost data for all accounts associated with the reporting building. The proprietor shall identify to the qualifying utility the accounts associated with each reporting building.

(b) A proprietor of a reporting building shall disclose the United States environmental protection agency's energy star statement of energy performance produced using a portfolio manager account to a prospective buyer, lessee, or lender for the preceding calendar year. A proprietor who delivers the United States environmental protection agency's energy star statement of energy performance to a prospective buyer, lessee, or lender is not required to provide additional information regarding energy consumption and the information is deemed to be adequate to inform the prospective buyer, lessee, or lender regarding the United States environmental protection agency's energy star statement of energy performance for each month of the preceding calendar year for the building that is being sold, leased, financed, or refinanced.

(2) By April 1, 2017, and April 1st of each year thereafter, the proprietor of a reporting building must transfer the United States environmental protection agency's energy star portfolio manager building characteristics, energy consumption, and energy cost data for each month of the preceding calendar year to the commerce portfolio manager account using the portfolio manager sharing feature. At the time of transfer or within a reasonable time of transferring data, the proprietor may include an explanatory comment for each reporting building for the purpose of identifying specific energy variations, such as occupancy variances or high energy use tenants. At the time of transfer, the proprietor must indicate to the department if the reporting building is occupied solely by the proprietor or by a single tenant, and if the energy consumption, energy cost, and other benchmarking data of the building relates to proprietary commercial activity.

(3) If any proprietor of a reporting building discloses information in good faith concerning a building's energy consumption, energy cost, or other benchmarking data in accordance with this chapter, no cause of action shall arise from the disclosure and the proprietor is not liable to others for the disclosure or its consequences.

NEW SECTION. **Sec.**  A new section is added to chapter 19.27A RCW to read as follows:

(1) The department shall establish a United States environmental protection agency energy star portfolio manager account to support data sharing transfers from proprietors.

(2)(a) The department shall make publicly available the building characteristics, annual energy consumption, energy cost, ratings, and other energy use data of reporting buildings, other than buildings that the proprietor indicates are occupied by the proprietor or by a single tenant and whose energy data relates to proprietary commercial activity. The department may not make publicly available building energy consumption, energy cost, or other benchmarking data that pertains to buildings occupied solely by the proprietor or by a single tenant and whose energy use relates to proprietary commercial activity, unless that data is aggregated with data from other buildings.

(b) For each reporting building, the department shall identify the city, county, and qualifying utility that provides service to the reporting building. The department must periodically update the building characteristics, energy consumption, and energy cost data and ratings that it makes available under this subsection. The department must make any explanatory comments received under section 2(2) of this act publicly available.

(3) Beginning June 1, 2017, and by June 1st of each subsequent year, the department shall analyze the data sharing transfers from proprietors and other supporting information to determine:

(a) Which reporting buildings in Washington have disclosed and transferred the information required by section 2 of this act during the preceding calendar year; and

(b) Which reporting buildings in Washington have failed to disclose and transfer the information required by section 2 of this act.

(4) If the department makes publicly available reporting building energy consumption, energy cost data, or other benchmarking data or information in good faith in accordance with this chapter, no cause of action shall arise from the disclosure and the department is not liable to others for the disclosure or its consequences.

NEW SECTION. **Sec.**  A new section is added to chapter 19.27A RCW to read as follows:

The department is authorized to enforce the disclosure requirements of RCW 19.27A.170 and section 2 of this act. The department is authorized to investigate and determine if a qualifying utility or proprietor has not complied with the requirements of RCW 19.27A.170 or section 2 of this act. The department shall work with qualifying utilities and proprietors to come into compliance with the energy benchmarking requirements of this chapter.

**Sec.**  RCW 19.27A.140 and 2011 1st sp.s. c 43 s 245 are each amended to read as follows:

The definitions in this section apply to RCW 19.27A.130 through 19.27A.190 ((~~and~~)), 19.27A.020, and sections 2, 3, and 4 of this act unless the context clearly requires otherwise.

(1) "Benchmark" means the energy used by a facility as recorded monthly for at least one year and the facility characteristics information inputs required for a portfolio manager account.

(2) "Conditioned space" means conditioned space, as defined in the Washington state energy code.

(3) "Consumer-owned utility" includes a municipal electric utility formed under Title 35 RCW, a public utility district formed under Title 54 RCW, an irrigation district formed under chapter 87.03 RCW, a cooperative formed under chapter 23.86 RCW, a mutual corporation or association formed under chapter 24.06 RCW, a port district formed under Title 53 RCW, or a water-sewer district formed under Title 57 RCW, that is engaged in the business of distributing electricity to one or more retail electric customers in the state.

(4) "Cost-effectiveness" means that a project or resource is forecast:

(a) To be reliable and available within the time it is needed; and

(b) To meet or reduce the power demand of the intended consumers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative project or resource, or any combination thereof.

(5) "Council" means the state building code council.

(6) "Embodied energy" means the total amount of fossil fuel energy consumed to extract raw materials and to manufacture, assemble, transport, and install the materials in a building and the life-cycle cost benefits including the recyclability and energy efficiencies with respect to building materials, taking into account the total sum of current values for the costs of investment, capital, installation, operating, maintenance, and replacement as estimated for the lifetime of the product or project.

(7) "Energy consumption data" means the monthly amount of energy consumed by a customer as recorded by the applicable energy meter for the most recent twelve-month period.

(8) "Energy service company" has the same meaning as in RCW 43.19.670.

(9) "Enterprise services" means the department of enterprise services.

(10) "Greenhouse gas" and "greenhouse gases" includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(11) "Investment grade energy audit" means an intensive engineering analysis of energy efficiency and management measures for the facility, net energy savings, and a cost-effectiveness determination.

(12) "Investor-owned utility" means a corporation owned by investors that meets the definition of "corporation" as defined in RCW 80.04.010 and is engaged in distributing either electricity or natural gas, or both, to more than one retail electric customer in the state.

(13) "Major facility" means any publicly owned or leased building, or a group of such buildings at a single site, having ten thousand square feet or more of conditioned floor space.

(14) "National energy performance rating" means the score provided by the energy star program, to indicate the energy efficiency performance of the building compared to similar buildings in that climate as defined in the United States environmental protection agency "ENERGY STAR® Performance Ratings Technical Methodology."

(15) "Net zero energy use" means a building with net energy consumption of zero over a typical year.

(16) "Portfolio manager" means the United States environmental protection agency's energy star portfolio manager ((~~or an equivalent tool adopted by the department of enterprise services~~)).

(17) "Preliminary energy audit" means a quick evaluation by an energy service company of the energy savings potential of a building.

(18) "Qualifying public agency" includes all state agencies, colleges, and universities.

(19) "Qualifying utility" means a consumer-owned or investor-owned gas or electric utility that serves more than twenty-five thousand customers in the state of Washington.

(20) "Reporting public facility" means any of the following:

(a) A building or structure, or a group of buildings or structures at a single site, owned by a qualifying public agency, that exceed ten thousand square feet of conditioned space;

(b) Buildings, structures, or spaces leased by a qualifying public agency that exceeds ten thousand square feet of conditioned space, where the qualifying public agency purchases energy directly from the investor-owned or consumer-owned utility;

(c) A wastewater treatment facility owned by a qualifying public agency; or

(d) Other facilities selected by the qualifying public agency.

(21) "State portfolio manager master account" means a portfolio manager account established to provide a single shared portfolio that includes reports for all the reporting public facilities.

(22) "Building characteristics" means the building size, age, primary function, address, and other information required to create a statement of energy performance.

(23) "Commerce portfolio manager account" means the portfolio manager master account created by the department pursuant to section 3 of this act.

(24) "Department" means the department of commerce.

(25) "Proprietor" means the owner or operator of a building or an agent acting on behalf of the owner or operator of a building.

(26) "Reporting building" means:

(a) A building that exceeds twenty thousand square feet of conditioned space except for a building that:

(i) Is a factory group F building, a residential group R building other than a group R-2 building containing five or more dwelling units, or a miscellaneous and utility group U building, as defined in the 2012 Washington state building code; or

(ii) Does not receive gas or electric service from a utility that is not a qualifying utility.

(b) A campus of buildings that are served by a shared energy utility account and together exceed twenty thousand square feet of conditioned space, except for a campus of buildings that:

(i) Are comprised exclusively of any combination of factory group F buildings, residential group R buildings other than a group R-2 building containing five or more dwelling units, or miscellaneous and utility group U buildings, as defined in the 2012 Washington state building code; or

(ii) Do not receive gas or electric service from a utility that is not a qualifying utility.

**Sec.**  RCW 19.27A.170 and 2009 c 423 s 6 are each amended to read as follows:

(1) ((~~On and after January 1, 2010,~~)) Qualifying utilities shall maintain records of the energy consumption data of all ((~~nonresidential and qualifying public agency buildings~~)) customer accounts to which they provide service. This data must be maintained ((~~for at least the most recent twelve months~~)) in a format compatible for uploading to the United States environmental protection agency's energy star portfolio manager. In carrying out the requirements of this section, qualifying utilities shall disclose and update energy consumption and energy cost data each billing period. The data disclosed and updated by qualifying utilities must be continuous and date back to no later than January 1, 2016.

(2) ((~~On and after January 1, 2010, upon the written authorization or secure electronic authorization of a nonresidential building owner or operator,~~)) A qualifying utility shall upload the energy consumption and energy cost data for the accounts specified by the ((~~owner or operator~~)) proprietor for a building to the United States environmental protection agency's energy star portfolio manager in a form that does not disclose personally identifying information.

(3) Until January 1, 2017, in carrying out the requirements of this section, a qualifying utility shall use any method for providing the specified data in order to maximize efficiency and minimize overall program cost. Qualifying utilities are encouraged to consult with the United States environmental protection agency and their customers in developing reasonable reporting options. After January 1, 2017, qualifying utilities shall upload the reporting building energy consumption and energy cost data by using energy star portfolio manager web services in order to automatically upload the specified data to the United States environmental protection agency's energy star portfolio manager.

(4) ((~~Disclosure of nonpublic nonresidential benchmarking data and ratings required under subsection (5) of this section will be phased in as follows:~~

~~(a) By January 1, 2011, for buildings greater than fifty thousand square feet; and~~

~~(b) By January 1, 2012, for buildings greater than ten thousand square feet.~~

~~(5) Based on the size guidelines in subsection (4) of this section, a building owner or operator, or their agent, of a nonresidential building shall disclose the United States environmental protection agency's energy star portfolio manager benchmarking data and ratings to a prospective buyer, lessee, or lender for the most recent continuously occupied twelve-month period. A building owner or operator, or their agent, who delivers United States environmental protection agency's energy star portfolio manager benchmarking data and ratings to a prospective buyer, lessee, or lender is not required to provide additional information regarding energy consumption, and the information is deemed to be adequate to inform the prospective buyer, lessee, or lender regarding the United States environmental protection agency's energy star portfolio manager benchmarking data and ratings for the most recent twelve-month period for the building that is being sold, leased, financed, or refinanced.~~

~~(6) Notwithstanding subsections (4) and (5) of this section,~~)) Nothing in this section ((~~increases or decreases the duties, if any, of a building owner, operator, or their agent under this chapter~~)) or section 2 of this act alters the duty of a seller, agent, or broker to disclose the existence of a material fact affecting the real property.

(5) Nothing in this section or section 3 of this act changes or limits the authority of a public entity to adopt building energy use disclosure requirements that are in addition to the requirements imposed by this section. The adoption of building energy use disclosure requirements that are in addition to the requirements of this chapter by a public entity does not affect the obligation of a utility or proprietor to comply with the requirements of this chapter.

(6) If any qualifying utility discloses information in good faith concerning energy consumption, energy cost, or other benchmarking data in accordance with this chapter, no cause of action shall arise from the disclosure and the qualifying utility is not liable to its customer or others for the disclosure or its consequences. A qualifying utility is not required to obtain a customer's written or electronic permission to disclose energy consumption, energy cost, or other benchmarking data in accordance with this chapter.

NEW SECTION. **Sec.**  A new section is added to chapter 19.27A RCW to read as follows:

(1)(a) If the department determines that a proprietor is not in compliance with the disclosure requirements of RCW 19.27A.170 or section 2 of this act, the department may issue a written notice of violation to the proprietor. The notice must state the requirement that was violated and any penalties imposed as a result of the violation.

(b) The department may impose the following penalties on a proprietor for the failure to disclose and transfer the building energy use benchmarking data as required by section 2 of this act:

(i) If the proprietor is not in compliance with the disclosure requirements of section 2 of this act within ninety days of receipt of the notice of violation, the department may impose a penalty of up to five hundred dollars;

(ii) If the proprietor is not in compliance with the disclosure requirements of section 2 of this act within one hundred eighty days of receipt of the notice of violation, the department may impose a total cumulative penalty of up to one thousand dollars;

(iii) If the proprietor is not in compliance with the disclosure requirements of section 2 of this act within two hundred seventy days of receipt of the notice of violation, the department may impose a total cumulative penalty of up to two thousand dollars; and

(iv) If the proprietor is not in compliance with the disclosure requirements of section 2 of this act within three hundred sixty days of receipt of the notice of violation, the department may impose a total cumulative penalty of up to four thousand dollars.

(2) In addition to the penalties authorized in subsection (1) of this section, the department may concurrently impose a separate and additional fine of up to five hundred dollars if the proprietor has previously been served with a notice of violation associated with the building under this chapter.

(3) If the department determines that the proprietor has complied with the disclosure requirements of section 2 of this act within ninety days of receipt of the notice of violation and the proprietor has not previously been served with a notice of violation by the department, the department must waive the penalty for the violation. The department may consider any technical difficulties experienced by a proprietor with the portfolio manager system in determining whether to assess or waive a penalty under this section.

(4) The authority of the department to issue penalties pursuant to this section is phased in as follows:

(a) After October 1, 2017, for violations associated with buildings greater than seventy-five thousand square feet that took place in calendar year 2016 or later;

(b) After April 1, 2018, for violations associated with buildings greater than fifty thousand square feet that took place in calendar year 2017 or later; and

(c) After April 1, 2019, for violations associated with buildings greater than twenty thousand square feet that took place in calendar year 2018 or later.

(5) A proprietor may appeal any penalties imposed pursuant to this section to the pollution control hearings board pursuant to the procedures established by RCW 43.21B.300.

(6) All penalties recovered under this section shall be paid into the state treasury and credited to the general fund.

**Sec.**  RCW 43.21B.110 and 2013 c 291 s 33 are each amended to read as follows:

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, local conservation districts, the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, local health departments, the department of natural resources, the department of fish and wildlife, the parks and recreation commission, and authorized public entities described in chapter 79.100 RCW:

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, section 7 of this act, 70.105.080, 70.107.050, 76.09.170, 77.55.291, 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, and 90.64.102.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

(c) A final decision by the department or director made under chapter 183, Laws of 2009.

(d) Except as provided in RCW 90.03.210(2), the issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

(e) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(f) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(g) Decisions of the department regarding waste-derived fertilizer or micronutrient fertilizer under RCW 15.54.820, and decisions of the department regarding waste-derived soil amendments under RCW 70.95.205.

(h) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026.

(i) Any other decision by the department or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(j) Decisions of the department of natural resources, the department of fish and wildlife, and the department that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7).

(k) Forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180.

(l) Decisions of the department of fish and wildlife to issue, deny, condition, or modify a hydraulic project approval permit under chapter 77.55 RCW.

(m) Decisions of the department of natural resources that are reviewable under RCW 78.44.270.

(n) Decisions of an authorized public entity under RCW 79.100.010 to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable by the hearings board under RCW 79.100.120.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.58 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Appeals of decisions by the department under RCW 90.03.110 and 90.44.220.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

**Sec.**  RCW 43.21B.110 and 2013 c 291 s 34 are each amended to read as follows:

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, local conservation districts, the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, local health departments, the department of natural resources, the department of fish and wildlife, the parks and recreation commission, and authorized public entities described in chapter 79.100 RCW:

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, section 7 of this act, 70.105.080, 70.107.050, 76.09.170, 77.55.291, 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, and 90.64.102.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

(c) Except as provided in RCW 90.03.210(2), the issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(e) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(f) Decisions of the department regarding waste-derived fertilizer or micronutrient fertilizer under RCW 15.54.820, and decisions of the department regarding waste-derived soil amendments under RCW 70.95.205.

(g) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026.

(h) Any other decision by the department or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(i) Decisions of the department of natural resources, the department of fish and wildlife, and the department that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7).

(j) Forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180.

(k) Decisions of the department of fish and wildlife to issue, deny, condition, or modify a hydraulic project approval permit under chapter 77.55 RCW.

(l) Decisions of the department of natural resources that are reviewable under RCW 78.44.270.

(m) Decisions of an authorized public entity under RCW 79.100.010 to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable by the hearings board under RCW 79.100.120.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.58 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Appeals of decisions by the department under RCW 90.03.110 and 90.44.220.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

NEW SECTION. **Sec.**  Section 8 of this act expires June 30, 2019.

NEW SECTION. **Sec.**  Section 9 of this act takes effect June 30, 2019.

**--- END ---**