

Introduced by

Representatives Heller, Headland, Kreidt

Senators Christmann, Freborg, Lyson

1 A concurrent resolution expressing the concern of the Legislative Assembly with the scope,  
2 justification, and substances of the Office of Surface Mining Reclamation and Enforcement's  
3 stream protection rule.

4 **WHEREAS**, the state's coal mining industry has a long history of protecting streams,  
5 watersheds, and the waters of North Dakota and often receives praise for its mining practices  
6 and environmental stewardship to the lands of North Dakota; and

7 **WHEREAS**, from 2003 through 2008, the Office of Surface Mining Reclamation and  
8 Enforcement conducted a five-year process, including public hearings, submission of thousands  
9 of public comments, and preparation of an environmental impact statement, that culminated in  
10 final regulations adding significant new environmental protections regarding the placement of  
11 excess spoil and clarifying its regulations relating to stream buffer zones pursuant to the  
12 Surface Mining Control and Reclamation Act; and

13 **WHEREAS**, the Office of Surface Mining Reclamation and Enforcement's 2008 regulations  
14 were consistent with a final decision from the Fourth Circuit Court of Appeals in *Kentuckians for*  
15 *the Commonwealth v. Rivenburth*, holding that it is "beyond dispute that the Surface Mining  
16 Control and Reclamation Act recognizes the possibility of placing excess spoil and material in  
17 waters of the United States even though those materials do not have a beneficial purpose" and  
18 such regulations helped to significantly reduce regulatory uncertainty brought on by earlier  
19 litigation questioning the meaning of the agency's stream buffer zone rule; and

20 **WHEREAS**, a federal court ruled that the Secretary of the Interior may not repeal the  
21 stream buffer zone rule without going through a rulemaking process, including public notice and  
22 comment as required under the Administrative Procedure Act; and

23 **WHEREAS**, on June 11, 2009, the Secretary of the Interior, along with the United States  
24 Army Corps of Engineers and the Environmental Protection Agency, signed a memorandum of  
25 understanding implementing an "interagency action plan" designed to "significantly reduce the

1 harmful environmental consequences of Appalachian surface coal mining operations . . ." and  
2 suggested that coal mining jobs that will be sacrificed in this state should be replaced with  
3 "green" jobs promoted by the memorandum of understanding; and the Office of Surface Mining,  
4 Reclamation and Enforcement further committed in the memorandum of understanding to  
5 consider revisions to the 2008 stream buffer zone rule; and

6 **WHEREAS**, the Office of Surface Mining Reclamation and Enforcement has failed to justify  
7 why a new "stream protection rule" is necessary or explain the problem that the agency is  
8 attempting to fix, and such concerns have been echoed by the Interstate Mining Compact  
9 Commission--an organization representing state mining regulators with substantial expertise in  
10 Surface Mining Control and Reclamation Act regulation; and

11 **WHEREAS**, the Office of Surface Mining Reclamation and Enforcement is inappropriately  
12 rushing to complete the rulemaking because the agency has committed to a self-imposed  
13 deadline of February 28, 2011, to publish a proposed rule through a unilateral settlement  
14 agreement with environmental groups and, in attempting to meet this artificial deadline, is  
15 committing flagrant violations of the required National Environmental Policy Act process; and

16 **WHEREAS**, the agency has also limited comment and participation by other members of  
17 the public by refusing to extend the comment period on its advanced notice of proposed  
18 rulemaking, by failing to adequately provide sufficient notice of the alternatives being  
19 considered, and by conducting "listening sessions" where the Office of Surface Mining  
20 Reclamation and Enforcement prohibited any public speaking by those concerned about the  
21 rule; and

22 **WHEREAS**, the proposed actions could sterilize several million tons of North Dakota lignite  
23 coal that would otherwise be minable under the current regulations that have been proven more  
24 than adequate to protect streams in North Dakota; and

25 **WHEREAS**, the coal mining industry is critical to the economic and social well-being of the  
26 citizens of North Dakota, accounting for over 27,000 direct jobs averaging over \$74,000 in  
27 compensation, over \$93 million in state taxes, and adding \$2.9 billion to the gross domestic  
28 product of the state;

29 **NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF**  
30 **NORTH DAKOTA, THE SENATE CONCURRING THEREIN:**

1 That the Sixty-second Legislative Assembly expresses its serious concern with the scope,  
2 justification, and substance of the Office of Surface Mining Reclamation and Enforcement's  
3 stream protection rule; and

4 **BE IT FURTHER RESOLVED**, that the Sixty-second Legislative Assembly expresses its  
5 concern with the procedure and process that the Office of Surface Mining Reclamation and  
6 Enforcement has been using to implement such regulation and calls upon the agency to  
7 immediately suspend work on the environmental impact statement and the regulation until such  
8 time as the agency clearly and publicly articulates why the 2008 regulation has not been  
9 implemented and provides specific details regarding each of its provisions and why the agency  
10 believes that they are insufficient; provides scientific data and other objective information to  
11 justify each and every provision of the new proposal; explains why the agency is contradicting  
12 its own annual state inspection reports, which indicate good environmental performance and  
13 refute the need for this new regulation; and justifies why a more limited approach would not  
14 achieve the objectives of the agency; and

15 **BE IT FURTHER RESOLVED**, that the Sixty-second Legislative Assembly calls upon the  
16 North Dakota Congressional Delegation and the Governor to oppose this unwarranted effort  
17 by the administration by withholding any further funding for the Office of Surface Mining  
18 Reclamation and Enforcement for the stream protection rule and environmental impact  
19 statement until such time as the agency justifies the need for the new rule; and

20 **BE IT FURTHER RESOLVED**, that the Secretary of State forward copies of this resolution  
21 to the President of the United States, the Governor of North Dakota, and each member of the  
22 North Dakota Congressional Delegation.