

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

HOUSE CONCURRENT RESOLUTION NO. 3031
(Representatives Heller, Headland, Kreidt)
(Senators Christmann, Freborg, Lyson)

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

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

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

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

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

WHEREAS, on June 11, 2009, the Secretary of the Interior, along with the United States Army Corps of Engineers and the Environmental Protection Agency, signed a memorandum of understanding implementing an "interagency action plan" designed to "significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations . . ." and suggested that coal mining jobs that will be sacrificed in this state should be replaced with "green" jobs promoted by the memorandum of understanding; and the Office of Surface Mining, Reclamation and Enforcement further committed in the memorandum of understanding to consider revisions to the 2008 stream buffer zone rule; and

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

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

WHEREAS, the agency has also limited comment and participation by other members of the public by refusing to extend the comment period on its advanced notice of proposed rulemaking, by failing to adequately provide sufficient notice of the alternatives being considered, and by conducting "listening

sessions" where the Office of Surface Mining Reclamation and Enforcement prohibited any public speaking by those concerned about the rule; and

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

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

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

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

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

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

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the President of the United States, the United States Secretary of the Interior, the director of Surface Mining and Reclamation and Enforcement, the Governor of North Dakota, the North Dakota Public Service Commission, and each member of the North Dakota Congressional Delegation.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

Filed in this office this _____ day of _____, 2011,
at _____ o'clock _____ M.

Secretary of State