Clean Streams: Lawmakers, Industry Should Support Policy to Protect State

Opinion
By Jeremy P. Muller

On Aug. 29, U.S. Judge Joseph R. Goodwin handed down his opinion on a lawsuit concerning West Virginia’s river and stream protections. He found that crucial provisions of the state government’s policy are illegal and do not comply with federal law. This marked the first time an anti-degradation policy was successfully challenged at the federal level. In his ruling, Judge Goodwin said: “West Virginia’s regulations simply fail to require the minimum protections required by [U.S.] regulation.” It means that a good portion of the clean streams policy developed by the West Virginia Department of Environmental Protection (DEP) with a coalition of industry and business associations failed to meet the requirements of federal law and the Clean Water Act.

The policy in question is termed “anti-degradation implementation procedures” and is intended to keep clean streams clean and prevent polluted ones from being polluted further. Anti-degradation is a review of a proposed polluting activity that ensures the activity benefits the public and not just the polluter. It is required by U.S. law, and until 2001, West Virginia had failed to comply for roughly 30 years.

In 1999, a two-year debacle began which led to the clean streams policy in question being drafted. The West Virginia Rivers Coalition filed a notice of intent to sue over West Virginia’s lack of anti-degradation implementation procedures. In reaction, a policy was developed under the West Virginia Environmental Quality Board by an industry and state agency-laden stakeholder committee.

That policy was summarily thrown out for being too protective by the Legislature the day before the 2001 session opened. Next, an industry coalition wrote one that was so weak it could not have received federal approval. Finally, DEP and the industry coalition crafted a policy late at night in the waning days of the session and the Legislature passed it. The U.S. Environmental Protection Agency approved that policy.

The Ohio Valley Environmental Coalition, West Virginia Rivers Coalition and 27 additional organizations and individuals promptly filed suit in federal court. Represented by attorneys Joe Lovett of the Appalachian Center for the...
Economy and the Environment, and Jim Hecker of Trial Lawyers for Public Justice, they said the policy did not meet federal requirements.

Throughout this two-year time-frame, a substantial coalition united in opposition to protections for our rivers and streams. This group was commonly referred to as an “industry” coalition. However, “industry” casts a much narrower net than the coalition’s composition suggests.

Those against protecting West Virginia’s rivers and streams, and who sided with EPA and DEP during the litigation, include the West Virginia Chamber of Commerce, the West Virginia Hospitality and Travel Association, the West Virginia Farm Bureau, the West Virginia Municipal Water Quality Association, the West Virginia Manufacturers Association, the West Virginia Forestry Association, the Contractors Association of West Virginia, the West Virginia Municipal League, the Association of Metropolitan Sewerage Agencies, the Independent Oil and Natural Gas Association, and, of course, the West Virginia Coal Association.

The mantra oft repeated by this coalition was that “environmental protections will shut down business in West Virginia.” An amusing scenario, since the pro-business Bush administration has done a fine job shutting down business in West Virginia and across the nation while weakening environmental protections.

Nevertheless, for all of industry’s lamenting on the fate of West Virginia if they didn’t get the policy they needed, the state and industry got what their efforts deserved - a failing grade in the U.S. judge’s ruling.

The point is this: Despite their rhetoric, posturing and hyperbole, industry and the state government failed to develop a policy that complied with U.S. law. Now we are back at square one. West Virginia has no anti-degradation policy, yet has spent untold dollars in state agency staff time and legal costs. This appears to be a common occurrence in the Mountain State. Unwilling to say “no” to big business, out-of-state corporations and notorious polluters, our elected officials think they need not comply with federal law. Lawsuits have been filed over anti-degradation, over river clean-up plans, over mountaintop removal mining. The list goes on. The common thread is that in all of these cases, the state was not complying with U.S. law.

This rogue mindset hampers West Virginia’s growth and development, and should not be coming from our most elevated elected officials. The lack of an anti-degradation policy could throw manufacturing, construction, mining and small business permitting issues into confusion, as permits granted by the state without an anti-degradation review may be challenged in court for failing to follow federal law.

Confusion in the permitting process is something that industry has repeatedly decried as a problem impeding economic development. Yet it is a situation they themselves have created. It makes industry’s calls for certainty in the regulatory process sound hollow, just like their bemoaning that environmental regulations will put them out of business.

So, four-plus years after the initial notice of intent to sue
over anti-degradation was filed, we are wondering why industry and business interests so vehemently push to weaken environmental laws intended to protect West Virginians, the state as a whole, its resources, and even its economy - four things industry and business proclaim to support.

But, more important, we are wondering why West Virginia’s elected officials continually bow down to industry and pass laws with a narrow focus and short-term gains, instead of looking at the broader picture and long-term consequences. Passing an anti-degradation policy that complied with federal law would have saved West Virginia hundreds of thousands if not millions of dollars; it would have instituted some certainty in the permitting process, and protected a most valuable and sought after resource, clean water.

We who live, work and play along and in West Virginia’s exceptional rivers and streams should all consider Judge Goodwin’s ruling a resounding victory. It puts the state on a path to truly protect West Virginia’s water. It also demonstrates the need for organizations and individuals to work for compliance with federal environmental laws, and specifically the Clean Water Act.

We hope that our elected officials, both current and future, will learn from the mistakes of the past and put West Virginia on a progressive track for the future. We also look forward to the opportunity to work with them toward that goal.

Muller is executive director of the West Virginia Rivers Coalition, headquartered in Elkins.