**Testimony of West Virginia Sierra Club on SB 373 – Feb. 3, 2014**

James Kotcon, Energy Committee Chair. Submitted on behalf of the approximately 2,000 members of the West Virginia Chapter of Sierra Club.

The West Virginia Chapter of Sierra Club has a long history of advocacy on behalf of clean water. While we support many provisions in SB 373, that long history compels us to point out the many flaws, loopholes and weaknesses in the bill.

If the Legislature wants a bill to protect clean water, the FIRST people legislators should talk to are those who have a track record of advocacy for clean water. Too many of the proponents of this legislation have spent too much time listening to too many lobbyists for the polluters, as if they should be trusted to protect our water. Too many legislators have put too much pressure on WV-DEP to get the permits out the door, instead of setting strong standards and demanding strong enforcement.

# The spill from Freedom Industries on Jan. 9 was not some fluke accident, it was the inevitable and easily predictable result of a regulatory system that emphasized “compliance assistance” instead of real enforcement. The problems are systemic within DEP, they cannot and will not be fixed with a token band-aid. Einstein identified this problem when he said: “We can't solve problems by using the same kind of thinking we used when we created them.”

We appreciate the pledge from Senate President Kessler on Thursday that the Legislature will make sure this kind of accident will never happen again. No one believes that slapping one more narrowly crafted permit requirement on one more narrow segment of industry will prevent these kinds of accidents, yet that is what SB 373 does. A real solution will require a new approach that protects all waters of the state.

Specific examples of the changes needed include:

1. Close the loopholes. As originally drafted, SB 373 started out with a comprehensive framework. But as more and more of the provisions from the Governor’s bill were added in, there was a rush in the Senate to exempt one industry segment after another. The bill is now so narrowly focused that I am not sure if anyone knows of any tanks anywhere that would be covered. How large is the universe of sites that still remain covered by the bill? Key loopholes to close include exemptions for:
   1. mobile tanks (Think about the train wrecks with exploding oil tank cars, and ask yourself how many go through your district?);
   2. surface pits and impoundments (remember the spill in Doddridge County where DEP never bothered to inform the municipal water system downstream?);
   3. tanks regulated under the Surface Coal Mining and Reclamation Act (How many tanks containing how much MCHM are scattered around at coal preparation plants, and how much of the MCHM used in the normal course of coal washing ends up in our streams and ground water, not as a leak, but as a deliberate discharge into an impoundment or stream?)
   4. tanks for brine, fracking chemicals or flowback waters at natural gas drilling and processing sites (Did anyone else notice how the gas industry got themselves exempted in several different ways, just so they could be sure to avoid any hint of regulation?); and
   5. tanks at hazardous and solid waste sites(Is there anybody who really thinks that hazardous waste or landfill leachate is just fine the way it is?).
2. Share the responsibility. SB 373 currently gives “sole and exclusive” authority to WV-DEP. DEP has repeatedly demonstrated that they can not and will not put water protection first. Partly as a result of their mindset, and partly as a result of legislative directives, DEP will almost never deny a permit, even one they know they can not enforce. But a resource as important as water needs shared responsibility. Everyone involved needs to know that they have both the responsibility and the authority to protect drinking water. That has to include DEP, but also the Department of Health, the Public Service Commission, local water utilities, and city and county governments. Language specifying “sole and exclusive” authority in one agency creates a mindset of “it’s not my job” in every other agency that deals with water.
3. Community Right To Know. SB 373 includes provisions to keep secret any information claimed as “confidential business information”. This is exactly the formula that industry used to sidestep a wide range of reporting requirements. The federal Community Right To Know Act has been one of the most popular and successful environmental laws ever written. Giving knowledge to the people is empowering, keeping secrets assures distrust and confusion. At a minimum, industries should know that they will forfeit their trade secret status if there is ANY unauthorized discharge.