

## ATTACHMENT A

### Detailed Concerns Regarding Provisions other than Control Levels and Deadlines in S.1844, the Clear Skies Act of 2003 January 26, 2005

#### SUMMARY:

The Clear Skies Act of 2003 (Clear Skies) diminishes or repeals entirely some of the most important and effective tools granted to states under the Clean Air Act for achieving federal health-based ambient air quality standards, including but not limited to:

- Use of Section 126 (petitions addressing transported pollution from stationary sources) until 2014, and only then under a higher burden of proof
- New Source Review (NSR)
- Designation and attainment criteria and requirements, including deadlines for attaining the federal health-based air quality standards
- Lowest Achievable Emission Rate (LAER) and offset requirements and conformity for most areas of the country
- Certain Prevention of Significant Deterioration (PSD) requirements
- The Maximum Achievable Control Technology (MACT) rule for power plants as it applies to hazardous air pollutants (HAPs) other than mercury
- Residual risk requirements for mercury
- Protection of visibility in Class I airsheds
- States' ability to be more protective

#### EXAMPLES:

##### **Weakens Section 126 (Relief from Interstate Transport)**

1. Clear Skies places a moratorium on the use of Section 126 of the Clean Air Act, thus denying states access to a vital backstop tool for relief from transported pollution from upwind stationary sources. Clear Skies prohibits EPA from making any finding on any Section 126 petition for power plants and boilers affected by Clear Skies' trading program prior to December 1, 2011. Under the existing Clean Air Act, Section 126 is designed to be a tool for prompt action; EPA must act on any submitted Section 126 petition within 60 days. Clear Skies limits how and when Section 126 can be used. It requires EPA to make findings by December 31, 2011 for all petitions submitted before January 1, 2010. Currently, the Clean Air Act specifically allows petitions to be submitted at any time and requires EPA to act within 60 days of receipt. Clear Skies requires EPA to extend the compliance date for Section 126 findings to ensure that no power plants and boilers are subject to *any* deadline prior to January 1, 2014. The existing Clean Air Act requirement that Section 126 remedies must fully be in place within three years of the finding would be eliminated.
2. While Clear Skies technically retains Section 126, it radically changes the criteria on which findings of significant contribution from an upwind stationary source or group of sources are made, rendering Section 126 virtually unusable. As proposed, Clear Skies requires that all Section

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New York Division of Air Resources, David Shaw  
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126 findings for power plants and boilers affected by the Clear Skies trading program be based on a consideration of other enacted or pending emission reduction programs – even if they are not yet implemented. Clear Skies further prohibits EPA from making a finding of significant contribution unless the petitioning state shows that the upwind emissions reductions it seeks are at least as cost effective as emission controls on other source types (e.g., mobile sources, area sources, etc.) that could be implemented locally or in the upwind area. States would not only be required to compare cost effectiveness to other potential state programs, but also to federal programs that states are precluded from adopting on their own. This is likely to put the states in a “Catch-22” position. For example, if controlling heavy-duty engine emissions was determined to be more cost effective than reducing emissions from upwind power plants, downwind states would still be powerless to address the problem due to federal pre-emption of state regulation of heavy-duty engines. In addition, the cost side of the analysis would include the *full* cost, whereas the benefit side is limited to the benefits corresponding to air quality improvements in the petitioning state’s nonattainment area *only* (i.e., it does not include *all* benefits to *all* areas from action in an upwind jurisdiction). CSA’s proposed test significantly biases the cost effectiveness test against the petitioning state. The result is an unbalanced cost benefit test that promises to eviscerate Section 126 as a practical tool for states. It also creates a program that is so unwieldy that few states, if any, would ever have the resources to produce a petition to protect themselves from overwhelming transport.

### **Weakens the New Source Review Program**

3. Under Clear Skies, the current New Source Review (NSR) program would no longer apply to the vast majority of new and existing power plants. New power plants would be required to comply with emissions performance standards, but there is no provision to ensure that these standards are periodically updated to reflect changing technology. The current New Source Performance Standards are woefully outdated and do not reflect the control levels that facilities can easily achieve with current control technologies. Unless Clear Skies allows for a continual updating, the impetus to find more efficient controls will be eliminated.
4. As indicated above, Clear Skies removes the requirement that “best available” cost-effective controls be installed when new facilities are built or when existing facilities are extensively modified. This removes an important technology driver for continued improvement in pollution controls. Without this driver, it is unlikely that we will see further improvement in control technologies.

### **Weakens Designation and Attainment Requirements**

5. Clear Skies dramatically extends the deadlines by when many areas must attain federal ozone and fine particulate standards and achieve local emissions reductions. Clear Skies allows a minimum of eight additional years – and as many as 15-20 additional years – for transitional areas to attain the eight-hour ozone standard. For the PM<sub>2.5</sub> standard, Clear Skies allows a minimum of five and as many as 12-17 additional years to attain. Under Clear Skies, the public health protections intended under the current CAA could thus be delayed for nearly two decades.
6. Clear Skies radically changes Section 107 of the Clean Air Act by creating a new “transitional” designation for certain areas that are monitoring violations of either the federal ozone or PM<sub>2.5</sub> standard, thus avoiding the label of “nonattainment” of the health-based standards. This new designation category-- assigned based on the relatively fragile criterion of anticipated air quality

improvements (e.g. modeling results rather than actual monitored values) allows such areas to bypass key emission reduction requirements that would otherwise be in force. It would dismantle the legal recourse that downwind areas currently have under the Clean Air Act to ensure that emissions from upwind areas that significantly contribute to unhealthy air quality downwind are mitigated.

A “transitional” designation under Clear Skies creates an uneven playing field in terms of basic requirements for areas that are violating the eight-hour ozone standard. Transitional areas are subject to significantly less rigorous requirements and oversight. By avoiding the “nonattainment” label, Clear Skies excuses “transitional” areas from adopting Clean Air Act programs that areas violating the eight-hour ozone standard must implement. Primarily, these programs control growth in emissions from the power sector and the mobile source sector using tools such as (1) transportation conformity, (2) offset requirements for new or modified stationary sources, and (3) Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) controls for sources subject to nonattainment New Source Review.

As currently outlined in CSA, “transitional” areas would be subject to Prevention of Significant Deterioration (PSD) provisions as if they were attainment areas, instead of the more stringent nonattainment New Source Review (NSR) provisions. The PSD program assumes that there is an amount of pollution in these areas that sources could be allowed to emit into the environment without violating the air quality standards. Since “transitional” areas already violate air quality standards, any additional emissions would further degrade air quality and compromise public health. Furthermore, the assumption that CSA’s caps will bring these areas in attainment neglects the fact that sources other than power plants would also gain the easements that come with the “transitional” status. Under Clear Skies, these facilities have no incentive to reduce emissions and would be able to increase emissions without installing appropriate controls, further hampering the area’s ability to come into attainment. Ironically, *attainment* areas in the downwind Ozone Transport Region would continue to be required to implement more local emission controls than *nonattainment* “transitional” areas would have to implement under Clear Skies.

### **Weakens the Mercury/MACT Programs**

7. Clear Skies removes EPA’s authority to regulate non-mercury hazardous air pollutants from power plants. Currently, EPA is required to apply Maximum Achievable Control Technology (MACT) to mercury and other hazardous air pollutants emitted by power plants. Clear Skies eliminates the MACT requirement for all other hazardous power plant pollutants, and shifts them to a new, unproven, and discretionary residual risk program that would not take effect until 2018. There is no justification for abandoning EPA’s obligation to protect the public from all hazardous air emissions from power plants.
8. With respect to power sector mercury emissions, Clear Skies eliminates a plant-by-plant toxic emission control mechanism (MACT) that has proven effective, and replaces it with a mercury cap-and-trade program that is far less stringent than could be achieved with existing control technology. By doing so, it removes facility-by-facility controls which provide the necessary safeguards to protect the public and the environment from elevated toxic exposure and subsequent impacts in areas close to a source. Under the Clean Air Act, EPA must promulgate regulations to control power plant emissions of mercury that reflect MACT levels of stringency and must be implemented by the end of 2008. Mercury control technologies such as activated

carbon injection have been shown to achieve control effectiveness in excess of 90%. By contrast, the mercury cap-and-trade program proposed in Clear Skies is not fully implemented until a decade later than the MACT requirement (i.e., in 2018) and represents, at most, 70% control effectiveness, on average. In addition, EPA predicts that actual mercury levels could remain well above the Clear Skies caps as the result of banking and trading, and a “safety valve” mechanism in the proposed legislation that is designed to limit the market price of mercury emissions allowances.

#### **Weakens the Regional Haze (Visibility) Program**

9. Clear Skies contains no provisions to track or remedy local and/or regional impacts of power plant emissions, and does not require even a minimum level of control at each power plant. For example, a power plant’s visibility impacts would only be considered if it were located within 50 km of a national park or wilderness area. This approach considerably undercuts the current Regional Haze program. While broad-based emissions cap and trading programs are good regulatory frameworks, they must be complemented by effective mechanisms or backstops to address local and regional impacts.

#### **Weakens States’ Ability to Be More Protective**

10. Clear Skies prevents states from accruing additional environmental benefits if they choose to set more protective state emissions caps for their power plants. Under its proposed cap and trade program, Clear Skies prohibits any states from “restricting” or “interfering” with the “transfer, sale or purchase” of allowances. If a state wanted to impose a more stringent cap for a power plant or group of power plants, it could do so, but it could not retire or withhold the allowances that accrue from the setting the more protective cap. Those allowances would remain in the Clear Skies trading program, and could thus be used in an upwind state. In this circumstance, the air quality benefits of the state action to impose more stringent power plant requirements would be largely lost due to an increase in emissions from facilities outside and upwind of the pro-active state.

#### **Does Not Provide Business Certainty**

11. Clear Skies invites a future Congress to weaken its final power sector emissions caps. The potential for a future weakening would introduce business uncertainty, encouraging affected sources to delay making the capital outlays necessary to comply with Clear Skies until after the mid-course review process is concluded. It also creates an expectation that is a significant departure from past federal programs.