SITTING IDLY BY
New York’s Children Breathe Dirty Air Due to Diesel Law Delays
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About Environmental Advocates
Environmental Advocates of New York’s mission is to protect our air, land, water and wildlife, and the health of all New Yorkers. Based in Albany, we monitor state government, evaluate proposed laws, and champion policies and practices that will ensure the responsible stewardship of our shared environment. We work, through coalitions and with our advocacy network of more than 55,000 people, to support and strengthen the efforts of New York’s environmental community and to make our state a national leader.

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By the Numbers

Children breathe in 3 times more air per pound than adults, dramatically increasing their vulnerability to particulate matter.

The number of years since DERA was passed:

- 3

Total funds available to New York State through the Volkswagen Mitigation Fund for clean air projects:

- $117M

Children living with asthma in New York State:

- 315,000

Direct medical costs and lost productivity due to asthma rates in New York:

- $1.3B

- 25% of students at Buffalo’s D’Youville Porter School with asthma

- 19% of childhood asthma in New York City are in some communities


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EXECUTIVE SUMMARY: With Volkswagen Mitigation Funds, Time for Governor Cuomo to Deny DERA Delays

Justice has been denied to New York breathers for too long, but thanks to money coming New York's way, the wait for cleaner air should be over.

Governor Andrew M. Cuomo and state legislators speak out frequently on issues of environmental justice and the need for New York State to be a climate leader. As it turns out, New York has had this opportunity since 2006 with the Diesel Emissions Reduction Act (DERA), but squandered it through funding delays. However, with New York receiving roughly $117 million from the Volkswagen Mitigation Fund — the result of the automaker cheating on emissions tests and thereby producing more air pollution than allowed — there is no reason for any State-owned and contracted-for heavy duty vehicle to be non-compliant with DERA. While all trucks should have been retrofitted with green technology long before this money came, now that it is available, any future delays are simply unjustified.

When it was enacted, DERA was a groundbreaking law meant to shepherd a cleaner, healthier fleet of heavy duty vehicles. The Legislature was motivated by several studies showing high rates of childhood asthma in communities adjacent to roadways, and the possibility of putting workers in good jobs making and installing filters. With New York being home to 1.4 million adults and 315,000 children with asthma, according to the American Lung Association, DERA provided the State a mechanism to significantly reduce a key asthma trigger and a broader public health risk: dirty diesel emissions.

"The scientific evidence was compelling and the Working Group’s conclusion was unanimous: diesel engine exhaust causes lung cancer in humans. Given the additional health impacts from diesel particulates, exposure to this mixture of chemicals should be reduced worldwide."

- Dr. Christopher Portier
World Health Organization, International Agency for Research on Cancer

The overarching issue surrounding these delays is compounded by the fact that as the top elected official in New York State, Governor Cuomo not only has the ability, but the moral responsibility, to hold New York accountable for its own vehicle’s diesel pollution. Moreover, if safeguarding the environment and public health from a hostile federal government is important to New York, then the State must lead by example. For instance, residents in the
South End of Albany are dealing with a multitude of environmental insults, including staggering numbers of diesel trucks. This led to the Department of Environmental Conservation (DEC) acknowledging that the air these residents are breathing could be making them sick. The DEC then called on the U.S. Environmental Protection Agency (EPA) to improve national air emissions and fuel standards.\(^5\)

However, during this same timeframe, New Yorkers still had not seen DERA implemented and thus, were still breathing diesel exhaust belched out by non-compliant trucks. As New York moves ahead with improving the air in the South End of Albany, it must also live up to the letter of DERA and be compliant with this law.

New York cannot expect that a Trump Administration committed to rolling back public health protections and reducing EPA budgets and staffing will deliver on stricter national standards. Given this, New York State cannot fail to fully implement our own diesel pollution laws.

DERA was originally passed in 2006 for its potential to create meaningful changes in air pollution levels, and to better protect the health of children. Dirty and polluted air was on the minds of legislators at this time due to several studies completed over many years which brought to light just how much air pollution there was and how harmful it is. After all, diesel emissions can cause or increase the risk of premature death, breathing problems, shortness of breath, asthma attacks, or respiratory infections.

**2003:** According to data gathered in a joint effort by Harlem Hospital Center and others, “25.5 percent of the children [within a 24-block radius of the hospital] have asthma, including many who were not previously diagnosed.” This suggests “the rates might be much higher than suspected in any number of inner-city neighborhoods around the country,” said project lead, Dr. Stephen Nicholas.⁶

**2004:** According to data available through 1999 from the Institute for Civil Infrastructure Systems at Robert F. Wagner Graduate School of Public Service, New York University, “[r]ates of death from asthma in the Bronx are about three times higher than the national average. Hospitalization rates are about five times higher. In some neighborhoods in the Bronx it is estimated that 20% of the children have asthma…. Bronx County has the highest pediatric asthma (children 0-4 years) hospitalization rates in the New York area.”⁷

**2006, April:** The New York State Assembly issued a report in April 2006 titled, *Our Children Shouldn’t Have to Beg to Breathe*, stating “[t]he problem of asthma has reached epidemic proportions in children, especially minority children. Simultaneously, the communities feeling the hardest impact across New York, are low-income communities with a history of environmental decay but with no ability to escape it.”⁸

**2006, October:** New York University researchers found that the South Bronx was “home to some of the highest asthma hospitalization rates for children in the [C]ity. In that study, researchers had children with asthma, aged 10- to 12-years-old, carry air monitors. Calculations could then be made determining how much fine particulate matter residents were exposed to. They found that Bronx County, along with ten other counties in the state, were exceeding the federal air quality standards for fine particulate matter due in part to the voluminous truck traffic. For the 69 days that measurements were taken, the average daily exposure to fine-particle pollution for a group of 10 children exceeded the E.P.A.’s standard on 18 days.”⁹

**2006, November:** DERA is signed into law by then-Governor George Elmer Pataki.

**2010:** DERA was set to be fully implemented in 2010. However, it has yet to come to fruition due to the state Senate repeatedly putting forth delays within its one-house budget proposals. Ultimately, an agreement...
is reached to extend the compliance deadline that is included in the budget bills passed by the legislature and signed by the Governor. While New York may have been ahead of the curve when it came to reducing dirty diesel emissions in 2006, this was short lived. As the years went by without cleaning up the emissions, studies continued to show dangerous levels of diesel pollution.

2013: In the Lower East Side of Buffalo, which is home to the Peace Bridge, one-quarter of all 660 students at D’Youville Porter School have asthma — asthma afflicts one in every three households in the community. “Studies found asthma rates are nearly four times the national average in the neighborhoods that share their air with the Peace Bridge and the 6 million cars, trucks and buses that cross it annually. The vehicles, especially diesel trucks, spew fumes that are known to worsen asthma symptoms.”

2013: According to a five-year study by researchers at New York University’s School of Medicine and Robert F. Wagner Graduate School of Public Service, because dirty diesel emissions are linked to high rates of asthma symptoms in “school-age children”, symptoms like wheezing “were found to double among elementary school children on high traffic days. Large numbers of those children attended schools near busy truck routes.”

2016: A study found that in South Albany, approximately 1,000 diesel trucks passed by the Ezra Prentice Homes daily. At the Ezra Prentice Homes “more than half of the residents have asthma.”

2016: The New York State Senate proposes a DERA delay for the 7th year. In the course of budget negotiations with the Executive and Assembly, it is agreed to in the Enacted Budget.

7. http://www.icisnyu.org/south_bronx/AsthmaAndAirPollution.html
Diesel’s Direct Harm to Health

Of the many pollutants that impact health and well-being, fine particulate matter (PM) — also called soot, ozone (O₃), and smog — are the most common. When inhaled, soot becomes lodged in the lungs of otherwise healthy people and can trigger asthma attacks, heart attacks, cause lung cancer, and can even cut short the lives of some seniors. It is this type of pollutant that is found in diesel emissions.¹³

Certain populations — including infants, children, and the elderly — are more susceptible to these health effects, as are populations that have pre-existing medical conditions, such as lung disease, heart disease, or diabetes. The public health impacts are enormous, especially for children. In the first year of life, a child “breathes in three times as much air per pound of body weight compared to an adult.”¹⁴ Then, due to their still-developing lungs and active lifestyle as children, they breathe in higher amounts of dirty air.¹⁵

This helps to explain, in part, why communities such as the South Bronx, South Albany, the Lower West Side of Buffalo, and elsewhere, have such widespread asthma rates.

Diesel pollution is disproportionately felt in frontline Environmental Justice communities. Busy truck routes often impact these communities as they are frequently nestled up against major highways or transport routes for goods carried by heavy duty vehicles.

As the previous studies have shown, the causal relationship between diesel emissions and health ailments has not dissipated since 2006. In New York State, 1.4 million adults and 315,000 children live with asthma. Additionally, over 2.3 million adults live with lung disease.¹⁶ According to the Office of the State Comptroller, “including Medicaid costs, the State Department of Health... estimated the annual overall cost of asthma in New York at $1.3 billion in direct medical costs and lost productivity.”¹⁷

Unfortunately, there exists a disconnect amongst legislators on this issue; one thing is said to their constituents and the press about the need for healthy air and protecting children with asthma, yet they then proceed to propose or accept DERA delays once inside the state Capitol.
For instance, Senator Jeffrey Klein (D-Bronx), leader of the Senate Independent Democratic Conference (IDC) has frequently spoken out on the need to combat high asthma rates, saying “[t]his affliction has not only taken our children’s health hostage, it is holding their education for ransom.” He has even gone so far as to issue reports since at least 2001 on the need for cleaner air in the Bronx. Despite recognizing these consequences, Senator Klein supports and votes for the budget delays.

This dissociation between words and actions continued when, in 2016, lawmakers passed legislation just months after delaying DERA which directed the state Health Department to research why the Bronx has “alarmingly high” asthma rates. The Governor proceeded to veto the bill.19

Today, New York is at a standstill on cleaning up its own diesel fleet.

“How can our State leaders sit idly by while a law that could reduce pollution remains unfunded? One in five of our children has asthma, but instead of funding laws that help us, the State has prioritized giving enormous subsidies to industries like FreshDirect, which will bring an additional thousands diesel truck trips through our community every day come June.

- A. Mychal Johnson
Co-founder of South Bronx Unite, an environmental justice organization fighting air pollution in “Asthma Alley”

**Volkswagen Settlement = Cleaner Air**

The solution is simple: enforce the law the Legislature passed more than a decade ago. DERA should be fully implemented with the State leading by example. By now, legislators should be utilizing regularly reported data on how effectively DERA is affecting public health, and there should be open discussions on how the State can go even further in terms of cleaning up air pollution.

With roughly $117 million coming to New York from the Volkswagen Mitigation Fund, there is no reason for Governor Cuomo and legislators like Senate Deputy Leader John DeFrancisco (R-Syracuse) to support and speak up in favor of delays by claiming the state does not have the resources. These funds are specifically designated for air quality improvement programs that came about from the company misleading consumers and accountability entities on their emission rates.20

An Unfulfilled Promise

In February, 2016, DEC Commissioner Basil Seggos testified on more than one occasion that the State’s fleet was 82-percent compliant with DERA requirements and that he did not know what percentage of contractor vehicles were complaint. This figure remains unconfirmed. However, data accessed through several agencies outlined within this report appears to contradict that statement. Commissioner Seggos committed to Senator Brad Hoylman (D-Manhattan) that more in-depth and complete data would be provided to his office — at the time of this writing, the DEC has failed to provide the Senator and his staff that information.

Further, in February, 2017, when asked by legislators about DERA’s status, Department of Transportation (DOT) Commissioner Matthew Driscoll said he was unable to commit to full implementation but would report back on compliance details. This lack of transparency and urgency in regards to DERA within the Cuomo Administration extends to the Freedom of Information law (FOIL) process.

Environmental Advocate submitted seven Freedom of Information Law (FOIL) requests to the following agencies:

- New York State Department of Environmental Conservation (DEC)
- New York State Department of Transportation (DOT)
- Metropolitan Transportation Authority (MTA)
- New York State Department of Agriculture and Markets
- New York City Transit Authority
- New York Power Authority (NYPA)
- New York State Thruway Authority (NYSTA)

Included in these FOIL requests were calls for the number of heavy duty vehicles that are subject to the provisions of the law, how many received best available retrofit technology (BART), information on any bids or contracts entered into by the State with contractors in which heavy duty vehicles are used, if DERA requirements are contained in said contracts, and how many BART waivers and useful life waivers have been applied for or granted. For more information on BART, waivers, and DERA’s implementation process see page 12.

DOT: The information contained in the responses ranged from helpful to disappointing. For instance, the DOT responded to the FOIL request by sending nearly 100 pages containing over 5,000 entries of every vehicle they have without totaling the number of these vehicles nor designating them as heavy duty or applicable under DERA. With such dismissal of basic information requests it is hard to know how much work remains in order to achieve clean air.

MTA: The MTA responded to the FOIL request by saying that they do not have any applicable records and to instead contact the New York City Transit Authority. Interestingly, when asked by Senator Hoylman in early 2016 whether the MTA was compliant with DERA, Tom Prendergast, MTA Chairman, answered with a resounding “yes, we are” leaving the impression that the agency is 100-percent in compliance with its own fleet as well as all contractors. Environmental Advocates has not seen any data to determine the veracity of this statement.
**Agriculture and Markets:** The agency failed to provide any data concerning the status of whether there are any heavy duty vehicles on their own fleet and the status of DERA compliance. Agriculture and Markets did provide examples of contracts which describe DERA requirements; it remains unclear, however, if the agency actually requires these contractors (projects may include State Fair renovations, for example) to meet DERA standards.

**New York City Transit Authority:** At the time of this writing, NYCTA had yet to respond to the FOIL request. Therefore, there is no way of knowing how many heavy duty vehicles in this fleet are compliant.

**Thruway Authority:** The Thruway Authority did provide valuable information. According to their FOIL response, NYSTA has 604 vehicles in the DERA program at different levels of the retrofit process. 271 vehicles were already replaced pursuant to the 2007 EPA standards, and they have received no useful life waivers or BART waivers. While NYSTA's response was helpful, it remains unclear what percentage of their own vehicles that have not been replaced are in compliance. It is also unclear the status of contractor compliance.

**Power Authority:** NYPA reportedly has 111 heavy duty vehicles which should fall under DERA compliance, 14-percent of which are DERA compliant, and 37 of which received waivers. Over half of their fleet's DERA compliance status is unaccounted for based on data received.

**DEC:** DEC's response was particularly convoluted, and failed to clearly specify vehicles operated by DEC. Data appears to include information on many different entities, including the Long Island Rail Road which reported 217 heavy duty vehicles, of which 62 were DERA compliant; 52 vehicles received useful life waivers. Another entity covered within DEC data was the New York State Bridge Authority, which has 27 heavy duty vehicles, none of which are DERA compliant. Due to the nature of the DEC’s response, it is unclear whether Commissioner Seggos meant that the entire state fleet, just the DEC fleet, or some variation of agencies, were 82-percent DERA compliant. Regardless, it appears that many larger agencies have a significant way to go before adequately protecting public health. Similar to Agriculture and Markets, contracts with contractors appear to require DERA compliance, however, we know from public statements referenced earlier by DEC Commissioner Seggos, this is not the case, leaving significant confusion about the status of DEC operations.

**Conclusion**

DERA was passed with a commitment to protect the health and well being of the citizens of New York — especially those most vulnerable to air pollution. While the law does not cover all diesel vehicles in New York, only state-owned and state-contracted-for vehicles, it should have served as a national jumping off point for actions across the transportation sector. Unfortunately, Governor Cuomo and state lawmakers have been stuck in neutral.

With a financial pathway forward and the health data as alarming as ever, the question is: **do Governor Cuomo and State lawmakers have the political will to fulfill their moral duty by cleaning up the pollution New York’s own fleet created?** There can be no more excuses and no more delays.

22. Confirmation as of March 1, 2017, more than one year after the commitment was made.
23. https://www.youtube.com/watch?v=uzbs8tTQQhA
24. Contact Environmental Advocates for access to records made available to us via FOIL.
DERA requires all heavy duty vehicles (those that weigh 8,500 pounds or more, and are owned, contracted for, or leased by a New York State agency or authority) to be retrofitted with particulate filters. The retrofit requirement is satisfied through the installation of the best available retrofit technology (BART), meaning the installation of EPA approved filters that decrease particulate matter emissions. Mitigation of extreme hardship when complying with DERA comes in the form of a waiver process. If it can be proven that there is no applicable or available BART, a BART waiver may be obtained upon application to the DEC. Furthermore, the DEC will grant a waiver to a State agency or a contractor under contract with the State when the heavy duty vehicle will be taken out of service permanently on or before December 31, 2018 (this date reflects the many delays put forth by the Legislature). In regards to oversight, the Legislature and the Governor are to receive a report from the commissioner outlining the use of BART which includes, the complete number of heavy duty diesel powered vehicles owned or operated by the State, the number of such vehicles using BART, the number of said vehicles equipped with an engine certified to the applicable 2007 EPA standard for particulate matter, and all waivers.

26. N.Y. ENV § 19-0323
27. 6 NYCRR 248-4.1