

The following analysis relates to the **February 4, 2008** versions of Int. 650-B and its corresponding draft regulations circulated by NYPD and the Mayor's office.

I. The Proposed Permitting Scheme Is Overbroad In Its Application And The Proposed Exceptions Do Not Resolve This Problem.

Int. 650-B covers *all* devices used to monitor nearly *all* environmental and workplace pollutants of concern to human health and the environment. Section 10-801 defines devices that are the subject of the bill as including *any* "instrument used for the purpose of monitoring the release or presence"¹ of *any* (a) "micro-organism . . . or structural components of such micro-organisms . . . whether engineered or naturally occurring," that is capable of causing death, disease, or other "biological malfunction" in any living organism, contaminating food or water, or polluting the environment;² (b) "chemical which through its action on life processes can cause death, serious physical injury or permanent harm to humans or animals";³ or (c) "radiation"⁴ or "substance that emits ionizing radiation".⁵

Int. 650-B excepts detectors which "are not possessed or deployed with a purpose of detecting a possible biological, chemical or radiological weapons attack,"⁶ including, among others, those possessed or deployed by "instructors or students for purposes of academic instruction"⁷ and "detectors possessed or deployed by certified industrial hygienists, labor unions and other individuals or entities responsible for or engaging in testing or monitoring of workplace or environmental safety."⁸

A. Int. 650-B's Definitions Are Simply Too Broad to Be Useful.

¹ § 10-801(c), (e), & (j) (definitions of "biological detector," "chemical detector," and "radiological detector").

² § 10-801(b) (definition of "biological agent").

³ § 10-801(d) (definition of "chemical agent").

⁴ § 10-801(j) (definition of "radiological detector").

⁵ § 10-801(i) (definition of "radioactive substance").

⁶ § 10-805(establishing "Exceptions").

⁷ § 10-805(e)(i)(exception afforded "accredited academic or instructional institution in an academic setting").

⁸ 10-805(e)(iv)(exception afforded "certified industrial hygienists, labor unions and other individuals or entities responsible for or engaging in testing or monitoring of workplace or environmental safety").

The definitions set forth in Int. 650-B are simply too broad to be useful.⁹ By way of example, biological agents as defined by Int. 650-B would require high school classes wanting to measure the presence of fecal matter in river water or community activists who wished to obtain fecal content counts to rebut claims that the Gowanus River would not be overburdened by proposed development to obtain licenses from NYPD. Should the federal Department of Homeland Security require placement of nuclear detectors in cell phones as a means of detecting nuclear terrorists, as recently reported,¹⁰ all such devices would have to be licensed under this legislation.

Quite simply, there can be no legitimate concern across the huge continuum of situations that potentially fall within the parameters of the definitions set forth in Int. 650-B. Combined, the definitions have the potential to cover hundreds (if not thousands) of ubiquitous water, air, and soil pollutants of all kinds, regardless of whether it is conceivable that these pollutants could be weaponized. The following are some of the overbroad implications of the language set forth in Int. 650-B:

- o Organophosphate insecticides are very similar chemically to Sarin and other nerve warfare agents. As a result, the same equipment that might be used to test for residues of insecticides in public housing, for example, might also be triggered by a nerve gas attack.
- o Chlorine gas is a potential chemical terrorism agent. However it can also be released from refineries, sewage treatment plants, and water treatment plants. Therefore a community group monitoring for chlorine gas downwind from one of these facilities would be impacted by this bill, even if amended.
- o The chemical definition would include water, as it can cause death through its action on life processes via drowning, and, thus, the chemical detector definition would include a rain gauge or a barometer.
- o The biological definition would include mold and the flu virus (or any other serious bacterial or viral disease).
- o The definitions would include virtually any medical diagnostic device, including a tongue depressor, which aids in the visual inspection of a patient's throat for "biological" infection, and a doctor's eyes, which can help assess bacterial infection. A flashlight used to look for rat droppings in dark corners of a basement would also be included, as searching for droppings constitutes "monitoring the presence" of biological agents, given that rats are vectors of disease.

Leaving aside these patently absurd implications that follow from the extraordinary breadth of the proposed language, the above definitions would include many millions of dollars worth of mobile and stationary testing equipment regularly used citywide by governmental and non-governmental entities whose work is unrelated to weapons detection. Such entities include:

⁹ We do note that nowhere does Int. 650-B define the term "weapon." Arguably, dust from the World Trade Center site post-September 11, because of the "chemical" agents and "biological agents" it contained could constitute a "weapon."

¹⁰ See, e.g., *Congressional Quarterly*, June 4, 2007.

- state and federal government agencies;
- unions and occupational health groups and professionals;
- environmental advocates;
- community/environmental justice groups;
- healthy schools advocates;
- pollution investigation and remediation companies;
- developers and property owners doing site investigations (*e.g.*, brownfields);
- medical institutions, doctors, and public health professionals;
- utilities and service providers;
- regulated parties required to conduct regular or continuous sampling pursuant to state environmental permits (*e.g.*, Clean Water Act or Clean Air Act permits); and
- consulting companies who have contracted with any of the aforementioned entities.

B. Int. 650-B Would Burden Valuable Activity that Is Fully Protected by the First Amendment.

The public has a First Amendment right to document and convey matters of public interest. Environmental testing and sampling unquestionably is of paramount public concern. Environmental sampling, whether used to teach, to conduct academic research, to conduct research in aid of the development of technology, to safeguard a workplace, to challenge development plans, or to corroborate or challenge environmental information disseminated by the government, is indispensable to keeping the public informed. The need to apply for and obtain permits for the abovementioned activities from the NYPD would impose undue burdens, in time and resources, on entities – especially non-profit and governmental entities.

Int. 650-B imposes no deadline for a decision on whether to issue or deny a permit. While the bill provides that the Police Department shall issue a determination “within thirty days of the completion of the review and investigation of the permit application,”¹¹ it does not provide any deadline for completion of that review and investigation itself. In other words, there is no legal limit on how long the Police Department can take to rule on a complete application. Given the need to consult with other agencies on applications that is noted in the bill,¹² and the limited resources of both the Police Department and those other agencies, there is every reason to expect that the processing of applications will be slow, particularly if a large number of entities is required to apply and/or is concerned that they may be required to apply due to ambiguity in the law. The time between submission of an application and issuance of a permit (assuming one is granted) would, in the best of circumstances, cause unnecessary delays in conducting important environmental and public health monitoring and, in many other circumstances, make sampling impossible because of the need to react to unexpected pollution events of limited duration.

Finally, it is important to note that the outright grant of discretion to NYPD set forth in Int. 650-B exceeds the traditional expertise of NYPD. It is little consolation that the Departments of Environmental Protection (“DEP”) or Health (“DOH”) will be regularly

¹¹ § 10-803(f).

¹² § 10-803(c)-(d).

consulted on permit applications (see section 10-803(c)) as those agencies are already operating on tight budgets and staff. Moreover, the DEP has long deferred to the state Department of Environmental Conservation on pollution matters. This wide discretion coupled with a lack of expertise is certain to produce significant bureaucratic hurdles, delay, and error during the application process and during field enforcement.

II. The Permitting Regime Contemplated by Int. 650-B and its Rules Vests NYPD with Standardless Discretion in Violation of the First Amendment and Traditional Principles of Due Process

Any system limiting environmental sampling to those holding NYPD licenses would violate the First Amendment. Many entirely legitimate and law-abiding individuals and entities do not have, do not want, or will not be able to obtain NYPD licenses. And even for those persons or entities that wish to have an NYPD license and could obtain one, the process could take a sufficiently long time as to preclude any person without an NYPD license from obtaining one in time to conduct time sensitive environmental testing.

Int. 650-B grants overly broad discretion to the Police Department with respect to the grounds for issuance or denial of a permit, including, most troublingly, consideration of “the character and fitness of applicants to possess or deploy” detectors.¹³ The proposed regulations further provide that, to obtain a permit, an applicant must be, “of good moral character”¹⁴ Factors for determining what constitutes good moral character are provided, but the NYPD is not limited to this list of factors in making its determination.¹⁵

Further, the appeal process provided by the bill and the proposed regulations do not provide adequate safeguards against improper permit denials. The bill defers to the Police Department the establishment of procedures to be followed in the event an application is denied.¹⁶ The proposed regulations provide that the applicant’s only recourse in the event of a permit denial is to submit a notarized appeal in writing to the Police Department within 30 days of the denial, which the Department may process at its leisure – there is no deadline for the determination of these appeals.¹⁷ Decisions on appeal would presumably be reviewable in state court under Article 78 of the Civil Practice Law and Rules, with judicial review likely limited to the same written record reviewed by the Police Department.

Moreover, Int. 650-B section 20-11 gives the NYPD commissioner sweeping powers to demand the surrender of environmental monitoring equipment upon the “occurrence of an emergency.” Despite the added language to limit the commissioner’s power to those biological, chemical or radiological detectors for which a permit is required pursuant to Chapter 8 of Title

¹³ § 10-807(b)(7).

¹⁴ Draft 38 RCNY § 20-03(d).

¹⁵ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

¹⁶ § 10-807(b)(10).

¹⁷ Draft 38 RCNY § 20-07.

10 of the New York City Administrative Code, the vagueness of the law provides few protections to citizens wishing to monitor the environment. First, there is no definition of “emergency” in the law – it is when the commissioner so declares it. And, unlike earlier sections of the law, under this section the commissioner is given the right to confiscate detecting equipment no matter what the purpose of its intended use. This seizure without due process poses Fourth and Fifth Amendment problems.

An additional concern is that most of the written exemptions to the licensing requirements appear in the proposed regulations. Regulations can be changed by the NYPD Commissioner with little or no input from the City Council or from the public, and these exemptions ought to instead be in the legislation itself.

Because the proposed regulations contain no standards guiding NYPD’s decision-making, they create the impermissible opportunity for an NYPD official arbitrarily and capriciously to deny permission to conduct environmental testing if s/he does not like the reason for the testing or the particular organization or individual seeking the license. Of particular concern to public employee unions, this discretion raises the potential that the City’s conflict-of-interest, as both employer and regulator of monitoring devices, could lead to unwarranted denials of applications to conduct independent testing for occupational health hazards at City work sites. This wide discretion also invites the possibility of politically motivated denials of permits – or the appearance thereof – to inhibit independent testing that seeks to question official government pronouncements on particular environmental and occupational health risks.

If Int. 650-B had been in effect in 2001, independent entities would have been required to apply for and obtain a permit before conducting any monitoring of downtown air quality following September 11th and entirely lawful monitoring during critical periods of exposure to airborne toxic pollutants would have been impossible. The misinformation disseminated at that time by federal, state and local agencies might never have been discovered without independent monitoring, which revealed dangerously high levels of contaminants present in the air and on the ground in Lower Manhattan. The release of this independent data arguably did incite public alarm and embarrass government officials – to the benefit of the general public. It is not unreasonable to worry that government entities might abuse statutorily-granted powers – whether those powers were intentionally legislated or not – to avoid similar future embarrassment or the exacerbation of “public alarm.”¹⁸

The Supreme Court of the United States has held that any scheme licensing First Amendment activity “must contain narrow, objective, and definite standards to guide the licensing authority” to protect against censorship or discretionary decision-making.¹⁹ Int. 650-B and the proposed rules enacting it contain no such standards and thus are unconstitutional on their face.

¹⁸ See Draft 38 RCNY § 20-11.

¹⁹ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

III. Int. 650-B Would Risk Unnecessary and Discriminatory Police-Civilian Interactions and Would Not Effectively Enhance Public Safety.

We expect that NYPD would argue that none of the concerns raised in the above sections are relevant to our groups because NYPD has sufficiently amended the original language of the bill to except the types of environmental and occupational safety and health monitoring our groups routinely conduct. We disagree. The language has been changed, but this new language creates equally dangerous practical problems.

In addition to being unconstitutional on its face, the proposed legislation threatens all law-abiding citizens and/or groups conducting environmental monitoring with wholly unnecessary and perhaps discriminatory interactions with police officers. Given the scope of environmental monitoring devices that can, are and will be deployed, that may or may not have as a purpose the detection of weaponized CBRN agents, virtually every person or entity possessing or using such a detector or device will become a suspect and possible target of a police stop and investigation.

As noted above, the current iteration of Int. 650-B, dated February 4, 2008, has changed the exemption criteria from the capacity of the detector, as was set forth in the prior version dated January 30, 2008 and in 650-A, to the purpose or intent of the individual possessing the equipment. While this modest change in language constitutes an improvement in terms of narrowing the scope of the bill, the new language requires a subjective evaluation of an individual's motives and introduces the potential for abuse of discretion by NYPD officers. Police officers will be put in an impossible situation. Unable to interrogate every person possessing or using a detector or environmental monitoring and sampling device, they will be left to pick and choose among the public, which opens the door to arbitrary or discriminatory police action. Moreover, enforcement of Int. 650-B is likely to result in numerous confrontations between police officers and individuals or entities engaged in wholly innocuous activities. Not only would this create significant tension between the police and the public, it is unnecessary to protect public safety, as the NYPD itself indicated at the January 31st meeting.

During times of emergency, such as the aftermath of tragedies such as 9/11, the legislation authorizes the police to make a subjective decision concerning the motives of an individual using a detector unit. Given that detector-devices often serve dual purposes (they could be used to detect a weapons attack, or to test air quality for contaminants unrelated to an attack), the police may even mistakenly accuse someone of testing for a weapons attack, when in fact testing is being conducted for other reasons. Even if the individual was sustained in an appeals process, he or she may have forfeited the ability to collect information about the environment in a timely manner.

IV. The Proposed Language Cannot Be Modified To Adequately Narrow The Scope Of The Permitting Scheme.

For all these reasons, we believe the proposed regulation is unconstitutional, violates federal and state statutes, and is unsound as a matter of public policy. We respectfully submit

that the NYPD's laudable goals of security and public safety can be met through a more narrowly tailored and more reasonably enforceable proposal. Accordingly, we urge you and the City Council to withdraw Int. 650-B and to craft legislation incorporating the following principles:

- The City has a legitimate interest in obtaining timely, accurate sampling data that could indicate a terrorist action that utilizes weaponized chemical, biological, radiological, or nuclear agents.
- For the purposes of this legislation, fixed installation shall refer to any device that is permanently installed in or on or attached to a property, structure, or vehicle. Portable and hand-held devices are excluded.
- Properties that desire to install fixed-installation monitoring devices that are deployed to detect and/or measure weaponized CBRN agents must register in advance with the City.
- The City may impose requirements, as a condition of registration of a fixed-installation monitoring device deployed to detect and/or measure weaponized CBRN agents, for maintenance, emergency action plans, including emergency communication with the City, and other requirements consistent with the City's interest in obtaining timely, accurate sampling data that could indicate a terrorist action that utilizes weaponized chemical, biological, radiological, or nuclear agents.
- Employer emergency action plans required by this regulation shall be informed by employee consultation in the design and implementation of such plans.
- The public's right-to-know shall not be diminished by this regulation. Action levels and other requirements shall be made public. Sampling results shall be made public in a timely manner.