

Actor's Equity Assn \* AHIA, NY Metro Local Section \* American Littoral Society, NE Chapter \* American Lung Assn of the City of NY \* CHEJ \* CEC \* Class Size Matters \* CWA, District 1 & Local 1180 \* CSEA \* DC 37, AFSCME \* EDF \* Gaia Institute \* Harriet Hardy Institute \* Healthy Schools Network \* IATSE, Locals 161, 600 & United Scenic Artists, Local USA 829 \* League of Conservation Voters \* Mason Tenders District Council of Greater NY and LI \* Mt. Sinai Ctr for Occupational & Environmental Medicine Advisory Board \* Natural Resources Protective Assn \* NRDC \* NYCLU \* NYC Soil & Water Conservation District \* NYCOSH \* NY Environmental Law & Justice Project \* NYPIRG \* NY/NJ Baykeeper \* NY Lawyers for the Public Interest \* NYSLIUNA \* NYSTLA \* North Shore Waterfront Conservancy of Staten Island \* PSC, NYSUT, AFT \* PHANYC \* RWDSU/UFCW \* Riverkeeper \* Sierra Club, NYC Chapter \* Soundkeeper \* Staten Island Taxpayers Assn. \* Sustainable South Bronx \* TWU, Local 100 \* United Church of Christ \* United Support & Memorial for Workplace Fatalities \* Wellness in the Schools \* WEACTION

March 13, 2008

Mayor Michael Bloomberg  
New York City  
City Hall  
New York, New York

**Re: Int. 650**

Dear Mayor Bloomberg,

On behalf of the 44 undersigned organizations, which represent environmental, labor, academic, public health and civil liberties interests, we write to express our grave concerns about New York City Council Int. No. 650 ("Int. 650") and urge you to ensure that it is withdrawn from further consideration by the Council. While we fully endorse reasonable efforts by the City Council and by the New York City Police Department ("NYPD") to prevent criminal or terrorist activity in New York City, we respectfully submit that the proposed legislation – even with revisions and associated draft regulations NYPD has circulated – will have a significant chilling effect on citizens' lawful, and even commendable, activity.

For the reasons explained below, we are convinced that Int. 650 fundamentally takes the wrong approach to advancing the City's legitimate interest in obtaining timely, accurate sampling data that could indicate a terrorist action utilizing chemical, biological, radiological or nuclear ("CBRN") agents. We stand ready to work with you and the City Council to develop alternative legislation, which must be narrowly crafted to serve the legitimate purposes asserted by the NYPD.

Int. 650, as originally introduced, would create an expansive and highly restrictive regulatory scheme and vests in the police commissioner broad, unilateral authority to regulate matters of significant scientific and technological complexity. The proposed legislation

effectively requires anyone in New York City's five boroughs who wishes to possess or use a device that measures CBRN agents to first obtain a license from the NYPD.<sup>1</sup> In order to obtain such a license, the person or corporate entity must demonstrate to the NYPD, among other things, that s/he or it is of adequate "character and fitness" (as defined in regulations to be written by NYPD) to possess and use the device. The bill authorizes the police commissioner to set technical standards regarding the minimum specifications of covered devices and to establish thresholds at which the presence of a chemical or biological agent or radioactive substance must be reported to the NYPD. The bill also criminalizes any failure to obtain a required permit, defining such violation as misdemeanor with penalties including jail time. As this would be a criminal offense, suspected violators would be subject to arrest and seizure of their monitoring devices by NYPD officers.

In advancing this bill, the police department has claimed that it must know the location of such detectors and must ensure such equipment is reliable in order to prevent "excessive false alarms and unwarranted anxiety that a large-scale public emergency may be occurring."<sup>2</sup> But, more recently in meetings with many of the undersigned organizations and individuals, NYPD has variously expressed the bill's purposes as including: preventing irresponsible marketing of monitoring devices, for private sector use (as in large commercial or residential buildings), that do not accurately detect CBRN agents; preventing the installation and use of detectors that would register excessive false alarms, triggering costly and disruptive, but unnecessary, emergency response actions; and facilitating the installation and use of accurate and effective CBRN detectors by private entities, with alarms to be promptly transmitted to NYPD, in order to enhance the City's emergency response capabilities in the event of an attack. In light of these purposes, NYPD, in recent meetings with many of the undersigned organizations and individuals, has stated that the types of devices it actually desires to regulate are "few in number."

Contrary to NYPD's expressed intent, by requiring prior NYPD authorization for the use of virtually all environmental monitoring devices, Int. 650 may actually do more to hinder the flow of information about serious airborne pollutants and other environmental public health conditions faced daily by City residents and workers than it would to aid in the detection of and response to a potential future terrorist attack. The legislation would even subject to criminal liability an environmental advocate or medical researcher who, for whatever reason, uses the proscribed environmental monitoring devices without a license when responding to an emergency requiring immediate detection data.

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<sup>1</sup> By virtue of its extraordinarily broad definitions of biological, chemical, and radiological "detectors", Int. 650 would cover all types of environmental sensors, as well as research and laboratory analyses, used by students, teachers, researchers, activists, unions and many other groups, including even New York State agencies, such as the Department of Environmental Conservation, and federal agencies, such as the Environmental Protection Agency, whose activities are unrelated to the detection of acts of terrorism.

<sup>2</sup> Int. 650-B, Section 1 ("Legislative purposes"). But, at the January 8th public hearing on Int. 650, and in subsequent meetings with Council staff and many of the undersigned organizations, the NYPD's representatives indicated that so far there have been no unusual numbers of false alarms generated by the use of the devices that would be subject to regulation under the terms of the bill.

It is not difficult to foresee how the bill could have grave consequences for public safety. If, for example, Int. 650 had been in effect in 2001, private individuals and independent organizations would have been required to apply for and obtain a permit before conducting any monitoring of downtown air quality following September 11; as a consequence, entirely lawful monitoring during critical periods of exposure to airborne toxic pollutants would have been impossible. The misleading nature of the information disseminated at that time by federal, state and local agencies would not have been discovered without the independent monitoring that revealed dangerously high levels of contaminants present in the air in lower Manhattan. Further, as the subsequent release of this independent data arguably alarmed and embarrassed government officials at that time, it is not an unreasonable concern that an administration might in the future invoke statutory powers – whether the bill’s original drafters intended such application or not – to control the independent collection and dissemination of such information should a similar situation arise again, notwithstanding the validity of the independent scientific data, the compelling public interest in making it known, and the First Amendment rights guaranteed for such communications.

Discussions with representatives of your Administration have led to a slate of revisions that seek to exempt the activities of organizations such as ours from the bill’s permitting scheme. While these revisions, proposed by your office and the NYPD as Intro 650-B, may mitigate the bill’s negative effects, fundamental flaws remain and we do not think that any further amendments to Int. 650-B will be sufficient to cure them.

Most significantly, even under the revised versions of Int. 650, the real possibility remains that the law would be applied over-broadly by NYPD officers in the field uncertain as to the applicability of the exceptions to a given device or activity.<sup>3</sup> We believe this will also result in a chilling effect on environmental and occupational health monitoring activities unrelated to CBRN weapons detection. That is, the prospect of either having to obtain NYPD’s permission to conduct protected environmental testing or risk summary arrest, seizure of equipment, and subsequent prosecution should a police officer incorrectly assess the activities of a field researcher will inevitably deter environmental monitoring. It is to be expected, therefore, that the practical effect of the proposed law would be to limit and constrain the collection and dissemination of scientific findings; compromise researchers’ First Amendment rights; and undermine the right of the city’s residents and workers to gain access to information regarding their health and well being.

We have attached to this letter a more detailed critique of the February 4, 2008 version of the bill circulated by NYPD, which elaborates on these fatal flaws of Int. 650 and identifies others, including the fundamental due process concerns we have with respect to the licensing procedures established in the proposed rules, as well as the emergency seizure provision set forth

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<sup>3</sup> Critically, as discussed further in the attachment to this letter, many monitoring devices may be used both for CBRN and non-CBRN detection purposes. As such, covered activities and devices could not be readily distinguished in many cases from activities and devices that are intended to be exempt from the law.

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in the legislation and proposed rules.<sup>4</sup> Virtually all of the critiques therein still apply to the most recent NYPD draft we have seen, which is dated February 18, 2008.<sup>5</sup>

For all of these reasons, we respectfully submit that, rather than attempting to rework the text of the bill further, your Administration should work with the City Council on an entirely new bill, focused exclusively on regulating those devices that relate to the NYPD's stated anti-terrorism and public safety concerns -- *i.e.*, fixed-installation monitoring devices that are designed, marketed, and deployed specifically to detect and/or measure CBRN weapons. Given NYPD's acknowledgement that the types of detectors it actually wants to regulate are "few in number," appropriate legislation would be narrowly tailored to address only those detectors, rather than drafted to encompass a broad universe of devices while seeking -- inevitably without success -- to identify, and ensure the freedom from unwarranted enforcement actions, of the overwhelming majority of devices and detection activities that should be exempt from the law's requirements.

Accordingly, the City should consider, if anything, a regulatory scheme for CBRN weapons detectors akin to the City's existing regulatory framework for fire detection and alarm systems, which establishes minimum technical requirements for design, installation, operation, and maintenance and requires approval from the City prior to their installation; requires the reporting of alarms and sets penalties for false alarms; and requires the preparation and implementation of emergency response plans subject to City approval.<sup>6</sup> (*See* New York City Administrative Code Title 27, Sections 27-293, *et seq.* (; Rules of the City of New York, Title 3, Chapters 6 & 17.) In addition, existing state unfair trade practice law already renders unlawful the misleading or fraudulent marketing of devices purported to detect CBRN agents. Properly enforced, this law protects unsuspecting consumers (including business consumers) from being sold, and then installing, sub-standard devices. It thereby also protects NYPD from the risk of excessive false alarms that would be triggered by such devices. (*See* N.Y. General Business Law § 349.)

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<sup>4</sup> The attached commentary is a collective work product; not every signatory to this letter has endorsed every issue addressed in the attachment.

<sup>5</sup> The one exception is that the list of exemptions from the permitting scheme, previously included only in the regulations, appears in the legislation itself in the February 18th draft. Even still, we note, the proposed legislative language -- rather than clearly and directly stating that the listed devices and activities *are exempt* from regulation under the law -- states that NYPD "shall exclude by rule" those devices and activities. If the reason for including exemptions directly in the legislation is to conclusively establish certain exemptions, shielded from future revision by NYPD through the rulemaking process, it is curious that the provision is drafted such that a rulemaking is still required to give the exemptions the force and effect of law.

<sup>6</sup> In fact, while Intro 650 (Section 10-807(b)(6)) calls for regulations governing "emergency action plans" in the event of an alarm, such requirements already exist in the Fire Department's regulations -- at least for commercial buildings -- which explicitly require the preparation and implementation of emergency response plans for incidents including "biological, chemical, radiological, nuclear or other chemical incident or release". 3 R.C.N.Y. § 6-02(b) (defining "emergency" for which an "Emergency Action Plan" is required).

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In summary, we object to Int. 650 because it would, if made law, unreasonably burden protected First Amendment activity; establish a licensing regime that violates traditional principles of due process; and precipitate tension and conflict between well-meaning members of the public and police officers charged with enforcing a law whose proscriptions are poorly defined and framed in terms that are overly broad. Thus, as stated, Int. 650 may actually do more to hinder the flow of information regarding serious airborne pollutants and other environmental public health conditions faced daily by City residents than it would aid in the detection of and response to a potential future terrorist attack.

We welcome the opportunity to meet with you to discuss this matter at your earliest convenience and remain fully committed to working constructively with the City Council and the Administration on the drafting of appropriate, alternative legislation. You can reach us through Joel Shufro at the New York Committee for Occupational Safety and Health, 116 John Street, Suite 604, New York, NY 10038; tel. (212) 227-6440; email: [jshufro@nycosh.org](mailto:jshufro@nycosh.org)

Sincerely,

Actors' Equity Association  
American Industrial Hygiene Association, New York Metro Local Section  
American Littoral Society - Northeast Chapter  
American Lung Association of the City of New York  
Center for Health Environment and Justice  
Citizen's Environmental Coalition  
Class Size Matters  
Communications Workers of America, District 1 and Local 1180  
CSEA  
District Council 37, AFSCME  
Environmental Defense Fund  
Gaia Institute  
Harriet Hardy Institute, Boston, MA  
Healthy Schools Network, Inc  
IATSE, Local 161, 600 & United Scenic Artists Local USA 829  
League of Conservation Voters  
Mason Tenders District Council of Greater New York and Long Island  
Mount Sinai Center for Occupational & Environmental Medicine Advisory Board  
Natural Resources Protective Association  
Natural Resources Defense Council  
New York Civil Liberties Union  
New York City Soil & Water Conservation District  
New York Committee for Occupational Safety and Health  
New York Environmental Law and Justice Project  
New York Public Interest Research Group  
New York / New Jersey Baykeeper

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New York Lawyers for the Public Interest  
New York State Laborers International Union  
New York State Trial Lawyers Association  
North Shore Water Waterfront Conservancy Staten Island, Inc.  
Professional Staff Congress, NYSUT, AFT  
Public Health Association of New York City  
Retail, Wholesale Department Store Union, United Food & Commercial Workers  
Riverkeeper  
Sierra Club, New York City Chapter  
Soundkeeper  
Staten Island Taxpayers Association  
Sustainable South Bronx  
Transport Workers Union, Local 100  
United Church of Christ  
United Support & Memorial for Workplace Fatalities  
Wellness in the Schools  
West Harlem Environmental Action

cc: Hon. Christine Quinn, Speaker  
Hon. Peter Vallone, Jr.  
Members of the City Council  
Hon. Scott Stringer  
Richard Falkenrath  
Massiel Garcia  
Robert Colandra  
Suzanne Mattei, NYSDEC Region 2  
Hon. Jerrold Nadler