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**TESTIMONY IN OPPOSITION TO INT. 650**

**SUBMITTED BY LAWRENCE M. LEVINE OF THE  
NATURAL RESOURCES DEFENSE COUNCIL (NRDC)**

**BEFORE THE COMMITTEE ON PUBLIC SAFETY  
OF THE COUNCIL OF THE CITY OF NEW YORK**

**APRIL 29, 2008**

Thank you for the opportunity to testify today on behalf of NRDC and our over 20,000 New York City members. My name is Larry Levine and I am an attorney in NRDC's New York office. In addition to this testimony, I call the Committee's attention to the letter to Council Speaker Quinn, dated today, in which NRDC and well over 40 other signatory organizations – representing environmental, labor, public health, civil liberties, and other interests – state their opposition to Int. 650. For all of the reasons set forth in that letter, we ask this committee to withdraw Int. 650 from further consideration.

I wish to acknowledge the willingness of NYPD to meet and discuss with us and many other organizations our concerns about Int. 650. We likewise acknowledge the efforts of Committee Chair Vallone to obtain certain language changes to the bill. However, while NYPD has made a number of revisions in response to criticism from many quarters, the version of the bill under consideration today, Int. 650-A, remains unacceptable.

Underlying all of our objections to the bill is the concern that, good intentions notwithstanding, it will ultimately make New Yorkers less safe rather than more, and will curtail the collection and availability of independent environmental monitoring data. We fully recognize that revisions made to the bill since its initial introduction would, as a formal legal matter, put environmental and public health monitoring activities beyond reach of the law's permitting, reporting, and other requirements. However, while individuals or organizations wishing to conduct such monitoring, without prior approval from NYPD, could be reasonably confident that they are not in violation of the law, the same cannot be said of their actual freedom to engage in monitoring without undue interference from NYPD – including the risk of seizure of their monitoring devices and a summons requiring them to answer to criminal charges.

This problem arises from the inability of virtually a NYPD officer – no matter how well-trained – to: (1) distinguish between a device capable of detecting a possible chemical, biological, radiological, or nuclear (“CBRN”) attack and a device designed to sample air, water, or soil for environmental contamination; and (2) determine, in an encounter with an individual using such an unidentified device, whether the individual is using it for the purpose of detecting a possible CBRN attack or for purposes of environmental or occupational health monitoring. In other words, officers will be unable to distinguish the devices and activities that are covered by the law from those that are excluded.

Environmental detectors are unfamiliar devices to most people without a technical background, including NYPD officers, as highlighted by incidents related to NYPD over the course of several meetings on the bill in which we have participated. Moreover, a given device may serve multiple purposes and have multiple capabilities, and could therefore be used for both CBRN weapons detection and for other unrelated purposes. For example, 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 used to detect a nerve gas attack. Likewise, chlorine gas is both a potential chemical terrorism agent and a pollutant that can be released from refineries, sewage treatment plants, and water treatment plants; therefore, a community group monitoring the air downwind from one of these facilities may use the same device as would be used to detect a chemical weapons attack with chlorine gas.

Further, because the applicability of Int. 650-A hinges on the intent of the user of the monitoring device (*see* § 10-809(a)(5)), an officer who suspects that a potentially covered device is in use, and determines that the user lacks a permit, will have to make a judgment about the person's subjective intent in using the device. Is the person to be trusted if he or she states that the device is being used solely for routine environmental monitoring? Will officers be likely, when acting within the realm of "anti-terrorism" laws, to "err on the side of caution" when evaluating such statements, by issuing a citation and seizing the detector, letting the courts or others sort out the situation later? And, especially, when the Commissioner directs NYPD officers to seize detectors covered by the law as a so-called precautionary measure (*see* § 10-807(b)(9)) – *i.e.*, under "emergency" circumstances, as proposed by the draft regulations NYPD has circulated with the bill (*see* proposed 38 RCNY § 20-11) – will officers be even more likely to be over-inclusive, rather than under-inclusive, in their on-the-spot judgments about whether a device is covered by Int. 650, and therefore lawfully subject to seizure?

These are very real concerns for individuals and organizations who presently conduct environmental monitoring in the city in support of efforts to protect the public health of their communities and their fellow New Yorkers. Any time such activities are halted by well-meaning

but mistaken enforcement efforts by NYPD, not only would the individual conducting the monitoring be unjustly caught-up in the criminal justice system, but the opportunity to take valuable environmental sampling at that place and time would be lost, as would the public benefit of the collection and dissemination of information about local environmental health risks. Moreover, the likelihood of this scenario will, itself, have a “chilling effect” on those who wish to undertake environmental sampling, as the risk of being subjected to police interference, criminal charges, and seizure of expensive monitoring devices will act as a deterrent to such lawful, indeed laudable, activities.

In response to these concerns, NYPD revised Int. 650 to limit enforcement actions to issuance of an “appearance ticket,” rather than arrest (§ 10-808(b)). But NYPD has refused – for no defensible reason we have been able to discern, after hours of conversation with representatives of NYPD and the Mayor’s office – to include language barring the seizure of the monitoring device upon issuance of the ticket. Also, despite the urging of a wide array of organizations, NYPD has refused to include a bright-line rule exempting all “handheld” and “portable” devices from coverage by Int. 650 – which would do much to decrease the chances of misapplication of the law by officers on the street. In fact, the exemption language in the current version of the bill is actually narrower than NYPD had previously proposed; the category of “portable” devices is now left out entirely from the exemptions (§ 10-809(a)(4)). That same provision also identifies only hand-held chemical or radiological detectors – but not handheld biological detectors – as subject to the exemption.

Finally, we invite the Committee to question, fundamentally, whether any permitting regime for CBRN detection devices is necessary at all. There is no credible threat of false alarms from un-permitted CBRN detectors causing panic in the City, as NYPD offered as its initial

justification for the bill. (In any event, building owners considering installing a CBRN weapons detector would surely be responsive to advice from NYPD to avoid certain detectors known to be unreliable, and NYPD has offered no reason why existing consumer protection laws are not a sufficient deterrent to hypothetical scams that falsely market alarms as CBRN weapons detectors.) Nor is pre-authorization of the possession and use of CBRN detectors necessary to meet NYPD's other asserted purposes, including the collection of information about the extent of the sensor network in place in the city, prompt notification to NYPD of alarms, and coordination of emergency response actions.

For these and all of the reasons stated in the letter we have joined over 40 other organizations in sending to Speaker Quinn today, we oppose Int. 650-A and urge this Committee to withdraw it from further consideration.