

1 [Health Code – Regulation of Biological Agent Detectors]

2  
3 **Ordinance amending the San Francisco Health Code by adding Article 35 to create a**  
4 **registration scheme and requirements for Biological Agent Detectors.**

5 Note: Additions are single-underline italics Times New Roman;  
6 deletions are ~~strikethrough italics Times New Roman~~.  
7 Board amendment additions are double underlined.  
8 Board amendment deletions are ~~strikethrough normal~~.

8 Be it ordained by the People of the City and County of San Francisco:

9 Section 1. The San Francisco Health Code is hereby amended by adding Article 35, to  
10 read as follows:

11 **SEC. 3500. FINDINGS AND STATEMENT OF PURPOSE.**

12 (a) Commercial vendors are promoting Biological Agent Detectors that have not been  
13 scientifically validated to companies and institutions in San Francisco.

14 (b) “A single system that exhibits high specificity for detection of biological agents in the  
15 environment currently does not exist as a commercially available item.” (Director of Homeland  
16 Security, Guide for the Selection of Biological Agent Detection for Emergency First Responders, March  
17 2005. 3.2) A lack of high specificity causes an unacceptably high rate of false alarms in biological  
18 agent detectors.

19 (c) According to a joint statement by the Federal Bureau of Investigations, Director of  
20 Homeland Security, and the Centers for Disease Control, “Currently, there are no definitive field tests  
21 for identifying biological agents. Additional field testing can mislead response efforts by providing  
22 incorrect or incomplete results, and destroy limited materials critical for definitive laboratory testing  
23 required to facilitate any appropriate public health and law enforcement response.” (Federal Bureau  
24 of Investigation/ Director of Health Services / Centers for Disease Control Coordinated Document;  
25 Guidance on Initial Responses to a Suspicious Letter / Container – November 2, 2004)

1           (d) Biological Agent Detectors that are commercially available have not been scientifically  
2 validated or approved for use by the Centers for Disease Control & Prevention (CDC).

3           (e) The currently available technology and protocols to confirm the presence or absence of  
4 a bioterrorism attack are not well developed, which may result in prolonged and unnecessary closure  
5 of the identified facility and nearby buildings. (United States Government Accountability Office,  
6 Report to the Chairman, Subcommittee on National Security, Emerging Threats, and International  
7 Relations, House Committee on Government Reform, House of Representatives. Anthrax detection:  
8 Agencies need to validate sampling activities in order to increase confidence in negative results.  
9 March 2006)

10           (f) A false alarm of a possible bioterrorism attack may cause civil unrest, business  
11 disruptions, prolonged facility closure, and mental health consequences.

12           (g) Prolonged closure of facilities and adjacent buildings to perform environmental  
13 sampling may cause extended work stoppage and significant financial loss to businesses.

14           (h) An estimated cost to the City and County of San Francisco in responding to a false  
15 alarm of a Biological Agent Detector is over \$700,000 per incident, with an additional \$200,000 for  
16 each additional day of emergency response and restoration activities. The costs may include  
17 decontamination, environmental sampling, law enforcement, laboratory testing, public health  
18 surveillance, and facility restoration.

19           (i) The City and County of San Francisco has a response plan for the federal Director of  
20 Homeland Security Biowatch program that continuously collects air samples to test for key  
21 bioterrorism agents and uses a CDC-coordinated Laboratory Response Network for testing and  
22 confirmation. The Laboratory Response Network program has been scientifically validated by the  
23 CDC.

1           (j) Emergency responders of the City and County of San Francisco use a Suspicious  
2 Substance Response Plan. With guidance from this response plan, emergency responders  
3 systematically assess the threats, potential risks, and the appropriate screening tests. If determined to  
4 be appropriate, the Hazardous Materials Unit or the Federal Bureau of Investigations (FBI) would  
5 collect the substance for testing at the CDC-coordinated Laboratory Response Network (LRN)  
6 reference laboratory at the California Department of Public Health. Using scientifically validated  
7 testing procedures, the LRN can produce reliable and validated test results within several hours.

8           (k) The San Francisco Director of Public Health and health professionals use medical and  
9 public health surveillance to detect any cases of bioterrorism.

10           (l) For these reasons, the City and County of San Francisco strongly discourages the  
11 purchase and use of Biological Agent Detectors by public institutions and businesses in San Francisco.

12           (m) If the National Science & Technology Council develops national equipment performance  
13 standards for biological agent detectors, the Department of Public Health shall make recommendations  
14 to the Board of Supervisors regarding whether to amend or repeal this legislation.

15 **SEC. 3501. DEFINITIONS.**

16           (a) "Biological Agent" means any microorganism, including bacteria, virus, infectious  
17 substance or toxin, whether engineered or naturally occurring, or any component of such micro-  
18 organism, bacteria, virus, infectious substance or toxin, capable of causing death, disease or other  
19 biological malfunction in a living organism.

20           (b) "Biological Agent Detection Facility Response Plan" means a plan developed and  
21 written to respond to a positive detection from a Biological Agent Detector including, but not limited  
22 to: emergency coordinators and contact information, notification protocol, evacuation procedures, air  
23 handling shutdown procedures, if relevant, procedures for collection of information on potentially  
24 exposed Persons, coordination with City agencies for any decontamination or post-exposure  
25

1 prophylaxis procedures, confirmation of detector results procedures, plan training and maintenance,  
2 and device maintenance.

3 (c) "Biological Agent Detector" means a device or equipment that tests for a biological  
4 agent that may be used for a terrorism attack.

5 (d) "Biological Agent Detector User" or "Detector User" means a Person who owns and  
6 deploys a Biological Agent Detector.

7 (e) "Certificate of Registration" means a certificate issued to a Biological Agent User under  
8 this Article.

9 (f) "City" means the City and County of San Francisco.

10 (g) "Director" means the Director of the San Francisco Department of Public Health or his  
11 or her designee.

12 (h) "False Alarm" means an event where a Biological Agent Detector signals a positive  
13 detection and follow up lab confirmation at a CDC approved Laboratory Response Network reference  
14 lab does not confirm the presence of a biological agent.

15 (i) "Fixed Position" means stationary and cannot be relocated readily.

16 (j) "Mobile" means capable of moving or being moved readily.

17 (k) "Person" means an individual, trust, firm, joint stock company, corporation,  
18 partnership, associations, but not a State or Federal governmental entity or agency.

19 (l) "Tax Collector" means the Office of the Treasurer and Tax Collector of the City and  
20 County of San Francisco.

21 **SEC. 3502. CERTIFICATE OF REGISTRATION REQUIRED.**

22 Any Person who possesses or deploys a Biological Agent Detector shall for each site, obtain  
23 and keep current a Certificate of Registration with the Director. The Certificate of Registration shall  
24 identify each Biological Agent Detector possessed or deployed at the site.

25

1 **SEC. 3503. APPLICATION FOR CERTIFICATE OF REGISTRATION.**

2 Every Person who is required to obtain a Certificate of Registration under this Article shall  
3 obtain a Certificate of Registration by filing a written application and Facility Response Plan with the  
4 Director upon forms furnished by the Director for that purpose, certifying that the Facility Response  
5 Plan meets the requirements of this Article, and paying the required fees.

6 **SEC. 3504. INVESTIGATION AND ACTION ON APPLICATION.**

7 (a) Upon receipt of an application, the Director may coordinate approval of the application  
8 with other directors of City departments. The Director may also request additional information from  
9 the applicant as needed to assess the application.

10 (b) Applicants may be required to meet with the Director and other appropriate City  
11 agencies in order to coordinate potential emergency responses to an alarm indicated or transmitted by  
12 a Biological Agent Detector.

13 (c) If the application is denied, the Director shall so notify the applicant, including the  
14 reason(s) for the denial.

15 **SEC. 3505. TRANSFER OF CERTIFICATE OF REGISTRATION.**

16 Certificates of Registration are non-transferable and may only be used by the Person who  
17 submitted the application under this Article.

18 **SEC. 3506. PRODUCTION OF CERTIFICATE OF REGISTRATION UPON REQUEST OF**  
19 **AUTHORIZED CITY REPRESENTATIVE.**

20 Any Person possessing a Certificate of Registration issued under this Article must produce the  
21 Certificate of Registration for review by any City employee authorized to inspect the premises.

22 **SEC. 3507. FEES PER BIOLOGICAL AGENT DETECTOR.**

23 (a) The Biological Agent Detector User shall pay a fee for each Biological Agent Detector  
24 in order to obtain and maintain a Certificate of Registration. The fee shall be \$1,700 for the first  
25

1 device, and \$200 for each additional device. The initial detector fee shall be paid to the City before the  
2 Detector User activates the Biological Agent Detector. The Detector User must renew the Certificate  
3 of Registration annually as provided in this Article, and pay the fees for each Biological Agent Detector  
4 for the Certificate of Registration to remain valid.

5 (b) Beginning with fiscal year 2012-2013, fees set forth in this Article may be adjusted each  
6 year, without further action by the Board of Supervisors, as set forth in this Section.

7 Not later than April 1, the Director shall report to the Controller the revenues generated by the  
8 fees for the prior fiscal year and the prior fiscal year's costs of operation, as well as any other  
9 information that the Controller determines appropriate to the performance of the duties set forth in this  
10 Article.

11 Not later than May 15, the Controller shall determine whether the current fees have produced  
12 or are projected to produce revenues sufficient to support the costs of providing the services for which  
13 the fees are assessed and that the fees will not produce revenue that is significantly more than the costs  
14 of providing the services for which the fees are assessed.

15 The Controller shall, if necessary, adjust the fees upward or downward for the upcoming fiscal  
16 year as appropriate to ensure that the program recovers the costs of operation without producing  
17 revenue which is significantly more than such costs. The adjusted rates shall become operative on July  
18 1.

19 **SEC. 3508. DUTY TO REPORT CHANGES**

20 Any Person required to obtain a Certificate of Registration under this Article shall notify the  
21 Director within 10 days of any relevant or material change in the information contained in the  
22 application or of other relevant circumstances, including but not limited to, if the Person acquires an  
23 additional Biological Agent Detector, ceases to possess a Biological Agent Detector, or modifies the  
24 training, notification, or response plans for the Biological Agent Detector. Upon notification of such  
25

1 change, the Director may suspend, revoke, or amend the registration or direct that the Certificate of  
2 Registration holder submit an application for a new registration. If Director instructs a Person to  
3 submit an application for a new registration, that Person must do so within 30 days of the mailing of  
4 the notice by the Director.

5 **SEC. 3509. INSPECTION.**

6 Any Person required to register under this Article must allow inspections by any City agency of  
7 the location or facility containing the Biological Agent Detector, either pursuant to the application  
8 process or following the issuance of the Certificate of Registration.

9 **SEC. 3510. TIME LIMIT FOR BUSINESSES OPERATING WHEN THIS ARTICLE IS**  
10 **ENACTED TO FILE AN APPLICATION FOR CERTIFICATE OF REGISTRATION.**

11 Any Person who already possesses a Biological Agent Detector as of the date this Article  
12 becomes effective must submit an application for a Certificate of Registration within 90 days of the  
13 effective date of this ordinance. Following a denial, an applicant may resubmit an application or  
14 remove the Biological Agent Detector within 30 days. If a Person's third application is denied, that  
15 Person is barred from resubmitting another application and must permanently remove the Biological  
16 Agent Detector within 30 days.

17 **SEC. 3511. DUTIES OF THE BIOLOGICAL AGENT DETECTOR USER.**

18 (a) A Biological Agent Detector User shall:

19 (1) Maintain the Biological Agent Detector so as to minimize or eliminate false  
20 alarms;

21 (2) Make every reasonable effort to have a responder to the Biological Agent  
22 Detector's location within 10 minutes of when the Biological Agent Detector alarm is activated to:

23 (A) Provide access to the Biological Agent Detector site;

24 (B) Assist with the assessment of the situation; or

1                                    (C) Provide alternative security for the Biological Agent Detector site; and,  
2                                    (3) Not activate a Biological Agent Detector for any reason other than an  
3                                    occurrence of an event that the Biological Agent Detector system was intended to report.

4                                    (b) A Biological Agent Detector User shall adjust the mechanism or cause the mechanism to  
5                                    be adjusted so that a Biological Agent Detector signal shall not be audible to the general public.

6                                    (c) A Biological Agent Detector User shall maintain at each Biological Agent Detector site  
7                                    a set of written operating instructions for each Biological Agent Detector system.

8                                    **SEC. 3512. PROHIBITION AGAINST BIOLOGICAL AGENT DETECTORS THAT EMIT**  
9                                    **FALSE ALARMS.**

10                                    No Detector User shall operate or maintain Biological Agent Detector that emits false alarms.

11                                    **SEC. 3513. VIOLATIONS AND PENALTIES.**

12                                    (a) **Enforcement.** Biological Agent Detector Users who violate this Article or any  
13                                    regulations enacted under Section 3519 shall be liable for administrative or civil penalties. The  
14                                    Director may assess administrative penalties following an administrative hearing. Civil Penalties may  
15                                    be assessed and recovered in a civil action brought in the name of the people of the City and County of  
16                                    San Francisco by the City Attorney in any court of competent jurisdiction.

17                                    (b) **False Alarm Penalty.** A Biological Agent Detector User shall pay penalties for each  
18                                    False Alarm as follows:

19                                    First False Alarm: Up to \$5,000.

20                                    Second False Alarm: Up to \$7,500.

21                                    Third And Each Subsequent False Alarm: Up to \$10,000.

22                                    (c) **Other Violations.** Any Person who violates any other provision of this Article or any  
23                                    rule or regulation promulgated pursuant to this Article may be subject to an administrative or civil  
24                                    penalty of up to \$500 per day of violation.

25



1           (d) **Factors For Setting Penalty.** In assessing the amount of the administrative or civil  
2 penalty, the Director or Court shall consider any one or more of the relevant circumstances presented  
3 by any of the parties to the case, including but not limited to the following: the nature and seriousness  
4 of the misconduct, the number of violations, the persistence of the misconduct, the length of time over  
5 which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's  
6 assets, liabilities, and net worth.

7           (e) **Presumption of Noncompliance in Civil Cases.** In addition to any other penalties  
8 provided in this Article, any Person or entity served with a notice or order by the Director setting forth  
9 the nature of the violation of this Article, demanding correction of such violation, and specifying the  
10 time within which such violation must be corrected, shall be presumed, in civil proceedings, to have  
11 failed to comply with that notice or order at and after the time given in that notice or order for  
12 correction of such violation, after the time specified in the order has expired without correction of the  
13 violation.

14           (f) In any civil or administrative proceeding to collect penalties under this Article, the  
15 Court or Hearing Officer may award the City costs and fees, including but not limited to attorneys'  
16 fees.

17 **SEC. 3514. INTEREST AND PENALTIES FOR NONPAYMENT.**

18           (a) Any fee, penalty, or cost due to the Director not paid by the due date is delinquent.

19           (b) If a Certificate of Registration fee, penalty or cost due to the Director is not paid within  
20 30 days after the same becomes due, the Tax Collector shall add 50 percent to the amount of the stated  
21 fee or penalty as a penalty for non-payment.

22           (c) In addition to the penalties imposed in Subsection (b), any Detector User who fails to  
23 pay any fee, penalty or cost due the Director shall pay interest on the amount due, exclusive of late  
24 payment penalties, plus an additional collection charge for each delinquent account in an amount to be  
25

1 determined by rules and regulations of the Tax Collector. The Tax Collector shall establish collection  
2 charges sufficient to reimburse the costs incurred by the City for collecting delinquent fees or penalties.  
3 Interest shall be paid at a rate of one percent per month, or fraction thereof. Interest and collection  
4 charges shall accrue 90 days after the original due date.

5 (d) If the Tax Collector determines that the Detector User has deliberately withheld the  
6 amount of the fee to be remitted or that a Detector User has failed to pay the amount of the fee for a  
7 period of one or more billing periods, or if the Tax Collector deems it in the best interest of the City  
8 and County, he or she may assume responsibility for collection of fees due under this Article from  
9 certain Detector Users for specified billing periods. The Tax Collector shall notify the Detector User  
10 that the Tax Collector has assumed responsibility for collection of the fees due and payable for the  
11 stated periods and demand payment of such fees. The notice shall be served on the Detector User  
12 personally by handing it to him or her or by deposit of the notice in the United States mail, postage  
13 prepaid thereon, addressed to the Detector User at the address on the application or location where the  
14 detector(s) is located. If the Detector User fails to remit fees, penalties, or costs assessed to the Tax  
15 Collector, the Detector User shall be subject to the interest and penalties provided in this Section.

16 **SEC. 3515. SUSPENSION AND REVOCATION OF CERTIFICATE OF REGISTRATION.**

17 In addition to the penalties described in Section 3513, the Director may suspend or revoke any  
18 Certificate of Registration if the Director finds:

19 (1) The registrant has violated any of the provisions of this Article;

20 (2) The application contains a material false statement;

21 (3) The Biological Agent Detector for which a Certificate was issued does not comply with  
22 any of the provisions of this Article or rules and regulations promulgated hereunder;

23 (4) The registrant has refused to permit any City inspector to inspect the premises or the  
24 Biological Agent Detector therein;

1           (5) The registrant refuses to produce the Certificate of Registration upon request by a City  
2 inspector;

3           (6) The registrant or his or her authorized employees or agents have failed to comply with  
4 the instructions of any City Director or cooperate in any investigation relating to the Certificate of  
5 Registration or the Biological Agent Detector for which a Certificate of Registration was issued;

6           (7) The Biological Agent Detector has more than two false alarms within a 12-month  
7 period; or,

8           (8) For good cause.

9 **SEC. 3516. APPEALS.**

10           (a) If the Director revokes or suspends a Certificate of Registration, assesses a penalty, or  
11 denies the issuance, renewal or reinstatement of a Certificate of Registration, the Director shall send  
12 written notice of the action and a statement of the right to an appeal to either the affected applicant or  
13 Biological Agent Detector User.

14           (b) The applicant or Biological Agent Detector User may appeal the decision of the  
15 Director as follows:

16           (1) The applicant or Biological Agent Detector User may file a written request for a  
17 review by paying an appeal fee of \$180 and setting forth the reasons for the appeal within 20 business  
18 days notice of the Director's decision. The Person filing the appeal must also deposit with the Tax  
19 Collector the full amount of any penalty imposed, plus any accrued interest and costs. Appeal fees, and  
20 any other amount deposited with the Tax Collector, will be returned to the appealing applicant or  
21 Biological Agent Detector User if the appeal is upheld.

22           (2) The Director may grant, but not deny, the appeal based upon an initial review of  
23 the appellant's written submission, as well as any other pertinent information.

1                   (3) If, after his or her initial review, the Director does not grant the appeal or  
2 determines that a hearing is appropriate or necessary, the Director shall appoint a hearing officer to  
3 conduct a formal hearing within 30 days of the receipt of the request and consider the evidence  
4 submitted by any interested Person(s). The hearing officer shall not be an employee whose regular  
5 duties include administration or enforcement of this Article. The hearing officer shall make his or her  
6 decision affirming or reversing the decision of the Director on the basis of the preponderance of  
7 evidence presented at the hearing, and must render the decision within 30 days after the date of the  
8 hearing.

9                   (c) Filing of a request for appeal shall stay the action by the Director revoking or  
10 suspending the Certificate of Registration or requiring payment of a penalty, until the appeal is  
11 complete. If a request for appeal is not made within the 20 business day period, the Director's decision  
12 is final.

13 **SEC. 3517. REINSTATEMENT.**

14                   A Person whose Certificate of Registration has been revoked or suspended may, at the  
15 discretion of the Director, have the Certificate of Registration reinstated if the Person:

16                   (1) In the case of revocation, submits a new application and pays a reinstatement fee equal to  
17 one-half of the certificate renewal fee;

18                   (2) Pays, or otherwise resolves, all outstanding fees and penalties; and,

19                   (3) Submits a certification from a Biological Agent Detector installation company, stating that  
20 the detector system has been inspected and repaired (if necessary) by the alarm installation company.

21 **SEC. 3518. LIENS.**

22                   (a) All final costs, fees, and administrative or civil penalties assessed against a Person for  
23 violations of this Article shall be an obligation owed to the City by the Person found to have violated  
24 this Article, and the owner of the property where the violation occurred, provided that both have been  
25

1 given adequate notice of the alleged violation(s). Such obligation may be collected by means of the  
2 imposition of a lien against the property of the owner of the property or the Person against whom the  
3 final administrative or civil penalty was assessed. The City shall mail to the owner of the property and  
4 to the Person against whom the final amount was assessed (if different from the owner of the property)  
5 a notice of the amounts due and a warning that lien proceedings will be initiated against the property if  
6 the amounts are not paid within 30 days after the notice is mailed.

7 (b) Liens shall be created and assessed in accordance with Article XX of Chapter 10 of the  
8 San Francisco Administrative Code (commencing with Section 10.230).

9 **SEC. 3519. RULES AND REGULATIONS**

10 The Director, after a noticed public hearing, may adopt rules and regulations to carry out the  
11 provisions of this Article. Such rules and regulations shall take effect 15 days after the public hearing.  
12 Violation of any such rule or regulation may be grounds for administrative or civil action against the  
13 permittee pursuant to this Article.

14 **SEC. 3520. GOVERNMENT IMMUNITY.**

15 Issuance of a Biological Agent Detector Certificate of Registration is not intended to, nor will it,  
16 create a duty or obligation, either expressed or implied, of response. Any and all liability and  
17 consequential damage resulting from the failure to respond to a Biological Agent Detector is hereby  
18 disclaimed and governmental immunity as provided by law is retained. By applying for a Certificate of  
19 Registration, the applicant acknowledges that the Director, law enforcement, or any other City director  
20 response may be influenced by factors such as the availability of Personnel, priority of calls, weather  
21 conditions, traffic conditions, emergency conditions, staffing levels and prior response history.

22 **SEC. 3521. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL WELFARE.**

23 In undertaking the adoption and enforcement of this Article, the City and County is assuming an  
24 undertaking only to promote the general welfare. The City does not intend to impose the type of  
25

1 obligation that would allow a Person to sue for money damages for an injury that the Person claims to  
2 suffer as a result of a City officer or employee taking or failing to take an action with respect to any  
3 matter covered by this Article.

4 **SEC. 3522. PREEMPTION.**

5 Nothing in this Article shall be interpreted or applied so as to create any power, duty or  
6 obligation in conflict with, or preempted by, any Federal or State law.

7 **SEC. 3523. SEVERABILITY.**

8 If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this Article or  
9 any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of  
10 competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining  
11 portions of this Article or any part thereof. The Board of Supervisors hereby declares that it would  
12 have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof  
13 irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses,  
14 or phrases be declared unconstitutional, or invalid, or ineffective.

15 APPROVED AS TO FORM:  
16 DENNIS J. HERRERA, City Attorney

17 By: \_\_\_\_\_  
18 CECILIA T. MANGOBA  
19 Deputy City Attorney

20  
21  
22  
23  
24  
25