



March 4, 2016

**U.S. Poultry & Egg  
Association**

1530 Cooledge Road  
Tucker, GA 30084-7303, USA  
Telephone: 770.493.9401  
Facsimile: 770.493.9257  
www.uspoultry.org

Patrick Kapust, Deputy Director  
Directorate of Enforcement Programs  
U.S. Department of Labor  
Occupational Safety and Health Administration (OSHA)  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Dear Mr. Kapust:

Thank you for taking the time to meet yesterday with me, Christian Richter of The Policy Group and Larry Stine of Wimberly, Lawson, Steckel, Schneider & Stine to discuss a narrow issue of concern with the current OSHA guidance to area offices affecting the poultry industry.

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On behalf of the USPOULTRY membership, we have worked constructively with OSHA regional officials through the REP outreach phase, but were compelled to request that a specific provision be removed from the October 28, 2015 Memorandum concerning "Inspection Guidance for Poultry Slaughtering and Poultry Processing Establishments" and the REP announced October 26 and 27, 2015 (Directive No. CPL 16/08). The REP targets poultry processors in Regions 4 and 6 and is scheduled to be in force beginning October 26, 2015. The October 28 memorandum fundamentally does the same for the entire country.

As we stated we are concerned that one, narrow aspect of these programs, as presented, seeks to expand unprogrammed inspections by using selection criteria that are not consistent with the Fourth Amendment to the U.S. CONSTITUTION.

During our meeting this week it was made it clear that OSHA does not agree with our concerns and believes that the agency indeed has the legal authority to expand unprogrammed inspections since OSHA has stated that poultry processing is a high hazard industry.

While we will continue to work with OSHA regional personnel as the REP advances and have not opposed the REP initiative, we respectfully disagree with OSHA's position and wanted to follow up with a more thorough explanation of our legal concerns.

Regional Emphasis Program (REP) and the October 28 Memorandum

The REPs and the October 28 memorandum purport to authorize OSHA to evaluate every aspect of a poultry processing facility in the course of any programmed, un-programmed, or other limited-scope inspection pertaining to poultry processing operations. The REPs state "(i)n addition and where applicable, all unprogrammed inspections will be expanded to include all areas required by this emphasis program". The October 28 memorandum states "All such inspections, programmed and unprogrammed, shall cover the hazards listed below". Therefore the REPs and the October 28

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memorandum would effectively authorize inspectors to expand any complaint or referral-based inspection to a comprehensive (wall-to-wall) inspection.

### Selection Criteria

In accordance with the Field Operations Manual (FOM), Chapter 9, Complaint and Referral Processing, area offices normally conduct an inspection for all formal complaints that contain allegations of hazards. In ordinary circumstances such investigations are confined to the areas or conditions that are the subject of the complaint. However, according to OSHA's guidance published in the Federal Register, if an employer refuses to allow the compliance officer to expand any inspection to a *comprehensive* inspection under the REP program, OSHA will seek a warrant in accordance with procedures in the current FOM for handling such refusals. The October 28 Memorandum also instructs the inspectors to expand unprogrammed inspections into a comprehensive inspection.

It is this aspect of OSHA's program and memorandum – expanding unprogrammed, complaint-based inspections into comprehensive, or wall-to-wall, inspections -- that raises serious Fourth Amendment concerns.

### Constitutional concerns

In OSHA's REP for Poultry Processing and its enforcement memorandum of October 28, 2015, OSHA has declared its intention to investigate poultry processing facilities from wall-to-wall even if their initial investigation is triggered by a specific and narrow complaint, referral, or incident. However, OSHA has known for quite a long time that such selection criteria have been found to be unconstitutional by the Sixth and Eleventh Circuits. *Trinity Industries, Inc. v. OSHA*, 16 F.3d 1455 (6<sup>th</sup> Cir. 1994); *Donovan v. Sarasota Concrete*, 693 F.2d (11<sup>th</sup> Cir. 1982); *In re Crider Poultry, Inc.*, 2010 WL 1524571 (S.D. Ga. 2010); *In re Establishment Inspection of Buffalo Recycling Enterprises, LLC*, 2011 WL 1118671 (W.D. N.Y. 2011) (following *Crider*). OSHA thus is vulnerable to challenge, certainly in the Sixth and Eleventh Circuits and arguably elsewhere, if it attempts to expand a narrow investigation in this manner.

In *Trinity Industries, Inc. v. OSHA*, 16 F.3d 1455 (6<sup>th</sup> Cir. 1994), and *Donovan v. Sarasota Concrete*, 693 F.2d 1061 (11<sup>th</sup> Cir. 1982), the Sixth and Eleventh Circuits rejected OSHA's attempt to use warrants to conduct wall-to-wall inspections when the initial investigation was triggered by a specific and narrow complaint, referral, or incident. These courts held that such expansion is not consistent with the Fourth Amendment to the U.S. CONSTITUTION, and is subject to being invalidated (and warrants quashed) on those grounds.

In *Trinity*, the Court of Appeals held that OSHA instruction CPL 2.45A, which purported to allow the Secretary of Labor to conduct a full-scope inspection on the strength of a single warrant initially obtained only on the basis of an employee complaint was invalid. The Supreme Court held that warrants are required for administrative inspections under the OSH Act in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325, 98 S. Ct. 1816, 1827, 56 L. Ed. 2d 305 (1978). The Court also stated that probable cause justifying the issuance of a warrant for administrative purposes may be based either on "specific evidence of an existing violation" or "on a showing that 'reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment].'" *Id.* at 320, 98 S.Ct. at 1824. Expounding on the second basis, the Court noted that a "warrant showing that a specific business has been *chosen* for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources ... would protect an employer's Fourth Amendment rights." *Id.* at 321, 98 S.Ct. at 1824–25 (emphasis added). Because administrative and legislative guidelines ensure that

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employers selected for inspection pursuant to neutral administrative plans have not been chosen simply for the purpose of harassment, courts have held that administrative plan searches may properly extend to the entire workplace. See *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir.1982). In the case of searches based on employee complaints, however, such safeguards are absent. Given the “increased danger of abuse of discretion and intrusiveness” presented by such searches, we agree with those circuits that have explicitly recognized that “a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint.” *Id.*

The *Trinity* court held that the flaw in OSHA Instruction CPL 2.45A was that it circumvented the purpose behind the reasonable administrative plan envisioned by the Supreme Court. *Barlow's*, 436 U.S. at 321, 98 S.Ct. at 1824. By allowing an employee complaint to trigger an administrative plan (wall-to-wall) search, OSHA was attempting to authorize a full-scope inspection of an employer in the absence of the probable cause showing required by *Barlow's* for such an inspection. This is precisely what the October 28 Memorandum purports to do, and the Sixth Circuit concluded that such action is not consistent with *Barlow's*, and the U.S. CONSTITUTION. *Trinity*, 16 F.3d at 1460.

In *Sarasota Concrete*, the Eleventh Circuit held that where nothing more was offered than a specific employee complaint relating to localized condition, probable cause existed for search to determine only whether a complaint was valid, and a search of employer's entire workplace was unreasonable. Because of the increased danger of abuse of discretion and intrusiveness, the Eleventh Circuit joined other courts that had recognized that a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint, which precludes automatic expansion of a complaint inspection. See, e.g., *Marshall v. Horn Seed Co.*, 647 F.2d 96, 101 (10th Cir.1981); *Marshall v. North American Car Co.*, 626 F.2d 320, 324 (3d Cir.1980); *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 720–21 n. 1 (8th Cir.1979); *In re Establishment Inspection of Asarco, Inc.*, 508 F.Supp. 350, 353 (N.D.Tex.1981); *West Point-Pepperell, Inc. v. Marshall*, 496 F.Supp. 1178, 1186 (N.D.Ga.1980), *rev'd on other grounds*, 689 F.2d 950 (11th Cir.1982); *Marshall v. Pool Offshore Co.*, 467 F.Supp. 978, 981–82 (W.D.La. 1979).

In an unreported Georgia district court case, *In re Crider Poultry, Inc.*, 2010 WL 1524571 (S.D. Ga. 2010), an OSHA warrant seeking to expand a complaint-based investigation was quashed. The *Crider* decision was endorsed in *In re Establishment Inspection of Buffalo Recycling Enterprises, LLC*, 2011 WL 1118671 (W.D. N.Y. 2011). See also *Matter of Samsonite Corp.*, 756 F.Supp. 498, 499 (D.Colo.1991) (whereas “programmed searches require less scrutiny from the magistrate who issues the warrant to inspect the facility, ... [u]nprogrammed inspections are not initiated by neutral criteria and could become tools of harassment.”) This is particularly true in cases involving an inspection of the entire facility, which is significantly intrusive and often extends over a period of weeks, creating disruption, inconvenience, and lost employee time. *Buffalo Recycling*, 2011 WL 1118671 at \*3, citing *Sarasota Concrete Co.*, 693 F.2d at 1069, n. 9, and *Crider Poultry*, 2010 WL 1524571.

### Conclusion

We thank you for meeting with us and for OSHA's sincere efforts made during the recent 90-day outreach and education period leading up to the Poultry Processing REP. I hope that we were able to convey that the concern we presented during our meeting was not about the Regional Emphasis Program's general purpose, scope or selection criteria.

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However, based on the foregoing, we continue to believe that OSHA's October 2015 REP and the October 28 Memorandum declaring the intention to expand narrow complaint and referral investigations in poultry processing facilities to wall-to-wall investigations overstep the legal boundaries of the Fourth Amendment's bar on unreasonable searches and seizures as recognized by the U.S. Supreme Court in *Barlow's* and the Sixth and Eleventh Circuit Courts of Appeals in *Trinity* and *Sarasota Concrete*. We request that OSHA reissue its October 28 memorandum and the REP after removing the selection criteria that seek to expand unprogrammed inspections into comprehensive inspections.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul W. Pressley". The signature is fluid and cursive, with the first name "Paul" and last name "Pressley" clearly distinguishable.

Paul W. Pressley  
Executive Vice President  
ppressley@uspoultry.org

cc: Thomas Galassi, Director, Directorate of Enforcement Programs  
Mr. Orlando Pannocchia, Counsel, Office of the Solicitor  
Kurt Petermeyer, OSHA Regional Administrator, Region 4  
Kelly Knighton, OSHA Acting Regional Administrator, Region 6