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March 18, 2024

Texas Department of Housing and Community Affairs
Attn: Wendy Quackenbush
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wendy.quackenbush@tdhca.texas.gov – emailed 3/18/24

Re: Comments on New 10 TAC Chapter 90, Migrant Labor Housing Facilities

Dear Ms. Quackenbush,

Texas Cotton Ginners' Association (TCGA) appreciates the opportunity to comment on this important rule. TCGA represents over 99% of the approximately 180 cotton ginning facilities in the state of Texas, ginning about 6 million bales of a typical United States crop of 16 million bales. TCGA's members typically employ five to 20 seasonal agricultural employees. Many of these employers provide Migrant Labor Housing and we anticipate this number will increase in the future. We reviewed the above referenced proposed rule, and would respectfully offer the following comments:

In the new rule, section 90.4(c)(12) states "A separate bed and bedding must be provided for each individual worker or Couple." This implies housing operators must provide "bedding" as well as the actual bed. Our members all supply the beds as specified in the rule. However, many do not provide bedding (i.e., sheets, blankets, pillows, etc.). The federal rules for Sleeping Facilities do not require housing operators to provide bedding. Title 20 CFR Part 654.416 requires that beds be provided with clean mattresses, but also states "Any bedding provided by the housing operator be clean and sanitary."

Requiring employers to provide bedding along with the bed is a large expense. Some housing facilities are quite large and will require a high volume of bedding items that the housing operator must maintain, wash, and rotate as employees come and go during the season. This bedding will also require replacement on a routine basis from wear.

This new specification in the proposed rule exceeds current federal standards for sleeping facilities. TCGA suggests that TDHCA reword Section 90.4(c)(12) as follows: "A separate bed must be provided for each individual worker or Couple. Any bedding, if furnished by the housing operator, must be provided on the same basis".

Thank you for allowing us to comment on this rule.

Sincerely,

Duncan B. McCook
Manager of Regulatory Affairs

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March 22, 2024

Wendy Quackenbush
Texas Department of Housing and Community Affairs
Rule Comments
via email to: wendy.quackenbush@tdhca.texas.gov

Re: Comments regarding proposed changes to 10 TAC § 90

Texas RioGrande Legal Aid, Inc. ("TRLA"), is a non-profit law firm which provides free legal services to low-income Texans. TRLA's farmworker team has decades of experience providing services to migrant farmworkers in Texas and several other states, and has engaged with TDHCA for years regarding the agency's enforcement of migrant housing regulations. We conduct outreach statewide to H-2A and non-H-2A farmworkers and are familiar with the general state of farmworker housing in Texas. We write to comment on the Department's proposed changes to 10 TAC § 90.

I. Comments regarding the Department's proposed changes

a. § 90.3(c) and § 90.5(i)(5) – Applicability

The Department has proposed amendments to §§ 90.3(c) and 90.5(i)(5) which clarify that housing providers must make the housing available for inspection, including all units being certified. This will improve the condition of migrant farmworker housing by clarifying that the Department should conduct an inspection of the entire facility, ensuring compliance for all units.

b. § 90.4(a) – Range Housing Standards

The Department has proposed an amendment to § 90.4(a) to include the "range housing" standards for H-2A workers certified in open range livestock jobs. While this change will ensure compliance with the open range livestock housing provisions, we caution the Department to clarify when these regulations are "applicable".

The range housing regulations are intended to recognize the reality of open range livestock work. In these jobs, workers travel over an open range with livestock over the course of the season. Because they are traveling over large distances and sleeping in different locations, fixed-site housing is replaced by campers and, in some cases, tents.

In our experience, employers frequently miscategorize employees as open range livestock herders when they are not performing open range work. Employers are incentivized to do so, as the required pay levels for open range herders are significantly lower than those for

fixed-site livestock workers.[1] Unfortunately, state and federal regulators frequently certify H-2A jobs as open range when the workers are actually performing fixed-site work.[2]

The TDHCA plays an important role in this regulatory scheme. To the extent that the Department conducts inspections of housing and finds that the housing is fixed-site rather than open range housing, the Department could better enforce the law by making its own determination as to whether the work is actually open range herding. The Department could clarify this by adding an explicit statement that it will only consider the open range housing requirements to be applicable when the work performed is actually open range housing.

c. § 90.4(c)(1) – Carbon Monoxide Detectors

The Department has proposed amending § 90.4(c)(1) to add a requirement for carbon monoxide detectors to be provided where units use gas or other combustible fuel. This requirement will make farmworker housing safer.

Farmworkers – like all Texans – often use combustible heat sources in cold weather. There is no requirement in state or federal law that housing be equipped with central heating or electrical heating. Frequent and long-lasting power grid failures have led to an epidemic of carbon monoxide poisoning. During the 2021 winter storms, at least 19 Texans died of carbon monoxide poisoning[3] and more than 1,400 sought care from emergency rooms and urgent care clinics for exposure.[4] Carbon monoxide detectors significantly reduce these risks; one study found that mandatory carbon monoxide detectors in New York were a factor in the 25-50% decrease in overall instances of CO poisoning.[5]

Additionally, farmworkers often use combustible fuel for cooking in small, enclosed spaces. This is particularly concerning in hotel rooms, which are increasingly being used as housing and which frequently do not have openable windows. Carbon monoxide exposure is a risk in such environments.

d. § 90.4(c)(12) – individual bed requirement

The Department proposes adding § 90.4(c)(12), clarifying the requirement that workers be provided with individual beds. This requirement will contribute to the safety and dignity of farmworker's living conditions. The Department may also wish to take this opportunity to clarify the requirements regarding bedding.

In our experience, forced bed sharing is a significant issue in farmworker housing. Our experience is that employers frequently require workers to share beds. This practice is

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[1] *See* https://flag.dol.gov/wage-data/adverse-effect-wage-rates

[2] TRLA has litigated at least one such case in recent years. See the attached complaint in *Rodriguez de Luna v. Childress*. *See also Saenz-Mencia v. Allred*, 808 F.3d 463 (10th Cir. 2015).

[3] *See* https://www.dshs.texas.gov/sites/default/files/news/updates/SMOC_FebWinterStorm_MortalitySurvReport_12-30-21.pdf, at 3.

[4] *See* https://www.texastribune.org/2021/04/29/texas-carbon-monoxide-poisoning/

[5] *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504304/

particularly common in hotel and motel housing; TRLA outreach staff have observed that housing providers commonly bait-and-switch regulators by reducing the total number of hotel rooms they have reserved for workers once the hotel has been certified, choosing to force workers into cramped quarters where they must share beds. Requiring workers to share beds for months at a time is undignified – professional workers would consider such conditions beneath them; why should farmworkers be any different?

The Department may also use this as an opportunity to clarify specific requirements for bedding. Proposed (c)(12) requires employers to provide a "bed and bedding" for each worker, but "bed" and "bedding" are not defined. The Department could improve farmworker health by clarifying that a bed requires a mattress. Housing providers sometimes provide workers with folding cots that have no mattresses, which are unsuitable for several months of continued use. Several other states have mattress requirements for farmworker housing.[6]

Additionally, the Department could tighten this language by clarifying that beds provided to couples be at least queen size. As currently proposed, the regulations would permit a housing provider to provide a single twin mattress to a couple, which is obviously inadequate sleeping space.

e. § 90.5(i) and (m) – Licensing

Proposed § 90.5(i) clarifies that the Department has the authority to perform follow-up inspections if necessary. Proposed § 90.5(m) clarifies that changes to the license more than 30 days after the initial inspection will require an additional inspection. These will further the statute's goal of providing safe and dignified housing for farmworkers.

Compliance issues in farmworker housing often arise after the inspection: accidents can damage the structure of the housing, plumbing systems can become overstressed, and employers can bring in more workers than there are beds, just to give a few examples. To give one recent example, the Department's recent investigation of Cantu Harvesting involved housing violations that did not arise until mid-season. Clarifying that the Department can conduct in-season inspections, and requiring a new inspection for substantial changes, will enable the Department to address these issues as they arise.

f. § 90.6(c)(4) – Posting in hotels

Proposed § 90.6(c)(4) allows hotels and motels to post the license in the "lobby or front desk area." The vague language of this section may frustrate the purpose of the poster requirement.

The purpose of the posting requirement is to inform farmworkers and their families of the regulations governing worker housing and how they can make complaints. Requiring the poster to be in the "lobby or front desk area" will often likely result in the poster being

[6] *E.g.* WAC 246-358-135 (Washington state), 10 N.Y.C.R.R. § 15.6 (New York), Attachment B (North Carolina state guidance interpreting OSHA guidance to require individual beds).

posted behind the front desk, in a position where it is not legible to workers. This would frustrate the purpose of the posting requirement. This could easily be resolved by prohibiting housing providers from hanging the poster behind the front desk, and by requiring the poster be in a location where all of the text is legible.

g. § 90.7(b) and (b)(4) - Complaints

The Department proposes revising § 90.7(b)(4) to provide penalties against employers who retaliate against housing occupants who file complaints in good faith. The Department also proposes amending § 90.7(b) to clarify that a copy of the substance of the complaint, rather than a copy of the complaint itself, shall be provided to the Provider. Both changes will further the goal of creating safe and secure farmworker housing by discouraging or preventing retaliation.

It is unfortunately common for employers to retaliate against low-wage workers who complain about working conditions. Other enforcement agencies, such as the U.S. Department of Labor, prioritize retaliation protections, finding that it is "of paramount importance" to enforce these provisions to ensure that other worker protection laws actually work.[7] TRLA currently represents a group of farmworkers who were retaliated against by an employer after they complained about their housing conditions.

§ 90.7(b) will also help protect housing occupants from retaliation by preserving their anonymity. We believe that these changes will lead to improved conditions in farmworker housing.

II. Additional changes

In 2019, TRLA commented on the Department's most recent proposal to amend these regulations. Several of those comments were not addressed in the regulations, and we re-urge them here.

a. § 90.3(a), (b), and (d) - public accommodations exemption

One major concern with farmworker housing is the increasing use of hotels and motels for long-term housing. While we understand the Department's concern that an unwitting hotelier should not be liable simply for unknowingly housing a few migrant workers without obtaining a license, the overriding concern is that the current language regarding who is a "provider" and who must obtain a license could potentially leave a loophole for employers to evade regulation.

§§ 90.3(a) and (b) state that an employer becomes a provider if they "own, lease, rent, or otherwise contract for" housing to be provided for migrant workers. This language would protect more farmworkers if it were broadened. Employers often arrange for housing with third parties without contracting directly with those parties. In those situations, the housing

[7] https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf

provider is aware that workers are being housed, but it is unclear whether the housing provider and employer are required to obtain a license.

As discussed in our previous comment, and as the U.S. Department of Labor recently acknowledged in regulatory changes to the H-2A program, public accommodation housing is a particular concern when it comes to enforcement. *See generally* 84 Fed. Reg. 36168 (July 26, 2019).

Attached is a copy of TRLA's comments to the 2020 regulatory changes which discusses this issue in more depth.

b. § 90.5(h) – attestation process for additional state standards

New § 90.5(h), formerly § 90.5(g), provides that applicants must certify that the housing complies with the additional state standards, "along with any supplemental documentation requested by the Department, such as photographs." This language could be clarified to ensure better compliance by requiring employers to submit some documentation other than a mere attestation.

As discussed in our comment to the 2020 regulatory changes, mere attestations are demonstrably ineffective. H-2A employers are required to attest under penalty of perjury that they are complying with all applicable state and federal laws. Our experience is that employers simply sign these kinds of vague attestations without investigating whether they actually are in compliance. Prior to 2020, there were almost no H-2A housing units in the state that were licensed by TDHCA under state law. All the same, hundreds of H-2A employers signed attestations under penalty of perjury that they were complying with all applicable state laws. More effective enforcement would involve a standardized list of documentation requirements for each additional state standard – photos, receipts, invoices, etc.

Again, our attached 2020 comment discusses this issue in greater depth.

c. § 90.4 – cooking facilities

We re-urge our comment that the Department's decision to remove former § 90.2(e)(1)(A), which required four-burner stoves, has created fire hazards in worker housing. As noted in our 2020 comment and in the DOL's preamble to recent H-2A regulatory changes, this is particularly concerning. *See* 84 Fed. Reg. 36168, 36193 (July 26, 2019).

Sincerely,

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November 22, 2019

Tom Gouris
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Re: **Comments regarding proposed changes to 10 TAC § 90**

Dear Mr. Gouris:

Texas RioGrande Legal Aid, Inc. (TRLA) writes to comment on the proposed regulatory changes to 10 T.A.C. Chapter 90. We thank the Texas Department of Housing and Community Affairs (TDHCA or the "Department") for the invitation to comment on the proposed regulations.

TRLA is a federally-funded non-profit that provides free legal services to low-income Texans. Our farmworker program covers Texas and six southern states. We are active in the farmworker law community and regularly meet with farmworker advocates across the country to discuss issues that impact our clients.

It has been our experience that the quality of farmworker housing varies greatly from state to state and that states with stricter farmworker housing regulations and more enforcement resources see a resulting increase in the quality of farmworker housing. Simply put, employers often cut corners by providing substandard housing, and it is only through regulatory enforcement and oversight that bad actors are brought into compliance.

Unlike many states, Texas's current standards for farmworker housing are quite protective of workers – even more so than federal standards. For instance, unlike the federal standards, the current TDHCA regulations do not exempt hotels, apartment complexes, and other public accommodations. In addition, the existing regulations provide several standards that are not contained in both sets of federal regulations, located at 10 TAC § 90.3 currently and § 90.4(c) in the proposed regulations. The current regulations, if fully enforced, would do much to improve the quality of farmworker housing in Texas.

Unfortunately, Texas does not dedicate the resources to enforcement of its farmworker housing regulations that other states do. Until 2018, not a single employer participating in the H-2A visa

program (a federal visa program in which employers can sponsor agricultural workers for temporary visas), pursuant to which an employer must provide free housing to workers, was licensed by the TDHCA. At present, less than 40% of the 364 employers that participate in the H-2A program and bring in at least three workers to Texas have a license from the TDHCA.[1]

It is the TDHCA's decision to accommodate H-2A employers' objections to complying with existing TDHCA regulations on migrant labor housing facilities that drives these proposed changes. As the Department notes in the purpose statement in § 90.1, the TDHCA's goal is to close the gap between the federal standards and the more stringent state standards by limiting the amount of TDHCA resources expended on inspections of facilities that obtain inspections under federal standards. Proposed 10 TAC § 90.1. This would have two major negative impacts on farmworker housing in Texas. First, it would decrease the quality of offered housing by reducing the number of inspections undertaken. Second, it would drastically decrease the already extremely low amount of resources the Department dedicates to enforcing these regulations.

Below are line-by-line comments on the proposed changes.

Proposed § 90.1 Purpose Statement

The purpose statement, added in these regulations, does not accurately reflect the purposes underlying the statute, which requires that the Board "adopt rules to protect the health and safety of persons living in migrant labor housing facilities" – full stop. Tex. Gov't Code § 2306.931(b). The licensing system serves to ensure that migrant farmworkers and their dependents have access to safe and decent housing as a matter of their own health. Further, safe housing for migrant farmworkers is a broader public health concern. That is because farmworkers who are in unsafe or unsanitary conditions may transmit diseases that can be spread to consumers via our food supply, creating national epidemics. Minimum housing habitability standards play a vital role in this process. Inadequate facilities for cooking, showering, or washing clothes covered in pesticide residue could all exacerbate farmworkers' health issues, causing dangerous germs or pesticide residue to be transmitted onto food.

It is also inaccurate to state that the purpose of the statute and regulations is to bring the state regulations into line with federal regulations or to reduce redundancies between the state and federal regulations. *See* Tex. Gov't Code § 2306.931(b). Instead, that is only the purpose of these specific regulatory changes; it is not the animating legislative purpose for the pre-existing state protections.

It is undeniable that protecting the health and safety of migrant farmworkers remains an important concern. TRLA has represented several groups of migrant farmworkers in housing cases in Texas in recent years, including in lawsuits or federal administrative proceedings against the following employers:

- AJK Enterprises - Van Horn (workers housed in overcrowded cinderblock facility forced to sleep in shipping containers that had been used as ostrich pens and not cleaned)

[1] The enabling statute for these regulations only applies to persons who provide housing for at least two families or three workers. *See* Tex. Gov't Code § 2306.921(3).

- Borders Melon – Eagle Pass (overcrowded, moldy housing without beds, with non-locking door near dangerous area of the Texas-Mexico border)
- Village Farms – Monahans (housing infested with bed bugs for years)
- Longoria Farms – Refugio (workers allegedly housed 6 to a small hotel room with 2 beds, no cooking facilities, no laundry facilities to wash clothes covered in pesticides) (federal administrative procedures are brought in lieu of a lawsuit, so a copy of the H-2A job order has been attached.)
- Wade Pennington & Sons, LLC (workers housed in abandoned cabin without adequate beds, toilet facilities, with leaky ceilings and holes in windows and walls, among other problems)

Proposed § 90.3 Applicability

i. *§ 90.3(a) and (d) - Public Accommodations Exemption*

We appreciate the Department's clarification in § 90.3(a) that state law does apply regardless of whether the hotel/public accommodation exemption under federal law applies. *See* proposed 10 TAC § 90.3(a); *cf.* 29 U.S.C. § 1823(c), 20 C.F.R. § 655.122(d)(1)(ii). This is one of the greatest strengths of the Texas law's ability to protect farmworkers. Our experience has been that compliance rates with substantive housing standards are low in public accommodation housing, particularly in the H-2A program.

However, § 90.3(a) and (d) impermissibly limit Tex. Gov't Code § 2306.922 by excluding entities that do not contract directly with growers or farm labor contractors. The statute provides for strict liability for anyone who establishes, maintains, or operates a migrant labor housing facility; it does not limit liability to only one party. Tex. Gov't Code § 2306.922. This includes owners of public accommodations, such as hotels or mobile home parks, that do not have a direct contractual relationship with employers or farm labor contractors. In many parts of the state, the custom is for workers to stay in low-rent mobile home parks or hotels that are in poor condition and wholly inadequate for long-term occupancy. The statute properly recognizes this reality and sweeps these entities into its ambit.

There are two primary drivers of low compliance rates in public accommodation housing. First, as the Department is aware, the H-2A regulations do not require a pre-occupancy inspection of public accommodation housing. 20 C.F.R. § 655.122(d)(1)(ii). Rather, the U.S. Department of Labor (USDOL) and the Texas Workforce Commission (TWC), which administer the H-2A program in Texas, rely on the employer's attestation that housing meets the applicable local, state, or federal standards. It is exceedingly rare for either the TWC or USDOL to exercise any oversight of public accommodation housing beyond verifying that the employer has attested to the housing's compliance with the applicable standards. These attestations have done nothing to actually ensure compliance with the law. As the Department is aware, less than two years ago, not a single H-2A employer was licensed by the Department. Still, every single H-2A employer in Texas attested under penalty of perjury that it complied with all applicable state laws, which would include the state migrant housing law. Zero of the several hundred H-2A employers in Texas had the required TDHCA housing license, and we are not aware of a single H-2A application being denied for lack of required housing licensure under state law.

The other primary driver of noncompliance in public accommodation housing is that most public accommodation housing is not designed for long-term occupancy and thus does not meet the requirements of a regulatory system that rightfully considers the reality that migrant farmworkers spend several months at a time moving between migrant labor housing facilities. Hotels often lack adequate laundry facilities or storage facilities for clothing, meaning that workers have to keep their pesticide-covered clothing in close proximity to their sleeping quarters, creating another vector of secondary pesticide exposure. Hotels also often lack dining or cooking facilities that are adequate for the number of workers being housed. Workers are thus forced to either live off of unhealthy pre-prepared food for months at a time or to cook in unsafe conditions. Many often bring hot plates into hotel rooms, which creates fire hazards and causes respiratory issues; often dishes and cooking utensils are washed in bathroom sinks or bathtubs, creating plumbing blockages.

The issues with poor conditions in public accommodation housing are well-documented. In the preamble to its current proposed regulatory changes to the H-2A program, for example, the USDOL notes that compliance in public accommodations housing is often nonexistent and uses this problem to justify the imposition of additional housing standards for public accommodation housing:

> Despite these requirements, in WHD's enforcement experience, H-2A employers often fail to secure sufficient rooms and/or beds for workers. This results in unsafe and unsanitary conditions for workers. Overcrowding, which is among one of the most common issues the Department encounters in rental and/or public accommodations, may result in unsanitary conditions, pest infestations, and outbreaks of communicable diseases. In some cases, for example, employers required workers to share a bed, required workers to sleep on the floor in a sleeping bag, or converted laundry or living spaces into sleeping facilities by putting mattresses on the ground. In other situations, as many as eight workers have been housed in a single room. Moreover, in rooms where workers also cook, the failure to provide sufficient space for workers to cook and sleep and/or to provide sanitary facilities for preparing and cooking can lead to health issues from improperly cooked food and/or pest and rodent issues. WHD also often encounters employers that do not provide sufficient access to laundry facilities when housing workers in rental and/or public accommodations. Sufficient access to laundry is critical to ensure the health of workers, as workers often perform work in fields sprayed with pesticides, which comes in contact with workers' clothing. Further, WHD has encountered numerous instances of faulty or improperly installed heating, water heating, and cooking equipment in rental and/or public accommodations, posing serious safety risks to workers. In some instances, for example, electrical currents have run through water faucets. In other instances, workers have used hot

> plates that were not plugged into a grounded electrical line, causing the hot plates to catch fire. *See* 84 Fed. Reg. 36,168, 36193 (July 26, 2019).

The experiences noted here by the USDOL track the experiences of TRLA staff in visiting public accommodation housing provided to farmworkers. For example, TRLA's case against Longoria Farms in Refugio, Texas, discussed above, shows the conditions that exist even in the highly-regulated H-2A program.

Further, the existing regulatory framework already addresses the Department's concern that it might be unfair to enforce the law against public accommodation owners who are unaware that their tenants are farmworkers. If the Department believes that an operator of a public accommodation is not an enforcement priority for any reason, the Department is free to exercise its discretion under existing law to decline to issue a fine.

ii. § 90.3(b) - Clarification Regarding Who Must Obtain License

We appreciate the Department's clarification in § 90.3(b) that employers, as "providers," are properly considered to be persons who "establish, maintain, or operate" migrant labor housing within the meaning of Tex. Gov't Code § 2306.922. As discussed above, we believe that the term "provider" is useful in that it encompasses the many different parties who may provide housing to migrant farmworkers – employers, farm labor contractors, private landlords, hotel operators, etc. However, the language in this section could be read as impermissibly narrowing the statute in several ways.

First, this section only allows that "agricultural employers" might become "providers" by owning, leasing, renting, or otherwise contracting for facilities used by workers. Proposed 10 TAC § 90.3(a). But, as the Department knows from its own experience, it is not only employers that may act as providers, but also farm labor contractors and other parties. The Department should eliminate this possible reading of the proposed regulation by adding the clause "or other persons" after "agricultural employers" in this section.

Second, this section implies that a contractual relationship must exist between the Provider and the owner/operator of the housing in order for the law to require that the Provider obtain a license. Proposed 10 TAC § 90.3(a). This would add an unnecessary and often difficult-to-prove element to the legal inquiry into whether a party is obligated to obtain a license for housing. It could also create an exploitable loophole that would allow employers to avoid liability under the statute altogether.

The agricultural labor market is notoriously informal; workers often travel long distances to work in unfamiliar places based on word of mouth or vague promises from labor contractors. Though federal law requires that employers and farm labor contractors provide workers with written disclosures detailing the wages and working conditions of the jobs they are offered, compliance with this requirement is low. In many instances, farmworkers do not even know the name of the farm on which they are working. As a result, formal contractual relationships memorialized in writing are few and far between. In recognition of the limits of contract law in a

farmworker context, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) introduces the concept of a "working arrangement" – a device to enforce agreements between parties where the formal elements of contract law may be impediments to holding parties to their word. *See* 29 U.S.C. § 1822(c).

Thus, in many instances a formal written contractual relationship may not exist between the agricultural employer and the owner/operator of the housing facility. Section 90.3(b) as drafted could be construed as eliminating liability in those instances. Agricultural employers could easily find ways to avoid the appearance of a direct contractual relationship with the owner/operator of a housing facility, such as by putting up a farm labor contractor to arrange for the housing or by requiring workers to book their own rooms individually and then simply paying the workers extra for the cost of the housing. Thus, this section as proposed would likely decrease the ability of the Department to enforce its regulations and to improve the quality of farmworker housing in Texas.

Finally, § 90.3(b) wrongly implies that only one party is responsible for maintaining licensure of a migrant labor housing facility. The section states that the "Provider . . . is *the* responsible entity for obtaining and 'maintaining' the License on such Facility" (emphasis added). The use of the exclusive "the" here wrongly implies that only one party is required to get a license. This cannot be squared with the plain language of Tex. Gov't Code § 2306.922 and .933, both of which create joint and several liability for "a person" who violates the statute. Indeed, where multiple parties could be considered to "establish, maintain, or operate" the housing, the statute makes it clear that all parties are jointly and severally liable if none obtains a license.

iii. § 90.3(d) – Exemption for Worker-Owned Mobile Housing

This section provides that no license for housing would be required in the instance where a worker houses themselves or their family members in a trailer, recreational vehicle, or other mobile housing that they own but park on the land of another person. The Department has clarified during stakeholder calls that this language was only intended to provide for an exemption in the instance where a worker is bringing their family in their vehicle to reside temporarily on another party's land. As TRLA noted in those stakeholder meetings, we believe that such an exemption should account for the reality that very often farm labor contractors who provide housing to workers are also workers themselves. This exemption could thus undermine the Department's goal to ensure that employers and labor contractors provide safe and sanitary housing to workers in their employ.

Proposed § 90.4 Standards and Inspections

The Department proposes that the standards currently located at 10 TAC § 90.2 be simplified by requiring that a housing provider meet the federal Employment and Training Administration (ETA) or Occupational Safety and Health Administration (OSHA) standards and a list of state standards. These amendments simplify the language in the current regulations but would omit two major protections in the current regulations.

Four-burner stoves would no longer be required, as they are in the Department's current regulations. *See* 10 TAC § 90.2(e)(1)(A). Two-burner hot plates are allowed under the federal standards. However, hot plates are often inadequate for the number of workers in a facility. Further, hot plates are a particular risk in hotels with no other cooking facilities. It is common practice for workers in hotel rooms to use hot plates, which are a fire hazard and which often create smoke in the room, thereby causing a health risk due to the fact that hotel windows often cannot be opened.

Housing providers would also not be required to develop and execute a vector control plan for vermin infestation, as they are required to under the current regulations. 10 TAC § 90.2(m). Pest infestations are a massive problem in farmworker housing – TRLA clients report their sleeping facilities being infested with roaches, spiders, tarantulas, scorpions, and bedbugs. TRLA has recently brought major bedbug cases against housing providers in Texas and across the country, and bedbugs remain a large problem in Texas. Requiring providers to develop a vector control plan reduces the health risk posed by pest infestation.

Department staff have raised concerns that the phrase "vector control plan" is too vague to be enforceable. "Vector control" is a widely-used term in public health literature to reference plans to combat public health risks by controlling their means of ingress. *See, e.g.*, Centers for Disease Control page on vector control for public health risks, https://www.cdc.gov/nceh/ehs/etp/vector.htm. Should the Department be concerned that the requirement to have a "vector control plan" by itself is too vague, the Department is free to require specific elements to be included in the plan. *See, e.g.* 40 TAC § 19.1914 (detailing specific elements of emergency plans that assisted living facilities are required by regulation to have on site).

Finally, these revised standards omit the reference to the Texas Commission on Environmental Quality (TCEQ) Public Drinking Water Standard, which is currently located in 10 TAC § 90.2(b). While both sets of federal standards do require that water quality meet some standards, they are vague as to *which* standards apply. The OSHA regulations provide that the water supply must be "approved by the appropriate health authority," 29 C.F.R. § 1910.142(c)(1), while the ETA regulations require that the water supply "meet[] the standards of the State health authority,", 20 C.F.R. § 654.405. While we believe that in Texas both the ETA and OSHA standards do require the employer to meet the TCEQ Public Drinking Water Standard, the explicit reference to the standard in the current regulation clarifies this issue. 10 TAC § 90.2(b). Should the Department omit this reference, the standard would be vague and difficult to enforce.

Proposed § 90.5 Licensing

i. § 90.5(d) – Reduced Fee for Facilities Inspected by Other Agencies

The Department proposes a reduced licensing fee of $75 for facilities that have been inspected by the TWC or another state or federal agency pursuant to federal regulations. This would drastically reduce funding for the Department's enforcement of the statute, decreasing the quality of farmworker housing across the state.

The revenue generated by the TDHCA's licensing fees is the only source of funding for the Department's enforcement of this statute. The Department has taken the position that it cannot use its general operating budget to enforce Tex. Gov't Code § 2306.921 *et seq.* and must instead rely on monies specifically appropriated for the migrant labor housing program. As a result, monies were appropriated specifically for the enforcement of the migrant labor housing program in both the 2017 and 2019 legislative sessions in the amount of the previous biennium's total revenues from licensing fees. Should the legislature continue to do so in future sessions, the Department's reduction of licensing fees would have a direct and negative impact on its funding for enforcing the law.

The decrease in cost from $250 per license to $75 would have a substantial impact on the Department's funding. As of September 2019, there were 364 H-2A employers in the state of Texas that employed at least three workers (and thus were legally obligated to obtain a license from the TDHCA). The total cost of the licensing fee reduction for these 364 facilities would be $63,700 per year, which is equal to the amount appropriated to TDHCA for the current biennium. This would obviously have a deleterious effect on TDHCA's ability to fund enforcement of the law, especially when the TDHCA's primary argument for its lack of greater enforcement of existing law is the Department's lack of resources.

ii. § 90.5(g) – Attestation Process for Facilities Already Inspected by Other Agencies

We appreciate the Department's goal to reduce the use of its limited resources spent in inspecting facilities that are inspected under federal law. Nevertheless, the process for streamlining the licensing of such facilities, as laid out in § 90.5(g), would not adequately safeguard the interests of farmworkers. The Department proposes that housing providers that are inspected by the TWC pursuant to federal standards (most or all of whom participate in the H-2A guestworker program) need not obtain an inspection to confirm that they also comply with state standards. Instead, such providers can submit their federal inspection, an attestation that they meet those state standards that go beyond federal law, and whatever documentation the Department may choose to require.

As discussed above, the Department's reliance on attestations is demonstrably misplaced. Given that hundreds of H-2A employers currently violate the law while attesting under penalty of perjury that they do not, attestations are not a reasonable method with which to generate compliance.

The proposed regulations are also inconsistent with the TDHCA's own internal audit of the migrant labor housing program, which found severe deficiencies in the Department's enforcement of existing law. The audit found that TDHCA was failing to meet the existing standards at 10 TAC § 90 and that even facilities which received inspections were many times not in compliance with the Department's existing rules. It also found that documentation of inspections was scarce; where facilities did not meet standards they were subject to reinspection before licensure but were licensed with no evidence that any reinspection occurred or that the deficiencies had been rectified. The Department's proposed changes could have aimed to address the findings of the internal audit by strengthening the Department's inspection process and requirements for documentary evidence from housing providers. Unfortunately, they do the

exact opposite by creating a drastic reduction in the amount of inspections delivered and without any clear requirements for what documentary evidence the Department should require from employers to complete reinspections. A copy of the internal audit is attached for reference.

The Department's goal should be to ensure that housing providers truly comply with the additional state-level standards laid out in § 90.4. The Department should provide a standardized list of documentation acceptable to prove that a facility meets those standards and require employers to submit that documentation with their license application. Photographs, where applicable, should be submitted electronically with all original metadata, including EXIF metadata which can be used to verify where and when the photographs were taken. This is important to ensure that the photos that housing providers submit are photos of the current housing conditions at the same facility for which they seek a license. Housing providers could otherwise easily submit old photos of facilities which have since fallen into disrepair, or photos of different facilities altogether than the facilities actually being provided to workers.
If the Department relies on attestations, the attestation should list each specific additional standard that housing providers must comply with in § 90.4. It should also provide a checkbox for each requirement, so that the housing provider must check each box to affirm that the offered housing meets the requirement. Finally, attestations should be required under penalty of perjury, as they are for the H-2A program.

Should the Department maintain the current proposal, is should clarify § 90.5(g) to provide that *only* an inspection conducted within the past 90 days shall be sufficient to issue a license at the reduced rate and without an inspection. We believe that this is the Department's intent, but the regulations as worded appear to provide that any entity that has been inspected by a state or federal agency once need never be inspected again.

Proposed § 90.6 Records

The Department has added a requirement that the housing provider post at the housing site an informational poster and decal provided by the Department that verify that the facility has been inspected and advise workers of their rights. We commend this proposed change, since such a posting requirement will support the Department's goal of spreading awareness of the licensing program among workers.

Proposed § 90.8 Administrative Penalties and Sanctions

The Department has proposed to clarify that penalties be assessed on a per-day, per-violation basis. This eliminates ambiguities regarding enforcement and empowers the Department to fine violators of the law appropriately. As discussed above, it has been our experience that active enforcement programs generate better outcomes for worker housing. We welcome the Department's efforts in enforcing these regulations.

Grower advocates have voiced concern that the Department should not assess fines for dates before the date with which a grower is given official notice by the Department of a violation. We believe that codifying such a proposal this in the regulations would severely negatively impact the Department's enforcement of the statute, which would have a corresponding negative impact

on the quality of farmworker housing in Texas. As we have discussed above, in our experience delivering legal services to migrant farmworkers in seven states, as well as our familiarity with the state of farmworker housing nationwide, states that have a more aggressive enforcement regime see returns in a better overall quality of farmworker housing.

Further, we believe the growers' concerns are unfounded. The regulations as worded give the Department the discretion to reduce fines or to decide not to issue fines at all. Should the Department believe that a fine should not be assessed for a violation where the housing provider was not on notice, the Department need not write that into the rule – it can simply exercise its existing discretion. Writing that limitation expressly into the rule would hamstring the Department's ability to enforce the law in cases where the violation is plain (such as where structural deficiencies could not have developed overnight), or where violations have been properly documented by those living on the property (but where the TDHCA arrives to conduct an inspection sometime after having received the documentation). The proposed changes would have the contrary effect of decreasing housing providers' day-to-day concern about housing conditions, and hence, the housing's overall quality. Instead, the proposed revisions would incentivize housing providers to bury their heads in the sand with respect to violations in the housing that they provide, since the Department could only fine them after providing formal notice to them of the violative conditions (conditions often which exist on property which the Provider themselves control, including access thereto).

We again thank the Department for the opportunity to provide public comment on these regulations as well as the opportunity to provide stakeholder feedback to the Department outside of the formal rulemaking process. Should you have any questions or wish to discuss these comments any further, please do not hesitate to contact us.

Sincerely,

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Encl.:

- Lawsuits filed by TRLA on behalf of migrant farmworkers subjected to poor housing conditions against AJK Enterprises, Borders Melon, Village Farms, and Wade Pennington & Sons.
- H-2A job order for Longoria Farms
- TDHCA internal audit of migrant farmworker housing program

March 22, 2024

Attn: Wendy Quackenbush
Texas Department of Housing and Community Affairs
Rule Comments
P.O. Box 13941
Austin, Texas 78711-3941

RE: Migrant Labor Housing Facilities Public Comment

To whom it may concern:

Thank you for the opportunity to comment on the Migrant Labor Housing Facilities rules. We offer the following comments.

Sincerely,

Texas Housers
Sidney Beaty, Research Analyst

Motivation, Education, & Training, Inc. (MET)
Stacey Taylor, Executive Director

Tierra del Sol Housing Corporation
Rose Garcia, Executive Director

Kathy Tyler

Please contact Sidney Beaty at Texas Housers with any questions: sidney@texashouing.org

We support proposed language that clarifies and strengthens the enforcement of state standards.

- §§90.3(c) and 90.5(i)(5): Automatic failure of an applicant that does not facilitate an inspection or allow access to all units during the inspection is an appropriate enforcement response.
- §§90.5(i) and 90.5(m): Clearly stating that TDHCA can conduct follow-up inspections or new inspections in cases where changes are made to an issued license will help address issues that arise mid-season or during occupancy.
- §§90.7(b) and 90.7(b)(4): Administrative penalties for retaliatory action and providing licensees that are the subject of complaints a copy "of the substance" of the complaint (as opposed to the complaint itself) will help protect workers' anonymity and ability to advocate for themselves.

§90.4(c)(1)

We support the addition of required carbon monoxide detectors in units with gas or other combustible fuel. However, we recommend that carbon monoxide detectors should be required for all units in line with US Consumer Product Safety Commission recommendations.[1] Carbon monoxide poisoning was a major cause of death during Winter Storm Uri as people used stoves, grills, and other dangerous means of heating their homes.[2] This is also a concern in the wake of hurricanes and other natural disasters, as people may try to use generators with improper ventilation when the power goes out.[3] In cases where misuse of equipment unintentionally leads to harm, such as during Winter Storm Uri or in the wake of natural disasters, carbon monoxide detectors can save lives.

§§90.2(8) and 90.4(c)(12)

We support the proposed requirement that a separate bed and bedding be provided for each worker or couple, and we support the language used to define couple. However, TDHCA should add language to require a "bed **with a clean mattress** and bedding" to align with ETA standards at 20 CFR §654.416(a) and range housing standards at 20 CFR §655.235(l). TDHCA should also update the language so that each couple must be provided a queen size mattress, bed, and bedding.

§90.4(c)13

TDHCA should add a new item under §90.4 to bring back a requirement for a four-burner stove. Former Migrant Labor Housing Facilities rules required a working four-burner stove when workers or their families cooked in their individual units and at least one working four-burner stove per 10 persons or two families when cooking and eating takes place in communal rooms or buildings separate from sleeping accommodations.[4] Current rules would allow the use of hot plates, which pose a major fire risk and are particularly prevalent in hotel or motel housing accommodations that lack cooking facilities.

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[1] US Consumer Product Safety Commission. (January 18, 2001). *CPSC Recommends Carbon Monoxide Alarm for Every Home.* www.cpsc.gov/Recalls/2001/cpsc-recommends-carbon-monoxide-alarm-for-every-home

[2] Texas Health and Human Services. (December 31, 2021). *February 2021 Winter Storm-Related Deaths – Texas.* www.dshs.texas.gov/sites/default/files/news/updates/SMOC_FebWinterStorm_MortalitySurvReport_12-30-21.pdf

[3] Iqbal, S., Clower, J.H., Hernandez, S.A., Damon, S.A., & Yip, F.Y. (October 2012). A Review of Disaster-Related Carbon Monoxide Poisoning: Surveillance, Epidemiology, and Opportunities for Prevention. *American Journal of Public Health*, 102(10), 1957-1963. doi.org/10.2105/AJPH.2012.300674

Stevens, B.R., & Ashley, W.S. (April 2022). Fatal Weather-Related Carbon Monoxide Poisonings in the United States. *Weather, Climate, and Society*, 14, 373-386. doi.org/10.1175/WCAS-D-21-0130.1

[4] 10 TAC §90.2(e)(1)(A) and (2)(A), archived September 19, 2017. https://web.archive.org/web/20170919035700/https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=10&pt=1&ch=90&rl=2

§90.5(d)

As has been discussed in public comment in prior years, a higher application fee would result in more funding for enforcement and better outcomes for workers and their families.[5] TDHCA should strike language that lowers the application for facilities that have been previously inspected and approved. If the language is to remain, we recommend removing the proposed change from "may" back to "will" to ensure that inspection actions result in appropriate application fees and enforcement funding.

§90.5(h)

TDHCA should clearly describe what documentation can be used to ensure state standards are being followed. The current description of the self-certification process is vague, which makes it hard to establish how thorough that process might be or how it might be improved.

§90.5(i)(3)

In line with past Texas Housers comments relating to Administrative Penalties and Debarment rules submitted in January 2024, we advocate for the inclusion of meaningful penalty floors to ensure that enforcement actions are impactful. The current rules allow the Director to reduce the penalty to "not less than $200," the one-day maximum fine for a violation under §90.8(b). The minimum fee that the Director can require should not be such a low flat number, and TDHCA should consider enacting a separate minimum in cases where violations impact the health and safety of workers and their families.

[5] Texas Department of Community Affairs. (October 10, 2019). *Governing Board Meeting*. www.tdhca.texas.gov/sites/default/files/board/transcripts/191010-board.pdf p. 87