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EPA moves to reject Texas air quality rules

The federal Environmental Protection Agency (EPA) recently indicated its intent to disapprove three of Texas' rules for issuing air quality permits. The rules are part of revisions to the State Implementation Plan (SIP), the state plan that shows how Texas intends to comply with requirements of the federal Clean Air Act.

The Texas Commission on Environmental Quality (TCEQ) is now drafting comments on EPA's proposed disapproval notice on three potential SIP air quality permit rule revisions:

- flexible permits that allow for an overall emissions cap at a site, rather than for individual units;
- changes that allow certain facilities ("qualified facilities") to make operational changes without obtaining a permit modification from TCEQ; and
- implementation of changes to federal new source review, which requires facilities that emit air contaminants to obtain a state and possibly a federal new source review permit when they construct new facilities or modify existing ones.

In addition, last November, EPA determined that TCEQ's rules on public participation in the rulemaking process contain some provisions that are not consistent with federal requirements and therefore cannot be fully approved, while others meet or exceed federal requirements.

The public comment period for EPA's disapproval of TCEQ's air quality permit rules is set to end November 23, and final action by EPA is scheduled for March 31, 2010, for the qualified facilities rule; June 30, 2010, for the flexible permits rule; and August 31, 2010, for the new source review changes. The public comment period for the public participation rules ended in January 2009, and the EPA's deadline for final action is November 30.

SIP revisions submitted to EPA

Texas' new source review program, which requires prior authorization to begin construction or modification of stationary sources of air contaminants, has been approved as part of its State Implementation Plan (SIP) since 1992. Since then, the state has submitted about 25 regulatory changes as revisions to the SIP. After being adopted as rules by TCEQ, revisions to the SIP are submitted to EPA for approval (*see State Implementation Plans, p. 3*). It is standard practice to implement state air permit rule revisions before they are approved by EPA, but the adopted rules are not federally enforceable until EPA approves them. The time period between when

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Governor's authority to issue posthumous pardons considered

While Gov. Rick Perry has said he does not have authority under the Texas Constitution or laws to grant posthumous pardons, others have said that such pardons, issued after the death of a person convicted of a crime, could be issued under current law. A proposal that would have amended the Texas Constitution to allow posthumous pardons failed to be adopted by the 81st Legislature during its 2009 regular session.

At the request of Sen. Rodney Ellis, the Texas Legislative Council issued a memo in July determining that under one interpretation of Texas law, the governor may have authority to grant a posthumous pardon but that its validity would depend on how a court considering a challenge to such a pardon interpreted certain legal doctrines. Sen. Ellis cited the memo in a request to the attorney general for an opinion on whether the governor may, under current law, grant a legally effective posthumous pardon.

The issue has been driven, in part, by the case of Timothy Cole, a Texas Tech student who was wrongfully convicted of rape and died in prison after

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a rule is adopted by TCEQ and when it is approved by EPA, commonly referred to as the "SIP-gap," has been as long as 15 years in the case of some of the Texas rules EPA recently moved to disapprove. For example, the flexible permits rule was submitted to EPA for review and approval in 1994 and has been legally binding and enforceable under state law, but not federal law, for 15 years.

Although EPA periodically has questioned whether the state air permitting program satisfies all federal requirements, no formal action ever has been taken to approve or disapprove 25 SIP air quality permit rule revisions. Some of the reasons for this delay include lawsuits challenging EPA rules and lingering disagreements with TCEQ over potential inconsistencies with federal air permitting regulations.

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In September 2007, EPA submitted a fair notice letter to a number of Texas industrial facilities holding flexible permits issued by TCEQ, advising them that the flexible permits did not necessarily reflect federally applicable requirements because they had not been approved by EPA as part of the SIP. In August 2008, the Business Coalition for Clean Air (BCCA) Appeal Group, the Texas Association of Business (TAB), and the Texas Oil and Gas Association (TxOGA) sued EPA for failing to perform its nondiscretionary duty to act on the Texas SIP. According to the plaintiffs, lack of formal action from EPA on these SIP air quality permit rule revisions has left permit holders and those who have applied for permits legally vulnerable and unable to make necessary business decisions because of uncertainty about whether or when their permits would become federally enforceable.

In July 2009, EPA settled the 2008 lawsuit, reaching an agreement with the plaintiffs on the timing of federal review to take final action on the proposed SIP air quality permit rule revisions. The proposed consent decree and settlement agreement was filed in federal court and published in the September 23, 2009, *Federal Register*. Of the about 25 proposed revisions awaiting formal action, the first three proposed permitting rule changes to be addressed, along with the public participation rule, are flexible permits, changes to qualified facilities, and various rule revisions intended to implement revisions to new source review (NSR) . EPA is required to take final action on all of TCEQ's 25 pending SIP submittals by December 31, 2013.

Disapproval of proposed permitting rules

Under Texas' air permitting program, any person who plans to construct a new facility or modify an existing facility that emits air contaminants must obtain a state and possibly a federal new source review (NSR) permit from TCEQ. The rules for flexible permits and "qualified facilities" are mechanisms used by TCEQ under state new source review to authorize the operation of facilities that emit air contaminants. TCEQ has been issuing permits under these rules for up to 15 years in some cases.

Flexible permits. The flexible permit rule allows for an overall emissions cap at an entire site, rather than for individual units, such as valves and tanks. Caps are based on what emissions would be if "best available control technology" were applied to all units under the cap. The company is free to over-control some sources and under-control others as long as the total emissions at the site are below the cap.

The flexible permits rule originally was developed by TCEQ as an incentive for grandfathered facilities to come forward and be permitted in order to reduce emissions. In 2001, the 77th Legislature made the permitting of previously grandfathered facilities mandatory, but the permit rule still is used as an incentive to reduce emissions.

EPA expressed concerns that federal new source review is not being conducted under the flexible permits rule and wants emissions limits that apply to individual units rather than to an entire site. They expressed

concerns that the permits create problems with the practical enforceability of national ambient air quality standards (NAAQS). The agency also expressed concerns about insufficient opportunity for public participation throughout the permitting process for flexible permits.

TCEQ may need statutory authority from the Legislature to re-issue NSR permits if EPA, in its final action, rejects Texas' flexible permits and TCEQ must re-issue them to comply with SIP-approved rules.

Qualified facilities. The "qualified facilities" rule allows facilities, usually chemical plants and refineries, that meet certain criteria to make physical or operational changes without obtaining a permit modification from TCEQ as long as the change will not result in a net increase in allowable emissions of any air contaminant or the emission of an air contaminant not previously emitted. For example, if a chemical plant had two storage tanks, each with an established allowable emissions level, and the plant wanted to increase the allowable emissions above the current permit limit in one tank, it could do so by providing a corresponding decrease in allowable emissions in the other tank. According to TCEQ, this rule is intended to provide additional flexibility for these facilities and streamline the permitting process so that TCEQ is not required to continue reviewing a facility that already is well controlled.

The qualified facilities program was created by the 74th Texas Legislature in 1995 through SB 1126 by Nixon. It amended the Texas Clean Air Act by revising the definition of "modification of existing facility." Under the qualified facilities rule, a facility is a "qualified facility" if it was issued a permit or permit amendment or was exempted from pre-construction permit requirements

State Implementation Plans (SIPs)

A State Implementation Plan (SIP) is an enforceable plan developed at the state level that explains how the state will comply with air quality standards under the federal Clean Air Act. A SIP must be submitted by state governments of those states with areas designated as being in "nonattainment" of federal air quality standards. Nonattainment areas are those that have failed to meet federal standards for ambient air quality. "Near nonattainment" areas are those that currently meet federal standards but are at risk of violating them.

The current non-attainment areas of Texas are:

- El Paso, for carbon monoxide and particulate matter; and
- Houston-Galveston-Brazoria, Dallas–Fort Worth, and Beaumont–Port Arthur, for eight-hour ground-level ozone.

The Texas SIP includes 14 sections. Section VI, titled Control Strategy, details the state's effort to meet national ambient air quality standards by describing the targets, plans, and control strategies for each nonattainment area, as well as the implementation plans for specific strategies required by EPA. Section VI is the only section that is continually revised and updated.

The initial phase of SIP revisions — during which data is collected and modeled, control strategies are proposed and tested, and the revision is drafted — typically requires three to four years. The SIP revision then is sent through TCEQ's formal rulemaking process, which involves publishing the proposal, public meetings, hearings, review of public comments, and adoption by TCEQ's commissioners. This usually takes about six months. Once a SIP revision is adopted by TCEQ, it is legally binding and enforceable under state law. After adoption, the revision is submitted to EPA for review and approval. The SIP revision is federally enforceable only after it has been approved by the EPA. When a SIP revision is not federally approved and enforceable, EPA could require the state to change its rules, or if necessary, replace the state rules with federal rules.

within the last 10 years, or if it uses air pollution control methods that are at least as effective at the best available control technologies required by a permit issued in the last 10 years.

In its notice indicating its intent to disapprove the rule, EPA expressed concerns that facilities are allowed to make modifications without formal review by the state and without public notice. State statute determines when an action, such as an operational change, is not a modification, and EPA has said this may conflict with federal law, which defines what is a modification, rather than what is not.

Federal New Source Review (NSR) revisions. After EPA revised its rules in 2002 in an attempt to provide more certainty about when federal new source review would be required, TCEQ adopted revised rules in an effort to conform, inadvertently deleting some definitions. EPA has expressed concerns about eliminating references to federal rules that are an integral part of the federal permitting program.

After the D.C. Circuit Court of Appeals subsequently struck down a portion of the federal rules, TCEQ tried to clarify in a rulemaking that use of a certain pollution control permit could not result in a level of emissions that would trigger a need for the portion of federal new source review struck down by the court. EPA has expressed concerns that TCEQ has not adequately clarified this in its rules.

Public participation. The Texas Legislature in 1999 enacted HB 801 by Uher, which revised notice requirements for permit applications to include deadlines for issuing public notice, a comment period, and an

Texas Clean Air Act

The Texas Clean Air Act (TCAA), established under Texas Health and Safety Code, ch. 382, governs all air quality permitting in the state and implements the federal Clean Air Act. The TCAA requires authorization for emissions of air pollutants. The federal permitting program requires states to evaluate six outdoor air pollutants — ground-level ozone/smog (O3), particulate matter (PM), nitrogen dioxide (NO2), carbon monoxide (CO), lead (Pb), and sulfur dioxide (SO2) — for which there are national ambient air quality standards (NAAQS).

The federal Clean Air Act is the legal foundation for the national air pollution control program. It requires each state to produce and regularly update a State Implementation Plan (SIP) (*see page 3*), which must include a description of control strategies, or measures to deal with pollution, for areas that fail to achieve NAAQS.

The federal Clean Air Act grants EPA enforcement powers and authority to establish national air quality standards, to approve or reject SIPs, to replace SIPs with Federal Implementation Plans (FIPs) when deemed necessary, and to monitor the achievement of goals laid out in SIPs and FIPs.

NAAQS, established by EPA**,** are based on criteria pollutants, which are commonly occurring air pollutants that can injure health, harm the environment, or damage property. The NAAQS set nationally acceptable levels of concentrations of these pollutants. SIP revisions are mandatory in nonattainment areas — those that fail to meet the NAAQS. If a state fails to submit or implement a SIP, or if it submits a SIP that is unacceptable to EPA, then EPA may impose sanctions or other penalties on the state. Typical sanctions include cutting off federal highway funds and setting more stringent pollution offsets for certain emitters. Offsets are the reduction of current emissions at a rate equal to or greater than the amount of emissions expected to be produced in a new project.

opportunity for public hearing. EPA expressed concerns in its recent notice that, under the revised rules for new source review, some notice requirements were insufficient and only those considered to be "affected parties" could comment on certain permits.

If EPA were to adopt its proposed limited disapproval of the state's public participation process, the state could be subject to sanctions, such as loss of federal highway funds, for failure to comply within 18 months of final disapproval. If EPA determined that existing permits were not federally enforceable and had to be re-issued under federally approved public participation rules, TCEQ would need statutory authority from the Legislature to recall permits to be re-issued.

Debate on Texas air rules

Supporters of EPA action to disapprove the Texas SIP revisions say that ending certain TCEQ rules, such as authorizing flexible permits and changes to qualified facilities, would reduce emissions by providing more controlled, transparent regulation. Texas is home to more oil refineries, chemical manufacturing plants, and coal-fired power plants and produces more electricity than any other state, and for 15 years, state regulations have allowed these powerful industries to skirt clean air standards. The current industry-friendly permitting process has been criticized as being merely a rubber stamp, and according to EPA, no other state gives polluters the flexibility for controlling emissions that Texas does. In its recent notice, the agency cited problems with the permit program's enforcement, monitoring, record keeping, and public participation, among other concerns.

Several groups, including the Environmental Integrity Project, Sierra Club, Galveston-Houston Association for Smog Prevention, and the Environmental Defense Fund have said that years of running a "rogue program" in Texas have resulted in thousands of facilities operating under state-issued permits that do not meet federal standards. Public Citizen said the state has gotten too comfortable with allowing substandard permits through TCEQ and that air quality has suffered as a result. The EPA actions would ensure the environmental protections required by federal law.

For example, flexible permits have allowed about 150 plants and refineries to exceed toxic emissions limits for one stack if they can average out the violation across the plant-wide cap. The flexible permits allow a high plant-wide emissions cap in order to avoid state violations. This is a circumvention of federal new source review, which prohibits such permits.

TCEQ's regulatory scrutiny of flexible permits also is seriously lacking because of an application process without public involvement. TCEQ technical reviews are inadequate and lack public input on toxic hotspots, such as the Houston Ship Channel area. In addition, no public participation was allowed during the permitting process for the large air emissions of grandfathered plants. While flexible permits were approved for projects with large net reductions in emissions, a lingering public question is whether the projected net reductions were sufficient to clean up old, dirty facilities or if larger reductions should have been required under NSR permits.

Houston, one of the most chemically polluted regions in the United States for ozone smog and air toxics, has the highest concentration of flexible permits in Texas, with 34 plants in Harris County, including two dozen plants sited along the industrialized Houston Ship Channel and 50 plants with emissions affecting ozone-smog levels in the Houston-Galveston-Brazoria ozone nonattainment region. Air toxics pollution and ozone-smog are made worse by the higher levels of emissions from dirty plants with flexible permits in the Houston ozone nonattainment region and other communities.

In many cases, including Houston, Texas City, Beaumont, Port Arthur, and Corpus Christi, the plants with the flexible permits are the largest sources of toxic and criteria air pollution in the communities. The reductions in pollutants touted by TCEQ and the industries is not enough — especially for pollutants that cause cancer, such as benzene and ground-level ozone.

Environmental quality and public health have been compromised for economic growth. Changes to the existing permitting program may prove costly to companies, but would help alleviate costly long-term health problems being caused by toxic emissions.

Opponents of EPA action to disapprove the Texas SIP revisions maintain that current rules protect public health and comply with federal requirements. TCEQ officials say their system has been successful in reducing air emissions in Texas. For example, flexible permits have helped reduce thousands of tons of emissions, such as cancer-causing benzene and ground-level ozone levels in the Houston area, which is home to the bulk of the state's oil refineries and chemical plants. Changing the flexible permits rule could have a big impact on how efficiently and effectively air emissions would be reduced. "We hope the EPA will consider the actual emission reductions achieved through our state programs and will continue to build on those successes," TCEQ Executive Director Mark Vickery said in a statement in October.

While Texas produces more electricity than any other state, it does so with fewer emissions per megawatt than all but a few states, including many states that are smaller, that import some of their power, or that have access to more nuclear or hydro power than Texas. Despite the active industrial sector in the state, Texas' current air quality permitting program not only meets federal regulations but provides several rules that are more stringent than what is required by federal law, such as TCEQ's public participation rules. For example, TCEQ requires a contested case hearing for each hearing request, while EPA requires only a notice and comment period.

Eliminating the existing air quality plan in favor of more rigid standards would hurt industries crucial to the Texas economy, and the costs of compliance could be passed on to consumers. Plants could be forced to spend millions of dollars to upgrade pollution control equipment, which could, in turn, raise the price of gas, tires, carpet, upholstery, and other products that pass through Texas facilities.

It is too early to know how the rules will change or how much it will cost, but these actions by EPA could hinder industries that employ thousands of people and pay billions in state and local taxes. The oil and gas industry alone provides about 190,000 Texas jobs and paid about $10 billion in state and local taxes and royalties last year, according to the Texas Oil and Gas Association. The chemical industry employs about 74,000 Texans and last year paid $1 billion in state and local taxes.

Depending on final EPA action, TCEQ might need to make rules that EPA could approve and work to issue air quality permits for facilities that currently are operating under disapproved rules. It would be a huge undertaking for TCEQ to reissue the thousands of permits affected by EPA action. This would leave permit holders in limbo until a new permit was issued.

It is unclear how permit holders operating for years under disapproved permits would be affected with respect to possible penalties. It also is unclear what the effects would be on capital investments, such as new facilities or equipment, that could prove to be out of compliance with new rules, especially during a time of economic recession, creating further uncertainty for permit holders.

— by Blaire Parker

Posthumous pardons, *from page 1*

serving 13 years of a 25-year sentence. After a petition from members of Cole's family asked a court to clear his name, Travis County District Judge Charles Baird convened a court of inquiry. A district court in Lubbock County previously had denied the Cole family's request. In April, Judge Baird issued an opinion saying that "Tim Cole was, and is, innocent of the crime for which he was convicted and imprisoned and is thus exonerated by this court." While discussions of posthumous pardons often mention Timothy Cole as a candidate for such a pardon, the Board of Pardons and Paroles has not received a formal request for a pardon in the Cole case.

Current process for receiving a pardon

Texas Constitution, Art. 4, sec. 11(b) and Code of Criminal Procedure, art. 48.01 authorize the governor to grant pardons to persons convicted of crimes. The governor may exercise this authority, a type of clemency, only upon the recommendation of the Board of Pardons and Paroles and in all criminal cases except treason and impeachment. These constitutional and statutory provisions are silent about posthumous pardons and do not expressly authorize or prohibit them.

Three types of pardons are issued in Texas: full pardons, conditional pardons, and pardons based on innocence. Full pardons restore a person's citizenship rights that were forfeited with a criminal conviction, including the right to serve on a jury and the right to hold public office. A conditional pardon imposes conditions upon someone who has been released from custody and can be revoked by the governor if the conditions are not met.

Discussions of posthumous pardons generally center on pardons based on actual innocence. Requests for pardons based on actual innocence are considered by the Board of Pardons and Paroles upon submission of either:

- a written recommendation of at least two of the current trial officials of the convicting court, with one trial official submitting documentary evidence of actual innocence; or
- a certified order or judgment of a court having jurisdiction, accompanied by a certified copy of the findings of fact and conclusions of law, in which the court recommends that the Court of Criminal Appeals grant state habeas relief, a type of challenge to a conviction, on the grounds of actual innocence.

Evidence of actual innocence submitted under the first set of criteria must include the results and analysis of pre-trial and post-trial DNA tests or other forensic tests, if any, and may include affidavits of witnesses upon which the recommendation of actual innocence is based.

In fiscal 2008, the Board of Pardons and Paroles considered one request for a pardon based on innocence. It recommended to the governor a pardon in the case, and the governor granted it. In fiscal 2007, it considered six requests for pardons based on innocence and recommended pardons in five of those cases. The governor approved three.

The Board of Pardons and Paroles does not process or track requests for posthumous pardons and reports that it currently does not have any such requests pending.

Current law on posthumous pardons

In July, the Texas Legislative Council issued a memorandum to Sen. Ellis determining that under current law a posthumous pardon issued by the governor could be valid or could be invalid, depending on how a court ruled in considering a challenge to such a pardon. Sen. Ellis has since requested an attorney general's opinion on the question.

Legislative Council memo. The Texas Constitution and the Code of Criminal Procedure are silent on the question of posthumous pardons, and no Texas court has squarely answered the question, according to the Texas Legislative Council. The council outlined two possible interpretations that could be used by a Texas court hearing a challenge to a posthumous pardon:

- A pardon would be invalid under a 1965 attorney general's opinion (C-471 (1965)), which states that the governor may not grant a legally effective pardon to a deceased person because Texas case

law requires pardons to be "accepted" in order to be legal, something that could not be done by a deceased person; or

- A pardon would be valid if the "public welfare test," as outlined by the U.S. Supreme Court in 1927 and affirmed by the court in 1974, were applied. Under this test, public welfare interests determine whether a pardon can be granted, and a pardon can be legal regardless of whether it is formally accepted.

The memo also noted that two posthumous pardons have been issued by presidents of the United States and that governors of several states have issued such pardons. In 1999, President Bill Clinton granted a posthumous pardon to Lt. Henry Ossian Flipper, the first African-American West Point graduate. Flipper received a dishonorable discharge from the military in 1881 after a court marshal trial, in what supporters of the pardon called a miscarriage of justice. In 2008, President George W. Bush pardoned the late Charlie Winters, convicted of violating the federal Neutrality Act by smuggling arms to Israel.

Legislation that would have changed Texas law specifically to authorize these pardons was considered by the 81st Legislature but not enacted.

Gov. Perry has stated he believes the governor does not have authority under current law to issue a posthumous pardon. He has cited the 1965 attorney general's opinion that pardons must be accepted in order to be legally effective.

Others argue that under current law the governor has authority to grant posthumous pardons because an attorney general's opinion is not binding on the governor and nothing in current law expressly prohibits this type of pardon. The legal theories requiring pardons to be accepted rely on outdated cases, according to those who support the legality of the pardons, and the issue should be governed by the "public welfare" test outlined in later cases. They also point out that a new law, HB 1736 by Anchia, which authorizes family members of persons posthumously pardoned to receive compensation from the state, implies that posthumous pardons are legal in Texas.

Request for attorney general's opinion. In July, Sen. Ellis requested an attorney general's opinion on whether the governor has authority to grant a legally effective posthumous pardon. He cited the Legislative Council's memo and asked questions focusing on four areas:

- whether the governor may grant a legally effective posthumous pardon under the law at the time of the request for the opinion or under state law since HB 1736 went into effect on September 1, 2009;

- whether the July 28, 1965, attorney general's opinion (No. C-471) is legally binding on the governor or whether he may issue a posthumous pardon upon recommendation of the Board of Pardons and Paroles;

- who has standing, and on what grounds, to challenge a governor's pardon, posthumous or otherwise, what the process is for challenging a pardon, and whether an appeals process is available if a challenge to a pardon is unsuccessful; and

- under current law, whether the Board of Pardons and Paroles is constitutionally authorized to recommend a posthumous pardon.

Proposals considered by the 81st Legislature

While the discussion now centers on whether current law allows posthumous pardons, legislation that would have changed Texas law specifically to authorize these pardons was considered by the 81st Legislature but not enacted. However, another law that became effective September 1, 2009, refers to such pardons.

During the 2009 regular session, two proposed constitutional amendments that would have authorized posthumous pardons were reported favorably by the House Corrections Committee but never considered by the full House. The proposed amendments contained identical language that would have authorized the

governor to issue posthumous pardons for actual innocence, upon recommendation of the Board of Pardons and Paroles. The House Corrections Committee added the posthumous pardon provision to the Senate-adopted version of SJR 11 by West, which was placed on the May 20 Constitutional Amendments Calendar but was not considered by the House. The companion measure, HJR 98 by Thompson, was reported favorably by the Corrections Committee but died in the Calendars Committee. Both resolutions also would have expanded the governor's authority to grant pardons, reprieves, and commutations to include cases in which a person had successfully completed a term of deferred adjudication. Enabling legislation for this provision was included in SB 223 by West, which was vetoed by the governor because the constitutional authorization failed to be adopted.

HB 1736 by Anchia, effective September 1, 2009, refers to posthumous pardons without explicitly authorizing them. The bill, the Tim Cole Act, revises the law that entitles certain wrongfully imprisoned persons who have received a full pardon based on innocence or who have been granted relief on the basis of actual innocence to compensation from the state. Under the law, if a deceased person would be entitled to compensation, including someone who received a posthumous pardon, the person's heirs, legal representatives, and estate are entitled to compensation as a lump sum.

Debate on constitutionally authorizing posthumous pardons for innocence

Debate about amending the Texas Constitution to specifically authorize the governor to issue posthumous pardons centers on whether the pardons are necessary to ensure justice in certain cases in which the accused has died or whether the pardon system should focus on cases involving living persons. Also at issue are details about how a system of posthumous pardons would operate and who would establish it.

Supporters of amending the Texas Constitution to authorize posthumous pardons say that an amendment authorizing the governor to issue posthumous pardons for actual innocence would improve the state's handling of cases of wrongful criminal convictions. The wrongful conviction of an innocent person is a miscarriage of justice that carries with it a moral obligation for the state to correct the injustice. Issuing a posthumous pardon to an innocent person would help meet that obligation by restoring the good name of a person wrongfully convicted, bringing peace to their families, and allowing them to receive the compensation they deserve. Allowing posthumous pardons for those who deserve them would help build a more just legal system in Texas.

If the state allows pardons for innocence when the accused is alive, there is no reason to prohibit such pardons for the deceased. The consideration of posthumous pardons would not tax the resources of the criminal justice system nor harm the established system because there would be only a small number of these special cases. Allowing third parties to be involved in pardon requests would be analogous to allowing their involvement in cases of compensation for wrongful convictions.

Amending the Constitution to authorize posthumous pardons would clear up any questions about the governor's authority or the state's policy in this area. Authorizing the governor to grant such pardons would not make them mandatory. Pardon requests could be required to go through the standard process and be vetted and approved by the Board of Pardons and Paroles and the governor.

Opponents of amending the Texas Constitution to authorize posthumous pardons say that pardons are designed to exempt persons from punishment for a crime, and the state's limited resources should focus on persons who are alive. Allowing third parties to apply for pardons for the deceased would be a move away from the traditional structure of the criminal justice system, which allows only two parties to be involved in a case: the state and the defendant.

Key questions. Details about how and when posthumous pardons could be requested and granted are part of the debate on the issue. Some argue that these details should be decided by the Legislature and not left to the Board of Pardons and Paroles, the Governor's Office, or some other entity.

Key questions about establishing a process for posthumous pardons include:

- Who would be authorized to request a posthumous pardon on behalf of a deceased person?
- Under what circumstances, such as actual innocence, could the pardons be requested?
- Would consideration of a pardon request be part of the judicial process or the clemency process?
- If a pardon were requested on the basis of actual innocence, what entity would decide the question of innocence and what entity would be the fact finder if new evidence were available?
- Would a recommendation from the Board of Pardons and Paroles be required?
- Would there be a process for challenging a posthumous pardon, and who would be authorized to make such a challenge?

— by Kellie Dworaczyk

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