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**Comments:** Re: Court of Appeals No. 03-10-00677-CV, *TJFA vs. TCEQ and BFI Waste Systems of North America, Inc.*

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ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 17, 2011

*Via hand delivery*

Mr. Jeffrey D. Kyle  
Clerk, Third Court of Appeals  
Price Daniel, Sr. Bldg, Room 101  
209 W. 14th St.  
Austin, Texas 78701

Re: **Court of Appeals No. 03-10-00677-CV**  
*TJFA, L.P. v. Texas Commission on Environmental Quality and BFI Waste  
Systems of North America, Inc.*

Dear Mr. Kyle:

Appellee, the Texas Commission on Environmental Quality (TCEQ), responds herein to a May 2, 2011, letter with the heading "Notice of Filing of Supplemental Authority" sent to you by Mr. James Hemphill, counsel for appellant TJFA, L.P. Would you please bring my letter to the attention of the Court? I am providing you the original and six copies of it and serving copies on all counsel.

Contrary to TJFA's argument, a recent Supreme Court opinion, *Roccaforte v. Jefferson County*, 2011 WL 1661445 (Tex. 2011), is neither (to use TJFA's words) "directly on point" nor "dispositive" of this appeal.

**TJFA improperly confuses citation and notice.**

In *Texas Natural Resource Conservation Commission v. Sierra Club*, 70 S.W.3d 809 (Tex. 2002), the Supreme Court wrote extensively about the difference between citation and notice, noting that the words "are by no means synonymous." *Id.* at 813. The Court discussed in detail Texas Health and Safety Code § 361.321(c), the service of citation provision at issue in the present case. The justices wrote that the provision "requires 'service of citation' when review is sought in district court," "controls the service requirements that apply to the [Commission]," and "dictates that citation be served on the [Commission]." 70 S.W.3d at 813, 814 (emphasis added). The Court also used the phrase "judicial-review prerequisites" when referring to, *inter alia*," § 361.321(c). 70 S.W.3d at 812 (semble).

***Roccaforte* did not concern service of citation requirements.**

*Roccaforte* was about a Texas Local Government Code section requiring notice<sup>1</sup> to certain county officials after a county is sued. A provision in an entirely different code addresses service of citation: “[i]n a suit against a county, citation must be served on the county judge.” Texas Civil Practice and Remedies Code § 17.024(a).

The high court held that the Local Government Code post-suit notice requirement was not jurisdictional. 2011 WL 1661445, star page 5. Observing that Court of Appeals cases already had come out the same way, *id.*, the justices considered the possible effect of the 2005 amendment to Texas Government Code § 311.034 (“Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a government entity.”), and held the amendment had not made the notice provision jurisdictional.

The intermediate appellate panel in *Roccaforte* had written that the county judge was served with citation within thirty days after suit was filed, in compliance with Civil Practice and Remedies Code § 17.024(a). *Roccaforte v. Jefferson County*, 281 S.W.3d 230, 236 (Tex.

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1. Part of a chapter entitled “General Provisions Relating to County Administration,” and headed “Notice of Suit Against County,” the section says:

- (a) A person filing suit against a county or against a county official in the official’s capacity as a county official shall deliver written notice to:
  - (1) the county judge; and
  - (2) the county or district attorney having jurisdiction to defend the county in a civil suit.
- (b) The written *notice* must be delivered by certified or registered mail by the 30<sup>th</sup> business day after suit is filed and contain:
  - (1) the style and cause number of the suit;
  - (2) the court in which the suit was filed;
  - (3) the date on which the suit was filed; and
  - (4) the name of the person filing suit.
- (c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

Texas Local Government Code § 89.0041.

App.–Beaumont 2009), *rev'd*, 2011 WL 1661445 (Tex. 2011).<sup>2</sup> Thus, in *Roccaforte* there was no issue relevant to the present case. Nor was there a timeliness-of-service-of-citation issue in any of the Court of Appeals cases discussed by the Supreme Court in the relevant section of its *Roccaforte* opinion, 2011 WL 1661445, star page 5. Those cases concerned only the post-suit notice provision in the Local Government Code. Most of the opinions said that service of citation had been timely,<sup>3</sup> showing judicial observance of the difference between citation and notice.

**When a statute specifies a deadline for service of citation, the deadline is jurisdictional.**

This Court recently has addressed timely filing of suit and service of citation in *Brooks v. Burnet Central Appraisal District*, 306 S.W.3d 419 (Tex. App.–Austin 2010, no pet.). *Brooks* concerned an appeal from a county appraisal review board's denial of a property tax protest. At the time, the applicable statutory provision, Texas Tax Code § 42.21(a), provided that a petition for review must be filed within 45 days of receipt of the appraisal review board's final order. The citation provision, in subsection (d) in the same section, said:

An appraisal district is served by service on the chief appraiser at any time or by service on any other officer or employee of the appraisal district present at the appraisal office at a time when the appraisal office is open for business with the public. An appraisal review board is served by service on the chairman of the appraisal review board. Citation of a party is issued and served in the manner provided by law for civil suits generally.

The plaintiff in *Brooks* had timely filed his suit but had not served process on the

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2. The court noted that Local Government Code § 89.0041 “may seem redundant or overly precautionary,” given the Civil Practice and Remedies Code requirement that citation in suits against a county be served on the county judge. 281 S.W.3d 230, 237, n. 3.

3. See *Ballesteros v. Nueces Cnty.*, 286 S.W.3d 566, 568-69 (Tex. App.–Corpus Christi 2009, pet. denied) (original petition had been filed on March 21, 2009, and citation had been served on March 29, 2006); *Dallas Cnty. v. Coskey*, 247 S.W.3d 753, 757 (Tex. App.–Dallas 2008, pet. denied) (plaintiff had substantially complied with § 89.0041 requirements because it had served the county judge with citation within thirty days of filing suit); *Dallas Cnty. v. Autry*, 251 S.W.3d 155, 158 (Tex. App.–Dallas 2008, pet. denied) (plaintiff substantially complied with § 89.0041 because the record showed the citation was issued and served on the county judge within thirty days after suit was filed); *Cnty. of Bexar v. Bruton*, 256 S.W.3d 345 (Tex. App.–San Antonio 2008, no pet.) (the same day plaintiff sued Bexar County, citation was served on the authorized agent for Bexar County).

The one case not directly accounting for whether or not citation was served, *El Paso County v. Alvarado*, 290 S.W.3d 895 (Tex. App.–El Paso 2009, no pet.), does mention that the county filed an answer. One can fairly infer that service of citation had occurred.

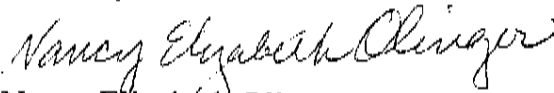
appraisal review board within 45 days of receipt of the final order. In analyzing the board's assertion that plaintiff's suit was properly dismissed by the trial court for lack of jurisdiction due to untimely service, this Court first looked to the statutory deadline for filing suit and wrote that compliance with *it* was jurisdictional. The Court then observed that "[w]hile subsection (d) . . . provides guidance on how an appraisal district or appraisal review board may be served, there is no indication that serving these parties within the time limit set forth in subsection (a) is a jurisdictional prerequisite." *Brooks*, 306 S.W.3d at 422.

The absence of a time limit in subsection (d) was the reason for the *Brooks* holding. 306 S.W.3d at 421-22. Page 421 of the opinion cited to *Texas Education Agency v. Donna Independent School District*, 221 S.W.3d 791 (Tex. App.—Corpus Christi 2007, no pet.), characterizing the court in that case as having "declin[ed] to 'impose service of citation within a very short limitations period as a jurisdictional prerequisite to suit' *in absence of direction from legislature.*" *Brooks*, 306 S.W.3d at 421 (emphasis added), quoting *Donna Independent School District*, 221 S.W.3d at 796. The reverse implication of the emphasized words, and of *Brooks* generally, is that a direction from the legislature *would* make the deadline for service of citation a jurisdictional prerequisite. The legislature gave precisely such a direction in the statutory provision applicable here, commanding that, for petitions for judicial review of TCEQ orders, "[s]ervice of citation must be accomplished not later than the 30th day after the date on which the petition is filed." Health and Safety Code § 361.321(c).

#### **Conclusion and request for relief.**

The TCEQ asks this Court to affirm the district court's dismissal. It continues to believe oral argument would be valuable.

Sincerely,



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