

CAUSE NO. D-1-GN-09-004062

TJFA, L.P.,

Plaintiff,

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Defendant.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

**PLAINTIFF TJFA, L.P.'S RESPONSE TO DEFENDANT
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S PLEA TO THE
JURISDICTION AND ALTERNATIVE MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, TJFA, L.P. ("Plaintiff") and files this its *Response to Defendant Texas Commission on Environmental Quality's Plea to the Jurisdiction and Alternative Motion to Dismiss*. Plaintiff asks the court to deny Defendant's motion to dismiss for lack of jurisdiction and retain Plaintiff's suit on the Court's docket. In support of this filing, Plaintiff would respectfully show the Court as follows:

I. INTRODUCTION

1. Plaintiff is TJFA, L.P. Defendant is the Texas Commission on Environmental Quality ("TCEQ" or the "Commission").

2. Plaintiff brought suit against Defendant seeking judicial review of the Commission's decision to grant the application for permit amendment of BFI Waste Systems of North America, LLC ("BFI") for an expansion of a municipal solid waste ("MSW") landfill (Permit No. MSW-1447A), known as the Sunset Farms Landfill, which lies in Travis County.

3. This Court has subject-matter jurisdiction over Plaintiff's suit and therefore should retain the suit on the Court's docket and deny Defendant's motion.

II. FACTS

4. On December 1, 2009, Plaintiff electronically filed its *Original Petition* against the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) with the Travis County District Clerk. On that same day, a copy of the *Original Petition* was served on Defendant and every other party to the underlying contested case hearing.

5. On the afternoon of December 1, 2009, Plaintiff received two e-mails in response to its electronically filed *Original Petition*. The first e-mail acknowledged receipt of the electronic filing and identified that the *Original Petition* had been “transmitted successfully to eFiling for Courts.” The second e-mail was a receipt for the fees assessed for filing the *Original Petition*.

6. It was Plaintiff’s counsel’s understanding that electronic filing of the *Original Petition* would also accomplish service of the citation. However, while counsel for Plaintiff received the aforementioned e-mails confirming that the filing had been received and that filing fees had been paid, counsel for Plaintiff did not receive the expected notice that service had been completed. Counsel for Plaintiff did not realize that either e-mail was instead an indication from the District Clerk’s office that the *Original Petition*, *i.e.*, the citation, was ready for service. Counsel believed that any delays in receiving confirmation that the citation had been served were associated with the holiday season.

7. Notice of the *Original Petition*’s readiness for service was provided to Plaintiff’s counsel via First Class mail, which was received by counsel for Plaintiff on January 8, 2010. The notice was mailed by the District Clerk’s office to an incorrect, former office address, although Plaintiff’s counsel’s current mailing address had been provided when the *Original Petition* was filed. However, Plaintiff’s counsel routinely checked the former office address for incorrectly addressed mail, and the mailing delay was only a day. Plaintiff’s counsel received

the notice regarding the *Original Petition* on Friday, January 8, 2010, and promptly obtained service of the citation the following Monday, January 11, 2010.

8. In a related proceeding, another protestant in the underlying contested case hearing, Northeast Neighbors Coalition (“NNC”) filed suit against the Commission arising out of the same decision of the Commission to grant the application of BFI for a major amendment to its Type I MSW Permit No. MSW-1447A. NNC’s suit against the Commission was filed on December 4, 2009, and is pending in the 126th Judicial District as Cause No. D-1-GN-09-004113.

9. Plaintiff attaches an affidavit to this response to establish facts not apparent from the record and incorporates that affidavit and related factual information by reference. *See* Attachment A, attached hereto and incorporated herein for all purposes.

III. ARGUMENT AND AUTHORITIES

10. Applicable case law does not support Defendant’s *Plea to the Jurisdiction, or, in the Alternative, Motion to Dismiss*. When a defendant asks the court to dismiss, the court must overrule the motion unless the pleadings and the parties’ evidence clearly demonstrate that the court lacks jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000); *see, e.g., State v. Sledge*, 36 S.W.3d 152, 155 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (trial court conducted hearing and received oral testimony, affidavits, exhibits, and stipulations). In ruling on the motion, the court is required to construe the pleadings and the evidence in the plaintiff’s favor. *See Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

11. Specifically, the plaintiff’s failure to comply with all statutory prerequisites does not remove the case from the court’s jurisdiction. As of 2000, the Texas Supreme Court has made clear that previous case law has been overruled “to the extent that it characterized the

plaintiff's failure to establish a statutory prerequisite as jurisdictional." *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

12. Furthermore, the Texas Court of Appeals has applied the Supreme Court's ruling in *Dubai* specifically to Section 361.321(c) of the Texas Health and Safety Code:

Section 361.321(c) of the Texas Health and Safety Code and section 2001.176(b)(2) of the APA, insofar as they require service of citation on a party of record in the contested case, do not define, enlarge, or restrict the class of causes the court may decide or the relief that may be awarded. Thus a failure to comply with their requirements is not, we believe, a defect that goes to the trial court's subject-matter jurisdiction under *Dubai*. We hold accordingly and conclude the trial court erred in dismissing the plaintiffs' cause of action.

Sierra Club v. Texas Natural Resource Conservation Comm'n, 26 S.W.3d 684, 688 (Tex. App.—Austin [3d Dist.] 2000). Thus, the failure to serve Defendant with the citation within the thirty-day timeframe defined in Section 361.321(c) is not grounds for dismissal of this case.

13. Defendant relies on Texas Health and Safety Code Section 361.321(c), which provides, in pertinent part, as follows:

[T]he petition must be filed not later than the 30th day after the date of the ruling, order, decision, or other act of the governmental entity whose action is appealed. Service of citation must be accomplished not later than the 30th day after the date on which the petition is filed.

TEX. HEALTH & SAFETY CODE ANN. § 361.0321(c). Accordingly, Defendant asserts that Plaintiff was required to serve the Commission with citation no later than December 31, 2009—within thirty days after the date on which the Original Petition was filed. Defendant further asserts that Plaintiff's compliance with "the statutorily prescribed method for invoking the jurisdiction of the courts" is needed for a court to maintain jurisdiction in an appeal of an agency order.

14. Based on applicable case law, as identified above, while Plaintiff did fail to serve the citation within statutory timeframes, such failure is not jurisdictional and is not grounds for dismissal of this cause of action.

15. It should also be noted that the failure to serve the citation on the Commission within the thirty-day timeframe has not harmed Defendant. Defendant had constructive

knowledge that the suit had been filed as of December 1, 2009, when a copy of the *Original Petition* was served on the Executive Director of the Commission. Also, as stated above, another related suit has been filed against Defendant by NNC. Both this cause of action and the NNC cause of action arise out of Defendant's decision to grant the application of BFI for a major amendment to its Type I MSW Permit No. MSW-1447A.

IV. CONCLUSION AND PRAYER

16. Based on applicable case law, including the Supreme Court's decision in *Dubai* and the Court of Appeals' decision in *Sierra Club*, while Plaintiff did fail to serve the citation within statutory timeframes, such failure is not jurisdictional and is not grounds for dismissal of this cause of action.

17. Because Plaintiff's pleadings establish the Court's jurisdiction and because Defendant's factual allegations disputing jurisdiction fail to clearly demonstrate that this Court lacks jurisdiction, the Court should retain Plaintiff's suit on the Court's docket.

18. For these reasons, Plaintiff respectfully requests that a hearing be held and after such hearing the Court deny Defendant's *Plea to the Jurisdiction, or, in the Alternative, Motion to Dismiss* and retain Plaintiff's suit on the Court's docket.

Respectfully submitted,

BIRCH, BECKER & MOORMAN, LLP

By:



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ATTORNEYS FOR TJFA, L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, express mail, electronic mail, facsimile, and/or U.S. First Class Mail, on this the 9th day of February, 2010.

Ms. Nancy Elizabeth Olinger Mr. Brian E. Berwick Ms. Cynthia Woelk Assistant Attorney General Environmental Protection and Administrative Law Division Office of the Attorney General P.O. Box 12548 Austin, Texas 78711-2548	<i>Attorneys for the Texas Commission on Environmental Quality.</i>
Mr. Paul G. Gosselink Lloyd Gosselink Rochelle & Townsend, P.C. 816 Congress Avenue, Suite 1900 Austin, Texas 78701	<i>Attorney for BFI Waste Systems of North America, LLC. Courtesy Copy</i>



ERICH M. BIRCH

AFFIDAVIT OF ERICH M. BIRCH

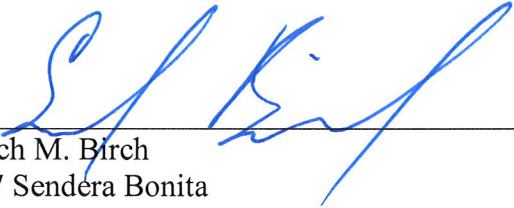
STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary, on this day personally appeared Mr. Erich M. Birch, a person whose identify is known to me. After I administered an oath to him, upon his oath he said:

1. My name is Erich M. Birch. I am over eighteen years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. I am a partner with Birch, Becker & Moorman, LLP (“BBM”). I am one of the attorneys of record for TJFA, L.P., the Plaintiff in Cause No. D-1-GN-09-004062, *TJFA, L.P. v. Texas Commission on Environmental Quality*.
3. On December 1, 2009, on behalf of Plaintiff, BBM electronically filed Plaintiff’s *Original Petition* against the Texas Commission on Environmental Quality (“Defendant” or the “Commission”) with the Travis County District Clerk. On that same day, a copy of the *Original Petition* was served on Defendant and every other party to the underlying contested case hearing.
4. On the afternoon of December 1, 2009, I received two e-mails in response to the electronically-filed *Original Petition*. The first e-mail acknowledged receipt of the electronic filing and that the *Original Petition* had been “transmitted successfully to e-Filing for Courts.” See Attachment 1 to this Affidavit. The second e-mail identified that it was a receipt for the fees assessed for filing the *Original Petition*. See Attachment 2 to this Affidavit.
5. It was my understanding that electronic filing of the *Original Petition* would also accomplish service of the citation. The two e-mails identified above appeared to confirm that the filing had been received and that filing fees were paid. I did not realize that either email was instead an indication from the District Clerk’s office that the *Original Petition, i.e.*, the citation, was ready for service. I believed that any delays in receiving confirmation that the citation had been served were associated with the holiday season.
6. I later received notice of the *Original Petition*’s readiness for service via First Class mail, which I received on Friday, January 8, 2010. The notice had actually been mailed by the District Clerk’s office to an incorrect, former office address for BBM. The current mailing address for BBM had been provided when the *Original Petition* was filed. Either I or one of my employees routinely checked the former office address for incorrectly addressed mail, and so the delay due to

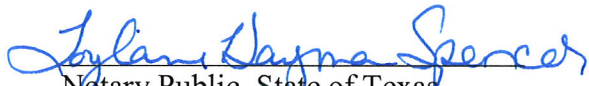
the incorrect mailing address was only a day. Upon receipt of the notice from the District Clerk's office on the afternoon of Friday, January 8, 2010, BBM promptly obtained service of the citation the following Monday, January 11, 2010.

FURTHER, AFFIANT SAITH NOT.



Erich M. Birch
207 Sendera Bonita
Lakeway, Texas 78734

SUBSCRIBED AND SWORN TO BEFORE ME by Mr. Erich M. Birch on the 9th day of February, 2010, to certify which witness my hand and seal.



Notary Public, State of Texas





Print name

My Commission Expires: 10/28/12

Erich Birch

From: eFiling@texasonline.state.tx.us
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Cause/Case Number: D-1-GN-09-004062
Document Type: Petition or Application: Civil
Filing Attorney: Erich M. Birch
Client Matter #: TJFA BFI
Style/Case Name: TJFA, L.P. v. Texas Commission on Environmental Quality
Judge(s):
Sealed Document: No

Status: CONFIRMATION
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Court Assignment: 353rd District Court
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