IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

Whether, as a general matter, an appellate court's decision takes effect the moment the court issues its opinion, order, or judgment, or later when rehearing is denied or the time for rehearing expires, or still later when the clerk issues the mandate, is a difficult question under Texas law and procedure, as reflected by the competing arguments in JUSTICE BRISTER's and JUSTICE WILLETT's separate opinions, and one we need not answer today. We all agree that if an appellate court

expressly states the time for its decision to take effect, that statement controls. That rule applies here.

In *Barshop v. Medina County Underground Water Conservation District*, we prescribed a filing deadline "six months after the [Edwards Aquifer] Authority becomes effective".[1] As it happened, the Authority began operations the day we issued our opinion and thus became effective. The deadline was set at six months from that date. We hold that the Authority correctly applied *Barshop*, and therefore we reverse the judgment of the court of appeals.[2] We remand the case to the trial court for further proceedings.

I

The Edwards Aquifer is an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin. It is the primary source of water for south central Texas and therefore vital to the residents, industry, and ecology of the region, the State's economy, and the public welfare.

Record droughts in the early 1950s prompted the Legislature to create the Edwards Underground Water District in 1959[3] "for the purpose of conserving, protecting and recharging the

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[1] 925 S.W.2d 618, 630 (Tex. 1996).

[2] 212 S.W.3d 683 (Tex. App.–Austin 2006) (op. on reh'g).

[3] *See* House Research Org., Bill Analysis, Tex. S.B. 1477, 73rd Leg., R.S. (1993) ("From 1950-1956, Texas experienced a record draught [sic], causing Comal Springs in New Braunfels to go dry for five months and reducing the flow of San Marcos Springs . . . . In response, the Edwards Underground Water District (EUWD) was legislatively created in 1959 to conserve, protect and recharge the groundwater in the five counties known as the Edwards Aquifer region.").

[aquifer's] underground water-bearing formations . . . and for the prevention of waste and pollution".[4] Although the District's powers were broadened over the years, it still lacked the regulatory authority the Legislature came to believe was essential. In 1993, the Legislature passed the Edwards Aquifer Authority Act (EAAA),[5] which replaced the District with the Edwards Aquifer Authority, giving the Authority broad powers "for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."[6] The EAAA also expanded the covered territory.

The EAAA prohibits withdrawals of water from the aquifer without a permit issued by the Authority,[7] limits the total permitted withdrawals per calendar year,[8] and gives preference to

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[4] Act of April 9, 1959, 56th Leg., R.S., ch. 99, §1, 1959 Tex. Gen. Laws 173, 173, *as amended by* Act of Apr. 12, 1979, 66th Leg., R.S., ch. 69, 1979 Tex. Gen. Laws 110; Act of May 23, 1979, 66th Leg., ch. 306, 1979 Tex. Gen. Laws 706; Act of May 19, 1983, 68th Leg., R.S., ch. 1010, 1983 Tex. Gen. Laws 5422; Act of May 29, 1987, 70th Leg., R.S., ch. 332, 1987 Tex. Gen. Laws 1746; Act of May 29, 1987, 70th Leg., R.S., ch. 333, 1987 Tex. Gen. Laws 1747; Act of May 26, 1987, 70th Leg., R.S., ch. 629, 1987 Tex. Gen. Laws 2411; Act of May 28, 1987, 70th Leg., R.S., ch. 652, 1987 Tex. Gen. Laws 2457; Act of May 29, 1989, 71st Leg., R.S., ch. 599, 1989 Tex. Gen. Laws 1988; *repealed by* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, § 1.41(a), 1993 Tex. Gen. Laws 2350, 2368.

[5] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, *as amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–.62, 6.01–.05, 2001 Tex. Gen. Laws 1991, 2021–2022, 2075–2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen Laws 4612, 4627–34; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901–09; Act of May 21, 2009, 81st Leg., R.S., ch. __, 2009 Tex. Gen. Laws ___ (Tex. H.B. 4762, to become effective Sept. 1, 2009).

[6] EAAA § 1.01.

[7] EAAA § 1.15(b) ("Except as provided by Sections 1.17 ["Interim Authorization"] and 1.33 [wells producing less than 25,000 gallons per day for domestic or livestock use] of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority."); EAAA § 1.35(a) ("A person may not withdraw water from the aquifer except

"existing user[s]" — defined as persons who "withdr[ew] and beneficially used underground water from the aquifer on or before June 1, 1993."[9] With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993.[10] A permit applicant must file with the Authority on a prescribed form[11] a "declaration of historical use of underground water withdrawn from the aquifer during the historical period from June 1, 1972, through May 31, 1993."[12] Subject to the limit on total withdrawals of water from the aquifer, an existing user who files a declaration "as required", pays an application fee (set at $25), and "establishes by convincing evidence beneficial use of underground water from the aquifer"[13] is entitled to "a permit for withdrawal of an amount

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as authorized by a permit issued by the authority or by this article.").

[8] Initially, the EAAA only capped withdrawals. EAAA § 1.14(b) (stating that, with certain exceptions, "for the period ending December 31, 2007, the amount of permitted withdrawals from the aquifer may not exceed 450,000 acre-feet of water for each calendar year"), *repealed by* Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.09, 2007 Tex. Gen. Laws 4612, 4634, *and by* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.09, 2007 Tex. Gen. Laws 5848, 5908. The EAAA now sets both the maximum and minimum withdrawals permitted per calendar year. Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.02, 2007 Tex. Gen. Laws 4612, 4627 (amending EAAA § 1.14(c) to state that, with certain exceptions, "for the period beginning January 1, 2008, the amount of permitted withdrawals from the aquifer may not exceed or be less than 572,000 acre-feet of water for each calendar year, which is the sum of all regular permits issued or for which an application was filed and issuance was pending action by the authority as of January 1, 2005"); Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.02, 2007 Tex. Gen. Laws 5848, 5902 (same).

[9] EAAA § 1.03(10).

[10] EAAA § 1.14(e) ("The authority may not allow withdrawals from the aquifer through wells drilled after June 1, 1993, except additional water as provided by Subsection (d) and then on an interruptible basis."), *amended by* Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.02, 2007 Tex. Gen. Laws 4612, 4627 (amending EAAA § 1.14(e) to state: "The authority may not allow withdrawals from the aquifer through wells drilled after June 1, 1993, except for replacement, test, or exempt wells or to the extent that the authority approves an amendment to an initial regular permit to authorize a change in the point of withdrawal under that permit."), *and by* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.02, 2007 Tex. Gen. Laws 5848, 5902 (same).

[11] EAAA § 1.16(b).

[12] EAAA § 1.16(a).

[13] EAAA § 1.16(d).

of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the historical period."[14] After existing users' applications have been processed, the Authority may issue additional permits up to the cap on total annual withdrawals.[15] The Authority's board of directors is required to "adopt rules necessary to carry out the authority's powers and duties . . . , including rules governing procedures of the board and authority."[16]

The EAAA was enacted May 30, 1993. The Authority was to commence operations September 1, 1993, the general effective date of the statute, but the new regulatory scheme was to be phased in over six months.[17] Existing users had until March 1, 1994, to file permit applications,[18] at which point the permit requirement would take effect. After March 1, a filer could generally continue to withdraw water pending approval of its application.[19]

But implementation of the EAAA was delayed. Prior to September 1, 1993, the United States Department of Justice refused administrative preclearance for the new Authority under section

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[14] EAAA § 1.16(e).

[15] EAAA § 1.18 states: "(a) To the extent water is available for permitting after the issuance of permits to existing users, the authority may issue additional regular permits, subject to limits on the total amount of permitted withdrawals determined under Section 1.14 of this article. (b) The authority may not consider or take action on an application relating to a proposed or existing well of which there is no evidence of actual beneficial use before June 1, 1993, until a final determination has been made on all initial regular permit applications submitted on or before the initial application date of March 1, 1994."

[16] EAAA § 1.11(a).

[17] Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 4.02, 1993 Tex. Gen. Laws 2350, 2371 ("This Act takes effect September 1, 1993, except Section 1.35 of Article 1 takes effect March 1, 1994.").

[18] EAAA § 1.16(b) ("An existing user's declaration of historical use must be filed on or before March 1, 1994, on a form prescribed by the board. An applicant for a permit must timely pay all application fees required by the board.").

[19] EAAA § 1.17.

5 of the Voting Rights Act of 1965.[20] On May 29, 1995, the Legislature amended the EAAA to meet the Department's objections, and the Department granted preclearance. The amended statute was to be effective August 28, 1995,[21] but on August 22, a group of landowners and others sued for a declaration that the EAAA was facially unconstitutional. The district court issued a temporary restraining order the same day prohibiting the Authority from beginning operations. On November 27, 1995, the district court rendered judgment declaring the EAAA unconstitutional and permanently enjoining implementation of its provisions. But on direct appeal, this Court in *Barshop v. Medina County Underground Water Conservation District* held that the EAAA was not unconstitutional on its face and therefore reversed the district court's judgment, dissolved the injunction, and remanded the case to determine whether attorney fees should be awarded.[22] We issued our opinion and judgment on June 28, 1996, denied rehearing on August 16, 1996, and issued our mandate on February 10, 1997.

The Authority began operations the day our opinion issued, taking over all the assets, offices, personnel, and papers of the District,[23] which had continued in existence. A temporary board of

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[20] *See* 42 U.S.C. § 1973c(a). The District's governing board consisted of fifteen elected directors. Act of April 9, 1959, 56th Leg., R.S., ch. 99, § 5, 1959 Tex. Gen. Laws 173, 175. The Authority's governing board consisted of nine appointed directors. EAAA § 1.09.

[21] Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; *see also* TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct . . . .").

[22] 925 S.W.2d 618, 637-638 (Tex. 1996).

[23] EAAA § 1.41 states in part: "(b) All files and records of the Edwards Underground Water District pertaining to control, management, and operation of the district are transferred from the Edwards Underground Water District to the authority on the effective date of this article. (c) All real and personal property, leases, rights, contracts, staff, and obligations of the Edwards Underground Water District are transferred to the authority on the effective date of this

directors appointed by the Legislature governed the Authority pending a November election.[24] The Authority's activities were widely reported in the media because of severe drought conditions existing in south central Texas,[25] diverse interests competing for permits,[26] and a lawsuit filed by the Sierra Club in June 1996 in the United States District Court for the Western District of Texas, seeking federal judicial management of the Edwards Aquifer to protect endangered species. On August 23, 1996, the federal court, convinced that it was facing an emergency, issued a preliminary injunction imposing a plan to manage the aquifer. The United States Court of Appeals for the Fifth Circuit stayed the injunction and later reversed it on the ground that the federal court should have

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article. (d) On September 1, 1993, all unobligated and unexpended funds of the Edwards Underground Water District shall be transferred to the authority."

[24] EAAA § 1.092(a) ("Until a board is elected as provided by this section and takes office, the authority is governed by a temporary board that consists of: (1) Mr. Phil Barshop; (2) Mr. Ralph Zendejas; (3) Mr. Mike Beldon; (4) Ms. Rosa Maria Gonzales; (5) Mr. John Sanders; (6) Ms. Sylvia Ruiz Mendelsohn; (7) Mr. Joe Bernal; (8) Mr. Oliver R. Martin; (9) Mr. A. O. Gilliam; (10) Mr. Bruce Gilleland; (11) Mr. Rogelio Munoz; (12) Mr. Doug Miller; (13) Ms. Paula DiFonzo; (14) Mr. Mack Martinez; (15) Ms. Jane Houghson; (16) one temporary director appointed by the South Central Texas Water Advisory Committee from among the members of the committee; and (17) one temporary director appointed jointly by the Commissioners Courts of Medina County and Uvalde County who must be a resident of one of those counties.").

[25] *See*, *e.g.*, Tom Dukes, *Water Use from Edwards Aquifer Must Be Cut*, DALLAS MORNING NEWS, July 14, 1996, at J6 ("Pumping too much water from the Edwards during the current drought threatens the aquifer's water quality as well as the amount of water available."); Editorial, *Aquifer Pumping Rules*, AUSTIN AM.-STATESMAN, July 2, 1996, at A8 ("A severe drought has made water a precious resource in Central Texas and throughout the state. Now more than ever, the water in the Edwards Aquifer must be managed to the advantage of everyone."); Jerry Needham, *The Water Crisis*, SAN ANTONIO EXPRESS-NEWS, June 30, 1996, at A1 ("The Texas Supreme Court's OK Friday for a regional authority to go to work managing the Edwards Aquifer still leaves the region wallowing in drought-induced water woes, but it provides a solid framework for problem solving, officials said Saturday."); *Texas: State Supremes Back Regulation of Edwards Aquifer*, GREENWIRE, July 2, 1996 ("A recent drought and unregulated pumping have substantially depleted the aquifer.").

[26] Needham, *supra* note 25 ("Diverse interests across the aquifer — farmers, San Antonio and other cities, recreational interests at aquifer-fed springs as well as municipal and industrial users downstream — still will be jockeying for a favorable share of the aquifer's bounty through permits.").

abstained to allow the Authority, which was "in the process of taking comments and formulating rules for permits and emergency measures", time to function.[27]

The EAAA directed the temporary board to "adopt rules governing the authority" "as soon as practicable."[28] On August 31, 1996, the Authority issued proposed rules to govern the process for filing a permit application, including a declaration of historical use.[29] The Authority set Saturday, December 28, 1996 — six months from the date of our *Barshop* opinion — as the filing deadline.[30] In response to comments, the Authority moved the deadline to December 30, the following Monday.[31] With few other changes, the Authority adopted the proposed rules on October 31, effective November 21, 1996.[32] As the Authority explained, although the initial rules did not lay out a complete permitting process, the Authority proposed them because it "believed it needed to provide notice to existing users as early as possible that December 30, 1996 will be the deadline for filing

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[27] *Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997).

[28] EAAA § 1.092(d).

[29] 21 Tex. Reg. 8401 (1996) (to be codified at 31 Tex. Admin. Code §§ 701.1-.6 and 701.11-.22) (proposed Aug. 26, 1996) (Edwards Aquifer Auth.).

[30] *Id*. at 8402 ("The injunction [in *Barshop*] was dissolved by the Texas Supreme Court, and the Act thereby became effective, on June 28, 1996. . . . In keeping with the intent of the Legislature, these rules require the filing of declarations of historical use by December 28, 1996, the date six months following the actual effective date of the Act.").

[31] 21 Tex. Reg. 11377, 11381 (1996) ("The proposed rule called for a filing date of Saturday, December 28, 1996. After further review, the filing date has been changed to Monday, December 30, 1996, because the Authority believes that this date is more consistent with legislative intent and will avoid difficulties for applicants who find themselves needing to file their applications on a Saturday when the offices of the Authority are closed.").

[32] *Id.* at 11384.

declarations of historical use."[33] On November 1, 1996, the Authority proposed further rules governing the process for reviewing permit applications,[34] which did not become effective until February 18, 1997.[35]

The Authority took steps to publicize the December 30 deadline as widely as possible. Respondent Chemical Lime, Ltd.'s predecessor in interest, APG Lime Corp., received a permit application form by mail mid-November, noticed the December 30 deadline prominently printed at the top of the form, and began gathering the historical data needed to submit it. APG's New Braunfels plant had been in operation since 1907, using limestone, water, and heat to manufacture lime used in purifying water and controlling sulphur emissions from coal-fired plants. For twenty-five years, the plant had used on average some 600 acre-feet — around 200 million gallons — of water a year.[36] APG's plant engineer, James Johnson, undertook to complete the permit application for the Authority but had trouble finding water usage data going back to 1972. In mid-December he telephoned the Authority to ask whether he could estimate water usage and was told he needed hard data. A few days before the deadline, he telephoned the Authority again to say that he would

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[33] *Id*. at 11379 ("There simply was not adequate time to develop a full review and hearings process on applications for historical use by the time the Authority believed it needed to publish this initial set of rules. The Authority believed it needed to provide notice to existing users as early as possible that December 30, 1996 will be the deadline for filing declarations of historical use. With that goal in mind these rules were developed. The Authority and staff knew at the time of proposal that additional rules would have to be developed to complete most of the sections with regard to the review and hearings on applications for permits.").

[34] 21 Tex. Reg. 11071 (1996) (to be codified at 31 Tex. Admin. Code §§ 701.31-.35, 701.51-.59, 701.71-.77, 701.91-.102, 701.121-.131, & 701.141-.147) (proposed Nov. 1, 1996) (Edwards Aquifer Auth.).

[35] 22 Tex. Reg. 1393, 1405 (1997).

[36] An acre-foot of water — 43,560 cubic feet — is equal to about 325,851 gallons.

not be able to gather all the historical information in time. He was told that others were having problems, too, and that he should, as he recalled, "get it in when you get it — when you get that data on it." Based on that conversation, Johnson believed he could submit the application late. He was not told that if the application was late, APG would lose its water, or that he could file an incomplete application by the deadline and supplement it later, which was the Authority's policy.

APG did not file its permit until January 17, 1997. The Authority did not notice that it was late and continued to process it, notifying APG in April 1998 that a permit would issue for 618.2326 acre-feet of water. In 1999, Chemical Lime acquired APG's plant and its interest in the permit application. Not until November 2000 did the Authority notify Chemical Lime that the application would be denied because it was filed after the deadline. Chemical Lime protested, but the Authority refused to reconsider.

Chemical Lime sued the Authority and its general manager and directors in their official capacities,[37] seeking a declaration that the application deadline should have been set no sooner than six months from this Court's denial of rehearing in *Barshop*, which would make Chemical Lime's application timely. Alternatively, Chemical Lime sought a declaration that it had substantially complied with the EAAA's permit requirements.[38] The deadline-validity issue was presented to the

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[37] The Authority acknowledges that governmental immunity from suit is waived by section 36.251 of the Texas Water Code, which states: "A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order. The suit shall be filed in a court of competent jurisdiction in any county in which the district or any part of the district is located. The suit may only be filed after all administrative appeals to the district are final." The term "district" includes an "authority created under . . . Section 59, Article XVI, Texas Constitution". TEX. WATER CODE § 36.001(1). The Authority was created under that provision. EAAA § 1.02(b).

[38] Chemical Lime urged other claims that are not before us, including a takings claim that was severed in the trial court.

trial court on stipulated facts. The court concluded that the EAAA "became effective on August 16, 1996", the date rehearing was denied in *Barshop*; that the December 30, 1996 deadline "established by the Authority rule . . . is not a valid, legal deadline"; that the proper deadline was February 16, 1997; and that Chemical Lime's permit application was timely filed. The substantial-compliance issue was tried to a jury, which found for Chemical Lime. Based on its conclusions and the jury verdict, the trial court rendered judgment for Chemical Lime. The court awarded Chemical Lime $481,948.72 attorney fees, plus attorney fees on appeal.

The court of appeals affirmed but concluded that the permit application deadline should be six months from issuance of the mandate in *Barshop*, or August 10, 1997.[39] The court "express[ed] no opinion regarding the legal status or validity of acts performed under color of the EAA Act between the June 28, 1996 supreme court judgment in *Barshop* and the court's issuance of its mandate" on February 10, 1997.[40] Having determined that Chemical Lime's application was timely filed, the court did not reach Chemical Lime's argument that it had substantially complied with the statutory permit requirements.[41] The court affirmed the award of attorney fees to Chemical Lime.[42]

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[39] 212 S.W.3d 683, 696 (Tex. App.–Austin 2006).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 698.

We granted the Authority and its agents' petition for review.[43] Because their interests are aligned, we refer only to the Authority in addressing their arguments.[44] The Authority contends that (1) the December 30, 1996 permit application filing deadline was valid, (2) by missing the deadline Chemical Lime failed to substantially comply with the statutory requirements for a permit as a matter of law, (3) chapter 36 of the Texas Water Code precludes an award of attorney fees to Chemical Lime under the Declaratory Judgment Act and requires an award of attorney fees to the Authority. We address these arguments in turn.[45]

II

To determine the validity of the Authority's December 30, 1996 permit application filing deadline, we begin with our decision in *Barshop*. One argument in that case against the constitutionality of the EAAA was that it set an impossible condition for compliance: a March 1, 1994 filing deadline that had expired before the Authority had even come into existence.[46] But the Legislature had amended the EAAA in 1995 to meet preclearance objections so that the Act could take effect, yet had not changed the deadline. So the argument had to be, not only that the deadline set by the EAAA turned out to be impossible, but that the Legislature *intended* — given its action

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[43] 51 Tex. Sup. Ct. J. 329 (Jan. 25, 2008).

[44] We have received amicus briefs for the State of Texas and the City of San Antonio, both in support of reversal.

[45] The State of Texas, as amicus curiae, argues that, because a judgment against the State is always superseded by the State's filing of a notice of appeal, the Authority had the discretion to implement the EAAA at any time while *Barshop* was pending. Thus, it argues, the December 30, 1996 filing deadline was valid regardless of when our decision in *Barshop* became legally effective. Our analysis of the case does not require us to reach this argument, and we express no opinion on it.

[46] *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 628 (Tex. 1996).

in 1995 — to set an impossible deadline, so that when the EAAA took effect, it would prohibit any withdrawal of water from the Edwards Aquifer by regular permit. The argument was that the Legislature had created a regulatory scheme to preserve a crucial resource that was not only destined to fail but intended to fail. We characterized this argument as "nonsensical" and the logical result of it "absurd".[47]

We explained the State's position this way:

> The State urges that we should interpret the March 1, 1994 date as directory rather than mandatory. The State maintains that we should consider the intent of the Legislature and construe this date to merely require that the declarations be filed with the Authority six months after the eventual effective date of the statute. We agree with the State.[48]

Thus, instead of adopting a "too literal construction of a statute, which would prevent the enforcement of it according to its true intent,"[49] we took a more pragmatic approach. We noted that in *Stephenson v. Stephenson*,[50] we had held that a statutory period for filing an appellate transcript with the newly created courts of civil appeals did not begin to run until "the appellate court clerk began operations".[51] "Similarly," we held that "the March 1, 1994 deadline contained in the [EAAA] was intended to provide existing users six months to file their declarations of historical use."[52]

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[47] *Id.* at 629.

[48] *Id*. at 628.

[49] *Id*. at 629 (quoting *State v. Dyer,* 200 S.W.2d 813, 815 (Tex. 1947) (internal quotation marks omitted)).

[50] 22 S.W. 150 (Tex. 1893).

[51] 925 S.W.2d at 630.

[52] *Id.*

Accordingly, we interpreted the EAAA "as requiring declarations of historical use to be filed six months after the Authority becomes effective."[53]

Because of the prolonged delays in implementing the EAAA, it was not clear how long it would take the Authority to begin operations. In fact, the Authority took over from the District the same day our opinion in *Barshop* issued. The EAAA instantly transferred to the Authority all that was the District's. Because the EAAA became effective immediately in a practical sense, the Authority read *Barshop* to require a filing deadline six months later, irrespective of further proceedings in this Court,[54] although it extended the deadline two days from Saturday to Monday.[55] Not only was the Authority under pressure to act expeditiously, it was concerned that any later deadline would be subject to challenge.[56]

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[53] *Id.*

[54] 21 Tex. Reg. 11377, 11381 (Nov. 22, 1996) ("A commenter contended that the filing date should be February 28, 1997, which is six months after the date the Texas Supreme Court issued its mandate on August 31, 1996 in Barshop v. Medina County Underground Water Conservation District, sending the case back to the trial court. The filing date stated in the rule is December 30, 1996, six months after the Texas Supreme Court dissolved the trial court injunction that had blocked the Act from taking effect. The staff adheres to the December date, because the Act became fully effective on June 28, 1996, when the injunction was dissolved. The dissolution of the injunction was immediately effective, and was not delayed by subsequent procedural steps in the Supreme Court. The staff recommends against adopting the February date because it is inconsistent with the Legislature's intent to require filing of declarations of historical use six months after the actual effective date of the Act. Adopting the later date would also expose those applicants who would file after December 30, 1996, to litigation attacking the filings as untimely.").

[55] *See supra* note 31; *see Pitcock v. Johns*, 326 S.W.2d 563, 565-566 (Tex. Civ. App.–Austin 1959, writ ref'd) (citing G*ardner v. Universal Life & Accident Ins. Co.*, 164 S.W.2d 582 (Tex. Civ. App.–Dallas 1942, writ dism'd w.o.j.) and former TEX. REV. CIV. STAT. art. 23, § 15 (1925) ("'Month' means a calendar month."), first codified as TEX. REV. CIV. STAT. art. 3140, § 10 (1879), and currently as TEX. GOV'T CODE § 312.011(7)); *see also Cambell & Son v. William G. Lane & Co.*, 25 Tex. 93 (1860); Op. Tex. Att'y Gen. No. 0-1492 (1939); *cf.* TEX. GOV'T CODE § 311.014(b), (c) (providing that, in construing a code provision, "[i]f the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.").

[56] 21 Tex. Reg. at 11381.

Despite the fact that the Authority began operations June 28, 1996, Chemical Lime argues, as the court of appeals held, that the EAAA did not become "effective" within the meaning of *Barshop* until the mandate issued in that case on February 10, 1997. Chemical Lime points to Rule 18.6 of the Texas Rules of Appellate Procedure, which provides that "[t]he appellate court's judgment on an appeal from an interlocutory order takes effect when the mandate is issued." Chemical Lime argues that the same rule should apply in an appeal from a final judgment. Alternatively, Chemical Line argues that the EAAA did not become effective until rehearing was denied in *Barshop* on August 16, 1996. But none of these arguments find support in *Barshop* itself. As Chemical Lime properly acknowledges, *Barshop*'s approach to resetting the filing deadline was entirely pragmatic.[57] *Barshop* set a new filing deadline based not on the legal effect of some procedural occurrence in that case but on the practical reality of the Authority's commencement of operations.

Further in the alternative, and focusing instead on practicalities, Chemical Lime argues that since the Legislature's intent in the EAAA was, as we stated in *Barshop*, "to provide existing users six months to file their declarations of historical use",[58] the period should run from the effective date of the Authority's rules governing the application process — November 21, 1996 — or at the earliest, from the date those rules were proposed — August 31, 1996. But this is an argument, not

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[57] Brief for Respondent 5 ("The Court selected that prospective trigger date for the six-month clock based on *Stephenson v. Stephenson*, 22 S.W. 150 (Tex. 1893), where the Court pragmatically held that a deadline for filing an appellate transcript did not expire before the newly-created courts of civil appeals were ready to accept such filings. *See Barshop*, 925 S.W.2d at 630.").

[58] 925 S.W.2d at 630.

that the Authority misconstrued *Barshop*, but that *Barshop* was wrongly decided. There is nothing to indicate that the inevitable delay in promulgating rules would have been any less had the EAAA taken effect in 1993. It was never possible for final rules to be in effect six months before the filing deadline. Nor did the lack of final rules hamper the filing process. The difficulty applicants faced lay not in any uncertainty over what rules would apply but in gathering the required data on water use. Out of more than a thousand applications the Authority received, only twenty-two were late, and there is no evidence that any delay was attributable to the promulgation of the Authority's rules.

The parties have devoted much attention to the problems in determining when, as a general matter, an appellate court decision takes effect. The concurring opinions shed helpful light on these problems and strongly suggest that this is an aspect of Texas appellate procedure that could well benefit from more definite rules and procedures. We conclude, however, that this case turns not on when our decision in *Barshop* became effective, but when the Authority became effective. On that issue, the facts leave no doubt that the Authority permissibly set the permit application filing deadline at December 30, 1996.

III

The jury found that Chemical Lime substantially complied with the EAAA's permit application requirements, and the trial court rendered judgment on their verdict. The Authority contends that Chemical Lime failed to substantially comply with the statutory requirements as a matter of law. The issue was not addressed by the court of appeals, but it has been briefed in this Court, and we elect to resolve it.

The doctrine of substantial compliance, though certainly familiar to the law, lacks comprehensive definition, so we begin with several limiting assumptions based on what the parties here do and do not argue. We assume, because the Authority does not argue to the contrary, that the EAAA does not require strict compliance with permit application requirements. The assumption is a reasonable one, since one of the EAAA's express requirements is that a "declaration of historical use must be filed . . . on a form prescribed by the board [of directors]",[59] though there is nothing to indicate that filing the same information on plain paper would require rejection of the application. We also assume that substantial compliance with a statute means compliance with its essential requirements, since the parties agreed that this was a correct statement of the law for the jury charge. We assume further, to the extent it is relevant, again because the Authority does not argue otherwise, that Chemical Lime tried in good faith to file its permit application by the deadline. Although it would seem that a person who meets essential statutory requirements has substantially complied, even if not acting in complete good faith, it is clear that a person's good faith is not enough for substantial compliance when essential statutory requirements like a deadline are not met. Finally, since the Authority initially approved Chemical Lime's application before noticing that it was late-filed, we assume that Chemical Lime complied with all statutory requirements except the December 30, 1996 filing deadline — that is, that Chemical Lime is an existing user that established by convincing evidence beneficial use of underground water from the aquifer during the 21-year period before June 1993. Since the Authority barely mentions late payment of the fee, the question we

[59] EAAA § 1.16(b).

decide boils down to this: did the Legislature consider the permit application filing deadline essential to the EAAA?

We think the answer must be yes. To be clear, the issue is not whether Chemical Lime substantially complied with the filing deadline. A deadline is not something one can substantially comply with. A miss is as good as a mile.[60] As the United States Supreme Court has explained:

> The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. Any less rigid standard would risk encouraging a lax attitude toward filing dates. A filing deadline cannot be complied with, substantially or otherwise, by filing late — even by one day.[61]

Rather, the issue is whether Chemical Lime substantially complied with the permit application process, one requirement of which was the filing deadline.

The importance of a fixed filing deadline is apparent in the EAAA. The Legislature picked a specific, calendar date by which permit applications were required to be filed. It did not delegate that responsibility to the Authority. It made no provision for extensions and did not empower the

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[60] More accurately: "An ynche in a misse is as good as an ell." W. CAMDEN, REMAINS CONCERNING BRITAIN 303 (2d ed. 1614). An ell was a unit of measurement used by English tailors, usually 45 inches.

[61] *United States v. Locke*, 471 U.S. 84, 100-101 (1985) (citation and internal quotation marks omitted). Justice O'Connor, concurring, opined that, because the Court's prior decisions did not necessarily bar the use of equitable estoppel in those circumstances, the Court's reversal did not in itself establish that the claimants would ultimately forfeit their mining claims, in further proceedings after remand. *Id.* at 110-112. In the case at bar, other claims remain pending in the district court, but we offer no opinion on the claims not before us.

Authority to do so. Its intent that applicants strictly adhere to the deadline is thus fairly clear. Though it became necessary for this Court to reset the deadline to preserve the constitutionality of the EAAA, it was not necessary, nor would it have been proper, to change the character of the new deadline, making it less mandatory than the Legislature originally intended.

The need for a filing deadline, with no exceptions, is also apparent. The Legislature found it necessary to cap annual water withdrawals to protect the aquifer. Because applications would exceed the cap, with no fixed cutoff, the Authority would be required to constantly readjust allocations among permittees to provide for late applicants. Indeed, the Authority argues that if Chemical Lime's application is deemed timely and approval required, all permits must be adjusted, albeit slightly (about 0.1%[62]), for total annual withdrawals from the aquifer to remain at the statutory limit. The Legislature could certainly have concluded that such readjustments should be avoided.

Had Chemical Lime filed an incomplete or inaccurate application, its argument for substantial compliance would be stronger, even though as a practical matter, it would make no discernible difference to the permitting process whether an application was amended after the deadline or filed a few days late. But a line must be drawn somewhere, and the Legislature was not required to draw it with perfect precision. Chemical Lime points out that in *Barshop* we agreed with the State that the March 1, 1994 filing deadline in the EAAA was "directory rather than mandatory".[63] Chemical Lime contends that the law permits substantial compliance with non-

[62] Chemical Lime's temporarily approved permit for 618.2326 acre-feet would be about one-thousandth of the 572,000 acre-feet total annual withdrawals now permitted by the EAAA.

[63] *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 628 (Tex. 1996).

mandatory filing deadlines. But in *Barshop*, we held only that the expired deadline was directory because, as we have already explained, any other reading would have led to an absurd result. We did not suggest that a viable deadline would also be merely directory.

Although the EAAA states that a declaration of historical use "must be filed" by the deadline,[64] Chemical Lime argues that because the EAAA prescribes no penalty for late filing, the deadline should not be treated as mandatory. We have said that "[t]he word 'must' is given a mandatory meaning when followed by a noncompliance penalty"[65] but this does not suggest that when no penalty is prescribed, "must" is non-mandatory. "When the statute is silent [regarding the penalty for noncompliance], we have looked to its purpose for guidance."[66] The EAAA does not suggest that an applicant can be fined for a late filing or that the water allocated should be reduced accordingly. The only penalty the EAAA suggests is that late applications will not be considered.

We recognize the hardship of this penalty to Chemical Lime, but we believe the EAAA requires a firm deadline. Chemical Lime's late filing did not substantially comply with the statute's permitting requirements.

IV

The trial court awarded Chemical Lime attorney fees under the Declaratory Judgment Act (DJA). The Authority argues that it can be sued only under chapter 36 of the Texas Water Code, and

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[64] EAAA § 1.16(b).

[65] *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (internal quotation marks omitted). *See also* TEX. GOV'T CODE § 311.016(3) ("'Must' creates or recognizes a condition precedent.").

[66] *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992).

that chapter does not provide for recovery of attorney fees by the plaintiff. While section 36.251 does provide for suit against the Authority,[67] section 36.254 states that that remedy "do[es] not affect other legal or equitable remedies that may be available." The Authority has not advanced an argument why we should not take section 36.254 at its word. Nor does the Authority argue that the DJA permits an award of attorney fees only to a prevailing party, an issue on which we express no opinion.[68] The Authority does not challenge the reasonableness or necessity of the fees awarded by the trial court.[69] But an award must be equitable and just,[70] considerations addressed to the trial court's discretion.[71] Now that Chemical Lime is no longer the prevailing party, the trial court should have the opportunity to reconsider its award.

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[67] *See supra* note 37.

[68] *Compare Vincent v. Bank of Am., N.A.*, 109 S.W.3d 856, 868 (Tex. App.–Dallas 2003, pet. denied) (a nonprevailing party may recover attorney fees under the Declaratory Judgment Act), *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 731 (Tex. App.–Waco 1998, pet. denied) (same), *Maris v. McCraw*, 902 S.W.2d 191, 194 (Tex. App.–Eastland 1995, writ denied) (same), *and Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39, 45 (Tex. App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.) (same), *with City of Houston v. Harris County Outdoor Adver. Ass'n*, 732 S.W.2d 42, 56 (Tex. App.–Houston [14th Dist.] 1987, no writ) (stating that it is an abuse of discretion to award attorney fees to a party who is not entitled to declaratory relief).

[69] The trial court awarded Chemical Lime $481,948.72 for attorney fees incurred through rendition of final judgment, plus $100,000.00 for attorney fees through proceedings in this Court.

[70] *See* TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

[71] *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998).

Because the Authority has prevailed, it is entitled to attorney fees under section 36.066(g) of the Water Code.[72] The parties stipulated below to the amount of those fees.[73]

V

Accordingly, the court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

Nathan L. Hecht
Justice

Opinion delivered: June 26, 2009

[72] TEX. WATER CODE § 36.066(g) ("If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.").

[73] The parties stipulated that the Authority's reasonable attorney fees were $253,525.50 in the trial court and would be $100,000.00 on appeal.