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Sierra Club v. Meiburg: Out, Damned Pollutants - Out, We Say - What, Will Georgia's Water Ne'er Be Clean

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**SIERRA CLUB V. MEIBURG: OUT, DAMNED POLLUTANTS!
OUT, WE SAY! WHAT, WILL GEORGIA'S WATER
NE'ER BE CLEAN?**

I. INTRODUCTION

Water covers approximately three-quarters of the Earth and serves as the lifeblood of the planet.¹ While a human can survive without food for more than a month, a human without water cannot survive more than a week.² Nevertheless, many humans treat lakes, estuaries and rivers as free dumping grounds without considering the harmful effects of their actions.³ Georgia exemplifies such careless disregard.⁴

During the Clean Water Act's⁵ (CWA) first sixteen years, Georgia failed to comply with the mandates of the Act.⁶ From 1988 to 1997, toxic chemicals discharged into Georgia's waters increased by more than 400 percent.⁷ At one point, thirty-five percent of municipal facilities operated in violation of the CWA.⁸ As a result, Georgia's rivers and streams contain more toxic chemicals than those in either New York or New Jersey.⁹ Approximately sixty percent of Georgia's monitored waterways fail to meet water-quality standards.¹⁰ Consequently, the water is not safe for swimming, fishing

1. Earthjustice, *Water*, available at <http://www.earthjustice.org/program/water/> (last visited Jan. 11, 2004) [hereinafter Earthjustice] (discussing Earth's water mass).

2. *Id.* (describing how rivers are planet's vascular system).

3. *Id.* (listing ways Earth's water is abused).

4. See *Sierra Club v. Hankinson*, 939 F. Supp. 865, 867 (N.D. Ga. 1996) [hereinafter *Sierra Club I*] (explaining factual background); Georgia Center for Law in the Public Interest, *The Clean Water Enforcement Project*, available at <http://www.cleangeorgia.org/projects/water/index.html> (last visited Jan. 11, 2004) (criticizing Georgia's water pollution).

5. The Clean Water Act, 33 U.S.C. § 1251 (2001).

6. See *Sierra Club I*, 939 F. Supp. at 867 (explaining factual background of case).

7. Georgia Center for Law in the Public Interest, *The Clean Water Enforcement Project*, available at <http://www.cleangeorgia.org/projects/water/index.html> (last visited Jan. 11, 2004) (criticizing Georgia's water pollution).

8. *Id.* (describing EPA's failure in controlling unlawful pollution).

9. *Id.* (comparing Georgia's pollution to other states).

10. Georgia Conservancy, *Current Issues: Water Quality - TMDLs*, available at http://www.gaconservancy.org/WaterQuality/WQ_Group_WaterQuality.asp (last visited Jan. 11, 2004) (explaining total maximum daily loads).

or drinking purposes.¹¹ In fact, five animals in aquatic habitats throughout Southwest Georgia are on the endangered and threatened species list.¹² The plaintiffs in *Sierra Club v. Meiburg* (*Sierra Club III*) sought Environmental Protection Agency (EPA) performance of its duties under the CWA and restoration of Georgia's waters to their natural state.¹³

Section II of this Note presents the facts of *Sierra Club III*.¹⁴ Section III examines the CWA's regulatory scheme, the form and role of injunctions in civil litigation, and the appellate courts' jurisdiction over and review of modified injunctions.¹⁵ Section IV discusses the Eleventh Circuit's holding and reasoning in *Sierra Club III*.¹⁶ Section V presents a critical analysis of the Eleventh Circuit's decision to reverse the trial court's modification.¹⁷ Finally, Section VI of this Note assesses the impact of the Eleventh Circuit's holding on Georgia's waters, as well as both of the parties.¹⁸

II. FACTS

In 1972, Congress passed the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."¹⁹ During the CWA's first sixteen years, Georgia consistently failed to comply with the Act's mandates.²⁰ By 1996, hundreds of

11. See Earthjustice, *supra* note 1 (describing problems that result from water pollution).

12. U.S. Fish & Wildlife Service, *The ACF and ACT Basins: Water Allocation and Natural Resource Protection*, available at http://athens.fws.gov/rivers/ACT_ACF.html (last visited Jan. 11, 2004) (discussing concerns for endangered or threatened species in Georgia).

13. See *Sierra Club I*, 939 F. Supp. 865, 868-69 (N.D. Ga. 1996) (outlining plaintiffs' case).

14. For a discussion of the facts, see *infra* notes 19-43 and accompanying text.

15. For a discussion of the CWA's regulatory scheme, the form and role of injunctions in civil litigation, and the appellate courts' jurisdiction over and review of modified injunctions, see *infra* notes 44-115 and accompanying text.

16. For a discussion of the Eleventh Circuit's holding and reasoning in *Sierra Club III*, see *infra* notes 116-43 and accompanying text.

17. For a critical analysis of the Eleventh Circuit's decision to reverse the trial court's modification, see *infra* notes 144-76 and accompanying text.

18. For a discussion of the impact of the Eleventh Circuit's decision, see *infra* notes 177-90.

19. 33 U.S.C. § 1251 (outlining Congressional goals).

20. See *Sierra Club I*, 939 F. Supp. 865, 867 (N.D. Ga. 1996) (explaining factual background of case). Georgia did not submit water quality limited segment lists (WQLSs) until late 1992, more than thirteen years after the first submission deadline. *Id.* at 869. After Georgia finally submitted the list, EPA failed to approve or disapprove the submission within thirty days, pursuant to the CWA. *Id.* Despite Georgia's repeated delays, EPA ultimately approved Georgia's 1994 WQLS. *Id.* Georgia submitted only two total maximum daily load determinations (TMDLs) for the 340 WQLSs identified in sixteen years. *Id.* at 871. Neither of the submis-

Georgia's waters were significantly polluted and failed to meet applicable CWA water standards.²¹

In 1994, the plaintiffs, Ogeechee River Valley Association, Inc., Trout Unlimited, Sierra Club, Georgia Environmental Organization, Inc., and Coosa River Basin Initiative, Inc., brought suit against EPA pursuant to the CWA and the Administrative Procedure Act (APA).²² The plaintiffs sought to compel EPA to execute its duties under the CWA.²³ Specifically, the plaintiffs sought to enforce the CWA's provisions commanding EPA to identify polluted waters by promulgating water quality limited segment lists (WQLSs) and establishing total maximum daily load determinations (TMDLs) for the WQLSs.²⁴

At trial, both Sierra Club and EPA filed cross-motions for summary judgment.²⁵ After reviewing the record and hearing oral argument, the District Court for the Northern District of Georgia concluded that "EPA's approval of Georgia's totally inadequate TMDL submissions and schedule for submission of TMDLs [was] arbitrary and capricious . . . therefore, the plaintiffs [were] entitled to summary judgment on the TMDL issue."²⁶ To create basic parameters of a short- and long-term TMDL process while guaranteeing the defendants' ultimate responsibility for completing each step in the process, the district court entered an injunction against EPA.²⁷ The injunction instituted the following measures: (1) TMDL development; (2) TMDL implementation; (3) progress reports of the development and implementation process; (4) continu-

sions satisfied the requirements of the CWA because they failed to provide daily limits for priority pollutants on the WQLSs. *Id.*

21. *See id.* (explaining factual background of case).

22. *See id.* at 866 (outlining procedural posture of case); *see also* 5 U.S.C. § 701 (2001) (providing authority for judicial review of agency actions).

23. *See Sierra Club I*, 939 F. Supp. at 866, 868-69 (outlining plaintiffs' case). The plaintiffs alleged that EPA has a duty to develop WQLSs for Georgia and establish TMDLs because the state failed to submit timely or adequate WQLSs or TMDLs. *See id.* at 868 (explaining plaintiffs' case). Furthermore, the plaintiffs asserted that EPA's approval of Georgia's inadequate submissions and EPA's failure to disseminate its own WQLSs and TMDLs are arbitrary and capricious. *See id.*

24. *See id.* at 866 (outlining remedies sought by plaintiffs). For a discussion of TMDLs, *see infra* notes 54-59 and accompanying text.

25. *See Sierra Club I*, 939 F. Supp. at 866 (explaining procedural posture).

26. *See id.* at 867 (summarizing court's conclusions). With respect to the water quality limited segment issue, the court denied both parties motions for summary judgment. *See id.* (summarizing court's conclusions).

27. *See Sierra Club v. Hankinson*, 939 F. Supp. 872 (N.D. Ga. 1996) [hereinafter *Sierra Club II*] (entering injunction that detailed and assigned responsibilities in TMDL process to parties).

ing jurisdiction; and (5) attorneys' fees, costs and expenses.²⁸ EPA appealed the district court's grant of summary judgment and the subsequent injunction.²⁹

In 1997, during EPA's pending appeal, the parties entered into a consent decree that the district court approved.³⁰ The decree instituted a schedule for Georgia to establish TMDLs for polluted waters.³¹ If Georgia failed to comply with the decree, EPA would establish TMDLs for WQLSs through 2004.³² In addition, the decree required EPA to establish TMDLs for twenty-one percent of Georgia's waterways.³³ Further, the decree provided for EPA review of Georgia's continued planning and implementation process.³⁴ By the close of 1997, EPA calculated 124 TMDLs for Georgia's waters.³⁵ Nevertheless, once EPA established TMDLs, neither EPA nor Georgia utilized them.³⁶ As a result, the consent decree had a negligible impact on water quality in Georgia.³⁷

Frustrated by the lack of progress under the decree, the Sierra Club filed a motion to re-open the decree and compel further EPA action.³⁸ In response, Georgia promised to develop implementa-

28. See generally *id.* (detailing terms of injunction).

29. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1027 (11th Cir. 2002) [hereinafter *Sierra Club III*] (outlining procedural history of litigation concerning Georgia's water quality).

30. See *id.* (describing outcome of initial litigation).

31. See *Sierra Club v. EPA*, 1997 N.D. Ga. Civ. Action File No. 94-CV-2501-MHS at 10 (detailing terms of consent decree). The consent decree scheduled EPA to establish TMDLs for the Savannah, Ogeechee, Suwannee, Satilla, Ochlocknee, St. Mary's, Oconee, Ocmulgee, Altamaha, Flint, Chattahoochee, Coosa, Tallapoosa and Tennessee basins from 1999-2004. *Id.* at 11-13.

32. See *Sierra Club III*, 296 F.3d at 1027 (detailing EPA's responsibilities pursuant to terms of consent decree).

33. See *id.* (detailing EPA's responsibilities pursuant to terms of consent decree). The 1998 TMDLs are the subject of the appeal in *Sierra Club III*. See *id.* (explaining factual basis for appeal).

34. See *Sierra Club v. EPA*, 1997 N.D. Ga. Civ. Action File No. 94-CV-2501-MHS at 14 (detailing EPA supervisory authority over Georgia's responsibilities under decree).

35. See *Sierra Club III*, 296 F.3d at 1027-28 (explaining EPA's compliance with consent decree). EPA established all but eight of the required TMDLs. See *id.* Sierra Club promptly filed a motion to compel EPA to establish the remaining eight TMDLs. See *id.* at 1028.

36. See *id.* (explaining continued failure to implement provisions of CWA by both Georgia and EPA). Georgia failed to implement TMDLs or utilize them in its non-point source management plans. See *id.* at 1028 (explaining Georgia's continued failure to implement provisions of CWA).

37. See *id.* (noting that "only one of . . . 124 waterbodies on Georgia's 1996 § 303(d) list met water quality standards").

38. See *id.* at 1023, 1028 (explaining Sierra Club's efforts to enforce decree). Sierra Club requested a court order requiring EPA to prepare implementation

tion plans.³⁹ As a result, the district court postponed ruling on Sierra Club's motion.⁴⁰ After Georgia submitted its implementation plans, EPA asserted that the plans rendered the Sierra Club's motion moot.⁴¹ The district court disagreed, concluding that the consent decree required EPA to either promulgate implementation plans or guarantee the adequacy of Georgia's plans.⁴² EPA appealed, asserting that the court's decision to require an implementation plan modified the decree, and that the court abused its discretion in modifying the decree.⁴³

III. BACKGROUND

A. The Clean Water Act's Statutory and Regulatory Scheme

1. Point Sources

Congress passed the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."⁴⁴ Section 301(a) of the CWA prohibits discharge of all pollutants, except those authorized by permit.⁴⁵ Pursuant to the Act, EPA issues permits for point source pollution.⁴⁶ A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."⁴⁷ Each source presents a "point" from which to measure the amount of pollutant discharged.⁴⁸ EPA issues permits to individual pollutant dischargers

plans for the 124 established TMDLs. *See id.* at 1028. EPA contested Sierra Club's motion, arguing that the decree did not require EPA to implement TMDLs. *See id.*

39. *See id.* (explaining Georgia's response to Sierra Club's motion).

40. *See Sierra Club III*, 296 F.3d at 1028 (discussing district court's reaction to Georgia's initiative regarding TMDLs).

41. *See id.* (noting EPA's repeated efforts to dismiss Sierra Club's action). Sierra Club defended its motion from the mootness threat on the ground that Georgia's plans were inadequate. *See id.*

42. *See id.* (summarizing district court's rationale for denying EPA mootness claim).

43. *See id.* at 1024 (highlighting issues raised by EPA on appeal).

44. 33 U.S.C. § 1251(a) (2003) (stating Congressional goals for CWA). To achieve this goal, EPA has two main responsibilities: (1) issuing permits that govern pollutant discharge, and (2) setting water quality standards. *Sierra Club III*, 296 F.3d at 1024.

45. 33 U.S.C. § 1311(a) (2001) (declaring discharge of pollutants illegal except when authorized by law).

46. *See id.* at § 1311(b)(2) (establishing framework for meeting CWA objectives).

47. 33 U.S.C. § 1362(14) (2003) (defining point sources).

48. *See Sierra Club III*, 296 F.3d at 1024-25 (defining point source).

through the National Pollutant Discharge Elimination System (NPDES).⁴⁹

2. *Non-Point Sources*

To regulate non-point source pollution, the CWA requires states to establish water quality standards.⁵⁰ In establishing water quality standards, a state designates a specific use for a body of water and sets the water quality level necessary to safely accommodate that use.⁵¹ The state must register all polluted waters and file a report with EPA for approval.⁵² If the regulation of point source discharges pursuant to the NPDES does not lead to the necessary water quality levels, then the state must establish TMDLs.⁵³

3. *Total Maximum Daily Loads*

A TMDL is a specified maximum amount of an individual pollutant that may pass daily through a body of water without violating water quality standards.⁵⁴ The state must establish TMDLs for each body of water for which point source regulations fail to achieve the established water quality levels.⁵⁵ The CWA imposes responsibility on the state to regulate non-point source discharges through implementation of TMDLs.⁵⁶ As part of the implementation plan, a state must prepare a management program certified by the state's attorney general.⁵⁷ The program must identify: (1) management practices and procedures; (2) programs for implementing management

49. 33 U.S.C. § 1342 (2001) (establishing framework for issuing permits under NPDES). "Although EPA has authority to issue permits, it has delegated that authority to the states . . . including Georgia." *Sierra Club III*, 296 F.3d at 1026.

50. 33 U.S.C. § 1313(a)-(c) (2001) (establishing regulatory scheme for water quality standards and implementation plans).

51. *See id.* at § 1313(c)(2)(A) (explaining states' responsibilities with regard to water quality standards and implementation plans). The particular level established by the state becomes that waterbody's water quality standard. *See id.*

52. *See id.* at § 1313(d)(1)-(2) (establishing regulatory scheme for identifying areas with insufficient pollution controls and establishing maximum daily loads). Each body of water on the list is a "water quality limited segment." *See* 40 C.F.R. § 130.2(j) (2001).

53. 33 U.S.C. § 1313(d)(1)(A), (C) (2001) (establishing when TMDLs must be promulgated).

54. *See id.* at § 1313(d)(1)(C) (defining TMDLs and ordering establishment); 40 C.F.R. § 130.2(e) (defining TMDL).

55. 33 U.S.C. § 1313(d)(1)(A), (C) (outlining states' responsibilities for creating TMDLs).

56. *See generally* 33 U.S.C. § 1329 (2001) (establishing regulatory scheme for non-point source discharges).

57. *See id.* at § 1329 (b)(2)(A)-(D) (establishing regulatory scheme and states' responsibilities in TMDL implementation).

procedures; and (3) annual milestones.⁵⁸ While a state is responsible for preparing lists of polluted waters and establishing and implementing the corresponding TMDLs, EPA still retains ultimate approval authority.⁵⁹

B. Injunctions

1. Generally

An injunction is an equitable writ issued by a court that requires a party to either perform or refrain from a specific act.⁶⁰ In issuing an injunction, a court employs its institutional clout to compel the desired conduct.⁶¹ As a remedy that applies to future conduct, many circumstances limit an injunction's predictive value and efficiency.⁶²

2. Consent Decrees

A consent decree is an injunction entered into through the parties' consent.⁶³ Although convenient, consent decrees often produce further impediments to a dispute's resolution.⁶⁴ Due to inequalities in parties' bargaining power and information accessibility, consent decrees may be "even less durable than a fully litigated order."⁶⁵ Furthermore, as a function of its nature and its purpose, a decree becomes less responsive over time.⁶⁶ As time passes,

58. See *id.* (establishing regulatory scheme and states' responsibilities in TMDL implementation).

59. See *id.* at § 1313(d)(1)-(2), 1329(b)(1)-(2) (establishing division of authority between EPA and states). If EPA rejects a state's lists or TMDLs, EPA must issue an appropriate list or TMDL. *Id.* at § 1313(d)(2).

60. See BLACKS LAW DICTIONARY (Bryan A. Garner ed., 7th ed. 1999). The equitable remedy of injunctions creates an interesting paradox. See John F. Dobbyn, INJUNCTIONS (West Publ'g Co., In A Nutshell Series, 1974) (providing general overview of injunctions and injunctive relief). "It is among the most ancient and most modern forms of relief available through our legal system." *Id.*

61. See Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in Federal Courts*, 64 TEX. L. REV. 1101 (1986) (explaining role of injunctions in judicial remedies).

62. See *id.* (listing circumstances that interfere with court's prediction). A court's predictive power is limited by (1) new statutes and regulations and changing judicial precedent, (2) traditional drafting limitations, and (3) the court's ability to predetermine a violator's future conduct based on his present and past conduct. See *id.* at 1101-02 (explaining limitations on injunctive relief).

63. See *id.* at 1102 (explaining factors that interfere with effectiveness of injunctions).

64. See *id.* (explaining factors that interfere with effectiveness of injunctions).

65. See Jost, *supra* note 61, at 1103 (explaining inequality between parties effect on efficiency of consent decree).

66. See *id.* at 1103-04 (explaining factors contributing to consent decrees' ineffectiveness). While an injunction responds to a dynamic problem, it is static in

changes in fact, law or information may affect a decree's responsiveness.⁶⁷ With all of these factors straining the decree, it may either oppress the violator it seeks to control, or leave the victim without protection.⁶⁸ To thwart the effect of time, parties adjust to changes; masters or other court-appointed agents set decrees; or courts interpret decrees' terms.⁶⁹ In extreme circumstances, courts will modify a decree's terms.⁷⁰

C. Appellate Jurisdiction and Inquiry of Modifications

Title 28 of the United States Code section 1292 (a) (1) provides appellate jurisdiction over district court interlocutory orders that either modify or refuse to modify injunctions.⁷¹ In *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*,⁷² the Eleventh Circuit held that, in determining the ripeness of a district court's order under section 1292(a)(1), the appellate court must: (1) consider whether there is an injunctive decree; and (2) consider whether the lower court's order "changed the underlying decree in a jurisdictionally significant way."⁷³ An order modifies the decree when it changes the par-

nature. *See id.* at 1103 (explaining inherent problem with injunctions that causes inefficiency).

67. *See id.* at 1104 (explaining factors contributing to consent decrees' ineffectiveness).

68. *See id.* (explaining how injunction may stray from its purpose).

69. *See id.* at 1104-05 (explaining how parties and courts counter time's effect on injunction).

70. *See Jost, supra* note 61, at 1104-05 (explaining where modification is appropriate to remedy inefficient injunction).

71. 28 U.S.C. § 1292(a)(1) (2001) (providing appellate jurisdiction over district modification orders).

[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Id. (providing jurisdiction to courts of appeals).

72. 280 F.3d 1289 (11th Cir. 2002).

73. *See id.* at 1292 (citing *Sierra Club v. Marsh*, 907 F.2d 210, 212 (1st Cir. 1990)) (stating test to determine if modification occurred). An order modifies a decree if it changes the underlying decree in a jurisdictionally significant way. *See id.* at 1292-93 (distinguishing interpretation from modification).

In *Birmingham*, the plaintiff class of male, non-black city employees challenged the city's hiring practices as discriminatory. *See id.* at 1290-91. The class appealed the interlocutory order of the district court, which stated that the prior consent decree required the class to show adverse impact of the city's procedures. *See id.* at 1292. The class contended that the order was ripe for appeal as a modification of the consent decree, because the decree clearly required the city to show the absence of discriminatory impact in its hiring practices. *See id.* The city claimed that

ties' legal relationship as established by the original decree.⁷⁴ In *Sizzler Family Steak Houses v. Sizzlin Steak House, Inc.*,⁷⁵ the Eleventh Circuit explained that the facts are dispositive; a district court characterizing its order as a clarification or interpretation rather than a modification enjoys no deference in the appellate court's jurisdictional determination.⁷⁶

The reviewing court generally does not scrutinize the details of the injunction or subsequent order.⁷⁷ A meticulous judicial inquiry runs contrary to the jurisdiction-granting purpose of section 1292.⁷⁸ In *Birmingham*, the Eleventh Circuit stressed that a narrow reading of section 1292(a)(1) is necessary to prevent the dangers of piecemeal appeals.⁷⁹ To resolve whether a district court's order modified an injunction, the reviewing court must determine whether the district court's appraisal of the decree is a "gross misinterpretation of the decree's original command."⁸⁰

review was unavailable because the order merely interpreted the consent decree. *See id.* The appellate court held that the order was not subject to interlocutory review, because (1) the order did not change the underlying consent decree in a jurisdictionally significant way; (2) it did not change the legal relationship of the parties; and (3) the district court's reading of the consent decree was not a blatant misinterpretation of the decree's original command. *See id.* at 1294-95 (finding in favor of appellees).

74. *See id.* at 1293 (citing *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 957 (7th Cir. 1999)) (restating proper test to determine jurisdiction). "Their legal relationship does not change merely because the district court finds that one party has satisfied some of the pre-existing requirements of the decree; instead, to effect a change in the legal relationship of the parties, the order must 'change the command of the earlier injunction, relax its prohibitions, or release any respondent from its grip.'" *Id.* (citing *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990)).

75. 793 F.2d 1529, 1539 (11th Cir. 1986). "What matters, however, is not the district court's characterization of its order as amendatory or explanatory but rather the actual effect of the order on the obligations of the parties as set forth in the original judgment." *Id.*

76. *Birmingham*, 280 F.3d at 1292 (citing *Gautreaux*, 178 F.3d at 956-57) (holding that facts are dispositive to resolution of whether order modified decree); *see Sizzler Family Steak Houses v. Western Sizzlin' Steakhouse*, 793 F.2d 1529, 1539 (11th Cir. 1986).

77. *Birmingham*, 280 F.3d at 1293 (recognizing need for relaxed judicial inquiry).

78. *See id.* (justifying need for relaxed judicial inquiry).

79. *See id.* (citing *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966); *United States v. Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998); *Marsh*, 907 F.2d at 214).

80. *Id.* at 1293. "[A]n analysis [that] aim[s] to uncover subtle rather than blatant misinterpretations . . . is . . . too searching for a preliminary jurisdictional inquiry." *Id.* (citing *Gautreaux*, 178 F.3d at 958).

Limiting our inquiry to a search for only blatant misinterpretations blocks the statute's modification provision from serving as a back door to appellate review of every administrative clarification the district court makes, while it simultaneously retains this court's authority to look behind labels when those labels obviously mischaracterize the order.

D. Modification of Injunctions in Federal Court

1. Generally

Pursuant to Federal Rule of Civil Procedure 60(b)(5)-(6) (the Rule), parties may move to modify an injunction or other equitable decree.⁸¹ The Rule permits a court to relieve a party from an order if the order is no longer equitable or for any other reason.⁸² The Rule codified the existing law established in *United States v. Swift & Co.*⁸³

2. Strict Approach

In *Swift*, the Supreme Court first recognized a court's power to modify an injunction.⁸⁴ *Swift* involved an acrimonious antitrust clash between the United States and the Nation's five leading meat-packers.⁸⁵ The district court entered a consent decree settling the dispute.⁸⁶ Later, the district court modified the decree due to changed conditions in the meat-packing and grocery industries that made the decree's provisions unduly oppressive.⁸⁷ In reviewing the court's modification power, the Supreme Court stated that an in-

Id. (citing *Gautreaux*, 178 F.3d at 957).

81. See Jost, *supra* note 61, at 1105 (explaining courts' modification power); see also Fleming James, Jr. & Geoffrey C. Hazard, Jr., *CIVIL PROCEDURE* § 12.15 at 686 (4th ed. 1992) (explaining modification power granted by Rule).

Boilerplate provisions within a decree do not give a court any more power to modify than it already possesses under Rule 60 of the Federal Rules of Civil Procedure. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) (examining courts' power to modify earlier decree).

82. See FED. R. CIV. P. 60(b)(5)-(6) (granting authority to modify earlier injunction).

83. 286 U.S. 106 (1932); Jost, *supra* note 61, at 1105 (explaining origins of Rule).

84. See generally *Swift*, 286 U.S. 106 (finding inherent power and reserved power to modify).

85. See generally *Swift & Co. v. United States*, 276 U.S. 311 (1928) (discussing facts of case extensively); *United States v. California Canneries*, 279 U.S. 553 (1929) (discussing facts of case leading to *Swift*). The United States alleged that the defendants suppressed competition in the purchase and sale of livestock and dressed meats and extended their monopoly into other related industries. See *Swift*, 286 U.S. at 110 (outlining parties' allegations).

86. *Swift*, 286 U.S. at 111 (explaining holding from which parties' appealed). The decree forbid the defendants from (1) maintaining the monopoly, (2) holding interest in stockyard companies, (3) engaging in producing, selling, or transporting 114 food products, (4) using their distribution plants for any of the banned products, (5) selling meat retail, (6) holding interest in a storage facility, and (7) selling fresh milk or cream. *Id.*

87. See *id.* at 113-14 (explaining facts leading to case before Court).

junction's explicit terms may reserve such power to a court.⁸⁸ The Court noted that absent a reservation, a court's inherent equitable power permits it to modify an injunction.⁸⁹ According to Justice Cardozo, a court's modification power remains unaffected whether it enters the injunction by consent or after litigation.⁹⁰ In either circumstance, a court does not relinquish "power to revoke or modify its mandate" if the decree becomes "an instrument of wrong" through changed circumstance.⁹¹

The Court then formulated the standard for courts to utilize when reviewing a lower court's discretion to modify a decree.⁹²

The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed* after years of litigation with the consent of all concerned.⁹³

88. *See id.* at 114 (examining courts' inherent modification power). "The power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints." *Id.*

89. *Id.* (citing sources for courts' power to modify). Because courts direct an injunction at future events, it logically follows that the injunction is subject to modification as events change. *Id.*

90. *Id.* (explaining that consent decrees may be modified as well).

91. *Swift*, 286 U.S. at 114-115 (defining scope of courts' power to modify). Under *Swift*, only new or unforeseen circumstances could justify modification of an order. *Sizzler Family Steak Houses v. Western Sizzlin' Steakhouses*, 793 F.2d 1529, 1539 (11th Cir. 1986).

92. *See Swift*, 286 U.S. at 115, 119 (explaining standard of review for modifications).

93. *Id.* at 119 (emphasis added) (stating inquiry for appellate review of decision to modify and modification).

3. Emergence of the Flexible Approach

In *Washington v. Penwell*,⁹⁴ the Ninth Circuit characterized the *Swift* modification standards for consent decrees as “draconian.”⁹⁵ The court refused to strictly apply the *Swift* principles because they would result in a judicially authorized violation of a state’s sovereign immunity.⁹⁶ In other cases, courts departed from a strict application of *Swift* and applied a flexible approach.⁹⁷ In *United States v. United Shoe Machinery Corp.*,⁹⁸ the Supreme Court employed a flexible standard when a decree’s purpose had not been achieved.⁹⁹ In doing so, it allowed modification to achieve the initial decree’s purpose and permitted the decree’s benefit to flow to the intended

94. 700 F.2d 570 (9th Cir. 1983). In *Washington*, a legal service organization sought review of the judgment of the district court, which determined that a portion of a consent decree was unenforceable against the state prison. *Id.* at 572 (outlining issues on appeal). In refusing to enforce the provision, the district court modified the decree. *Id.* (detailing lower court’s decision). The Ninth Circuit affirmed, concluding that the funding provision at issue was not intended to bind the individual agents of the state, but rather the state itself, something the Eleventh Amendment prohibits. *Id.* at 575 (upholding modification).

95. *Id.* at 574 (explaining need for alternative test).

96. *Id.*

97. See Jost, *supra* note 61, at 1113 (explaining development of flexible approach). Though a departure from strict interpretation of *Swift*, courts draw from Justice Cardozo’s own words in justifying a more flexible approach. *Id.* (explaining basis for flexible approach). Justice Cardozo articulated that “[t]he distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct of conditions and are thus provisional and tentative.” *Swift*, 286 U.S. at 114 (explaining need for modification where facts are subject to change). “A continuing decree of injunction directed to events to come is subject always to adaptation as events shape the need.” *Id.* Commentators classify the cases employing a flexible approach into four categories: (1) “modification to maintain congruence with the law,” (2) “modification to relieve the obligor from unfairly oppressive or inefficient decrees,” (3) “modification to effectuate the rights of the beneficiary,” and (4) “modification to serve the public interest.” Jost, *supra* note 61, at 1114 (categorizing cases utilizing flexible approach).

98. 391 U.S. 244 (1968).

99. *Id.* at 248-49 (holding that flexible standard is appropriate where decree’s purpose had not been achieved).

When interpreting a consent decree, courts utilize the same rules as those used to interpret a contract. See *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000) (citing *Jacksonville Branch, NAACP v. Duval Cty School Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992)). A court will look to extrinsic evidence to determine the parties’ intent only if a provision is ambiguous. *Id.* (explaining when extrinsic evidence is relevant). The Supreme Court stated that “any command of a consent decree or order must be found ‘within its four corners,’ and not by reference to any purposes of the parties or of the underlying statutes.” *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233 (1975) (citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971)) (internal quotations omitted).

beneficiary.¹⁰⁰ In *Duran v. Elrod*,¹⁰¹ the Seventh Circuit recognized that modification is appropriate when enforcing a decree without modification would be detrimental to the public interest.¹⁰²

In *Rufo v. Inmates of Suffolk County Jail*,¹⁰³ an institutional reform case, the Supreme Court recognized the flexible approach.¹⁰⁴ The Court explained that Federal Rule of Civil Procedure 60(b)

100. See *United States v. United Shoe Machinery*, 391 U.S. 244, 248-49 (1968). *United Shoe Machinery* arose out of a civil suit brought by the United States, alleging that the defendant monopolized the shoe manufacturing machinery trade. *Id.* at 245 (explaining procedural posture). The lower court entered an injunction, enjoining United from further monopolization. *Id.* at 246 (finding in favor of plaintiffs). After the injunction's terms failed to achieve their purpose, the government petitioned the court for modification. *Id.* at 247 (explaining factual background and procedural posture). After distinguishing the case from *Swift*, the Court held that the court possesses a duty to prescribe relief which will terminate the illegal action. *Id.* at 250 (modifying decree). "If the decree has not, after 10 years, achieved its 'principal objects' . . . then 'the time has come to prescribe other' . . . 'means to achieve the result.'" *Id.* at 251-52 (reasoning necessity for modification).

The *United Shoe Machinery* holding "indicates that an injunction may be modified to impose more stringent requirements on the defendant when 'the original purposes of the injunction are not being fulfilled in any material respect.'" *Exxon Corp. v. Texas Motor Exchange*, 628 F.2d 500, 503 (5th Cir. 1980) (quoting 11 C. Wright & A. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 2961 (1973)).

101. 760 F.2d 756 (7th Cir. 1985).

102. *Id.* at 759-61 (holding that modification is appropriate when failure would result in damage to public interest). In *Duran*, the defendants sought modification of a consent decree to allow "double bunking" in a Cook County Jail. *Id.* at 758 (explaining factual background of case).

The court explained that in "deciding whether to modify a decree the district judge cannot just appeal to the sanctity of contracts; he must consider the concrete impact of modification on both parties" and the public. *Id.* at 760 (explaining factors to consider in modification). In considering the modification, the court characterized the plaintiffs' hardship, short-term double bunking, as modest. *Id.* (analyzing hardship resulting without modification). As for the impact on the public if the court denied modification, Judge Posner believed releasing 500 felons would amount to a judicially mandated crime wave. *Id.* at 761 (analyzing hardship resulting without modification).

Though the arguments for double bunking — delay in building construction, a rising prison population, taxpayer and citizen resistance to expansion of jails — were well known when the court entered the initial consent decree, the court noted that this was not a sufficient ground to deny modification. *Id.*

In *Duran*, the decree's purpose was to create constitutionally compliant conditions in the jail. See *id.* at 757 (outlining requirements of decree). Though the Seventh Circuit modified the no double bunking provision, the modification was within the scope of the decree's purpose as the Constitution does not forbid double bunking. See *id.* at 762 (holding that court did not abuse its discretion).

103. 502 U.S. 367 (1992). Petitioners sought review of the decision denying the sheriff's motion to modify a consent decree entered to correct unconstitutional conditions at a county jail. See *id.* at 376-78 (explaining procedural posture).

104. *Id.* at 383 (identifying flexible approach). The Supreme Court relied upon lower courts' previous recognition of a more flexible standard. *Id.* at 381 (identifying flexible approach).

permits a more flexible standard than that announced in *Swift*.¹⁰⁵ The Court cited lower courts' practice in implementing and modifying decrees to demonstrate the need for a flexible approach.¹⁰⁶ The Court also recognized that a court may modify a consent decree (1) when changed factual circumstances make the decree substantially more burdensome, (2) when enforcing the decree would injure the public interest, or (3) where required obligations become illegal.¹⁰⁷ Under the flexible standard, "[a] party seeking modification of a . . . consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."¹⁰⁸ When a moving party meets the standard, the court considers whether the modification is properly tailored to the changed circumstance.¹⁰⁹

Under the new approach, changed circumstances in fact or law still justify modification; however, courts no longer require that the change be coupled with a grievous wrong or extreme hardship.¹¹⁰ In *System Federation No. 91 v. Wright*,¹¹¹ the Court modified a consent decree where changes in law permitted union shop agreements that the Railway Labor Act¹¹² and the original consent decree prohibited.¹¹³ The Court found that the district court possessed statutory authority to adopt the consent decree.¹¹⁴ The Court concluded that it must be permitted to modify the decree's terms to advance legislative objectives when the legislation is amended.¹¹⁵

105. *Id.* at 378-80 (rationalizing flexible approach despite strong language of *Swift*). The Court insisted that the Rule did not misread *Swift*. *Id.* at 380 (reconciling flexible approach with Rule and *Swift*).

106. *Id.* at 381 (explaining need for flexible approach).

107. *Id.* at 384, 388 (clarifying flexible approach's applicability).

108. *Rufo*, 502 U.S. at 383 (explaining flexible standard).

109. *See id.* (explaining second part of flexible approach inquiry).

110. *See generally* *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961) (permitting modification where change in law occurred though no showing of grievous wrong).

111. 364 U.S. 642 (1961).

112. 45 U.S.C. § 152 (1945) (amended by 45 U.S.C. § 152 (1951)).

113. *See System Federation No. 91*, 364 U.S. at 652-53 (holding that district court erred in denying motion to modify consent decree after change in law permitted what was formerly illegal).

114. *See id.* at 650-51 (discussing courts' power to modify).

115. *See id.* (discussing courts' power to modify).

IV. NARRATIVE ANALYSIS

A. Jurisdiction – Did the District Court Modify the Decree?

Before addressing the merits of EPA's appeal, the Eleventh Circuit examined its jurisdiction to review the action.¹¹⁶ The Sierra Club asserted that the Eleventh Circuit lacked jurisdiction under Title 28 of the United States Code section 1292(a)(1) because the district court's order, requiring EPA to create implementation plans, did not modify the consent decree.¹¹⁷ In response, EPA argued that the court had jurisdiction over the appeal because the district court modified the decree.¹¹⁸

In determining whether the district court had modified the decree, the Eleventh Circuit noted that precedent requires a reviewing court to ask whether the district court's appraisal of the consent decree was "a gross misinterpretation of the decree's original command."¹¹⁹ Under this analysis, a reviewing court must ascertain the legal relationship created by the original consent decree and decide whether the order under review altered the relationship in a "jurisdictionally significant way."¹²⁰ Next, the Eleventh Circuit looked to the four corners of the consent decree to determine what relationship it established between the parties.¹²¹

The Eleventh Circuit found that the consent decree required EPA to establish TMDLs if Georgia failed to do so.¹²² To determine

116. *See Sierra Club III*, 296 F.3d 1101, 1028-32 (11th Cir. 2002) (analyzing court's jurisdiction). The court concurred with the parties that the district court's order did not fall within the terms of 28 U.S.C. § 1291 or the collateral order doctrine. *Id.* at 1029 n.6 (analyzing court's jurisdiction).

117. *Id.* at 1029 (explaining Sierra Club's jurisdictional argument). Based upon a proposed rule, Sierra Club argued that implementation plans should be read into TMDL establishment. *Id.* at 1030 n.10 (explaining Sierra Club's jurisdictional argument).

Because the statute and regulation referenced in the decree created no ambiguity as to whether the establishment of TMDLs included implementation plans, the court denied Sierra Club's request to read implementation plans into mandated TMDL establishment. *See id.* 1030 (rejecting Sierra Club's argument).

118. *See id.* at 1028-29 (detailing EPA's assertion that court possessed jurisdiction).

119. *Id.* at 1029 (citing *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 280 F.3d 1289, 1293 (11th Cir. 2002) (discussing whether district court modified or simply interpreted decree).

120. *Id.* (citing *Birmingham*, 280 F.3d at 1292) (discussing second step in determining whether district court modified decree).

121. *Sierra Club III*, 296 F.3d at 1029 (citing *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000)) (using contract principles to interpret consent decree).

122. *See id.* (finding that consent decree required EPA to establish TMDLs on certain conditions). The court noted that EPA complied with the consent decree's terms. *See id.* at 1029 n.8 (detailing EPA compliance with decree's orders).

whether establishing TMDLs required EPA to implement plans, the court again looked to the decree's terms.¹²³ The Eleventh Circuit explained that none of the referenced material commanded EPA to implement plans as part and parcel of establishing TMDLs.¹²⁴ Examining the decree as a whole, the court noted that it unmistakably required EPA to establish TMDLs under certain circumstances, but it plainly failed to require implementation.¹²⁵

The Eleventh Circuit then addressed the district court's reasoning that the consent decree required implementation plans.¹²⁶ Rejecting the assertion that TMDL establishment without implementation amounted to a hollow ceremony, the court explained that the decree placed the problematic task of establishing TMDLs on EPA, while the implementation obligation rested with Georgia.¹²⁷ Discarding the district court's second rationale for its inter-

123. See *id.* at 1030 (finding that establishing TMDLs does not include implementing TMDLs). The decree adopted the CWA's definition of a TMDL. See *id.* (noting meaning provided in section 303(d)(1)(C) of CWA).

124. See *Sierra Club III*, 296 F.3d at 1030 (finding lack of implementation requirement). Citing the CWA and the reference regulation, the court pointed out that "[a] TMDL is defined to be a set measure or prescribed maximum quantity of a particular pollutant in a given waterbody . . . while an implementation plan is a formal statement of how the level of that pollutant can and will be brought down to or kept under the TMDL." *Id.* (citing 33 U.S.C. § 1313 (2001); 40 C.F.R. § 130.2(i) (2001)).

125. See *id.* (finding that decree did not require EPA implementation). The Eleventh Circuit later explained that it could not read the consent decree at issue as having a broad purpose of achieving cleaner water, thereby including implementation into the TMDL establishment mandate. See *id.* at 1031-32 (citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971)).

[T]he [c]ourt explained that because consent decrees are normally compromises between parties with opposing positions in which each party gives up their rights to litigation . . . consent decrees should be interpreted as written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Id. at 1032 (citation omitted) (internal punctuation omitted).

126. See *id.* at 1031-32 (rejecting district court's reasoning for modifying decree). The district court reasoned that the consent decree required implementation plans because establishing TMDLs without implementing them reduces the decree to "an academic endeavor which would have no effect on water quality in Georgia." *Id.* at 1030-31 (quoting district court's reasoning). Furthermore, the district court stated that an interpretation of the decree excluding implementation plans clashed with the CWA's "goal of improving water quality." *Id.* at 1031 (detailing district court's reasoning).

127. See *id.* at 1031 (stating that decree did not place obligation on EPA to implement TMDLs). "Interpreting the decree as written gives it meaning, because establishing TMDLs is a meaningful and not necessarily simple step in the process of controlling pollution." *Id.* (rejecting *Sierra Club's* hollow ceremony argument).

pretation, the Eleventh Circuit refused to discover a mandate outside the four corners of the consent decree.¹²⁸

After reviewing the consent decree and the district court's rationale for finding that the decree called for implementation plans, the Eleventh Circuit declared that the decree created a relationship with Georgia in which EPA could establish, but was not required to implement, TMDLs.¹²⁹ The Eleventh Circuit explained that the district court's order requiring EPA to implement TMDLs exceeded that relationship.¹³⁰ In doing so, the district court modified the decree because it altered the established relationship between the parties by placing a non-existing duty on EPA.¹³¹ Having found a modified decree, the court concluded that it had jurisdiction to address the merits of EPA's appeal pursuant to 28 U.S.C. § 1292 (a)(1).¹³²

B. Abuse of Discretion – Did the District Court Abuse Its Discretion When It Modified the Decree?

Once the Eleventh Circuit determined that the district court modified the consent decree, the court evaluated whether the modification was an abuse of discretion.¹³³ Highlighting the decree's provisions that reserved modification power for the district court, the Sierra Club argued that the modification fell within the district court's discretion.¹³⁴ Reasoning that the cited "boilerplate provi-

128. See *id.* at 1031 (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233 (1975), *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959)); see also *Hughes v. United States*, 342 U.S. 353, 356-57 (1952)). In addition, the court reasoned that the CWA cannot act as "a source of authority for changing the [CWA's] allocation of responsibilities." *Id.* (rejecting Sierra Club's claim that CWA's purpose justifies modification).

129. *Sierra Club III*, 296 F.3d at 1032 (finding that only EPA obligation stemming from decree was to establish TMDLs for Georgia).

130. See *id.* (holding that district court abused discretion in modifying decree).

131. See *id.* (citing *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 280 F.3d 1289, 1293 (11th Cir. 2002)). If a decree requires a party to perform task A, and later a court orders the party to perform task B, the court altered the parties' legal relationship. *Id.* (explaining altered legal relationship requirement and stating that "... [t]he change is sufficiently obvious" and "blatantly or obviously wrong" when decree did not originally require specific duty). See *id.* at 1032 (citing *Birmingham*, 280 F.3d at 1293).

132. See *id.* (holding that court possessed jurisdiction to address merits of appeal).

133. See *id.* at 1032-33 (addressing merits of appeal).

134. See *Sierra Club III*, 296 F.3d at 1032 (explaining Sierra Club's argument that district court did not abuse discretion). One such provision stated that the district court may modify the decree's terms and grant further relief as justice requires. See *id.* at 1032-33 (explaining reasoning behind Sierra Club's argument).

sions" did not grant any greater modification power than Federal Rule of Civil Procedure 60(b)(5), the Eleventh Circuit qualifiedly agreed with the Sierra Club's assertion.¹³⁵ The court explained that while the district court retained authority to modify the decree, a party seeking modification must show: (1) "a significant change either in factual conditions or in law," and (2) "the proposed modification is suitably tailored to the changed circumstance."¹³⁶

In response, the Sierra Club, relying on a proposed rule published by EPA, attempted to demonstrate a change in the law.¹³⁷ Not persuaded, the court pointed out that Congress never appropriated funds for the rule and that EPA ultimately withdrew the prospective rule.¹³⁸ The court also found the Sierra Club's reliance on guidance documents unconvincing.¹³⁹

The Sierra Club next asserted that the district court acted within its discretion because the decree's purpose was left unaccomplished.¹⁴⁰ The court disagreed, maintaining that the decree's purpose was to establish TMDLs.¹⁴¹ Though the goal of clean water motivated the Sierra Club to bring the action, the decree's purpose was limited to completing only one step in achieving clean water.¹⁴² The court focused on the decree's explicit terms, concluding that

A second provision disclaimed any interpretation limiting the court's modification power. *See id.* (explaining Sierra Club's argument).

135. *See id.* at 1033 (holding that district court possessed power to modify).

136. *Id.* (explaining necessary showing to modify decree).

137. *See id.* (detailing alleged change in law).

138. *See id.* (rejecting Sierra Club's argument).

139. *See Sierra Club III*, 296 F.3d at 1033 (citing Administrative Procedures Act which requires compliance with rulemaking procedures in order to change regulations). The court noted that there was also no change in the factual circumstances. *See id.* at 1033-34 (addressing allegation of changes in factual circumstances). While Georgia did not implement EPA's TMDLs in the manner contemplated by the decree, Georgia had never carried out its duties pursuant to the CWA. *See id.* at 1033 (explaining that Georgia's failure to comply with CWA does not constitute new or changed circumstances). The court commented, "Georgia's governmental lethargy in this area is nothing new." *Id.* (explaining that Georgia's failure to comply with CWA does not constitute new or changed circumstances).

140. *See id.* at 1034 (explaining Sierra Club's argument). Sierra Club cited *Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1539 (11th Cir. 1986) and *United States v. United Shoe Machinery*, 391 U.S. 244, 251-52 (1968) for the proposition that a decree's failure to achieve its purpose is a changed circumstance justifying modification. *See id.* (detailing Sierra Club's argument).

141. *Id.* at 1034 (rejecting proposed purpose of assuring clean water).

142. *See id.* (stating Sierra Club's assertion that decree did not achieve purpose).

experience had not shown that the decree's purpose was incapable of achievement.¹⁴³

V. CRITICAL ANALYSIS

A. Jurisdiction – The District Court Modified the Consent Decree

Applying the analysis set forth in *Birmingham*, the Eleventh Circuit determined that the district court modified the consent decree.¹⁴⁴ In its principled analysis, the court utilized the correct standard for determining whether a lower court modified an earlier decree, thereby granting the reviewing court appellate jurisdiction pursuant to 28 U.S.C. § 1292(a).¹⁴⁵ As commentators note, Congress did not intend to open the floodgate to appeals with section 1292(a), and the judicial inquiry under the jurisdictional statute serves as evidence of this intent.¹⁴⁶ Rather than inquire as to whether the district court merely erred in its interpretation, the proper analysis, followed by the Eleventh Circuit, requires the court to inquire as to whether the misinterpretation is “so blatant or obviously wrong that it leaps from the page.”¹⁴⁷

143. See *id.* (finding purpose of decree capable of accomplishment). “Under the decree . . . Georgia is still responsible for incorporating TMDLs into its NPDES permits; and Georgia is still responsible for implementing non-point source pollution controls.” *Id.* at 1034 (subtly suggesting other forms of relief to enforce Georgia’s obligations under decree).

144. See *Sierra Club III*, 296 F.3d at 1032 (citing *Birmingham Fire Fighters Ass’n 117 v. Jefferson County*, 280 F.3d 1289, 1293 (11th Cir. 2002)) (holding that “[b]ecause the decree as written and entered did not require EPA to prepare implementation plans for the TMDLs, the district court’s order requiring EPA to prepare them modified the decree because it changed the legal relationship of the parties by ‘changing the command of the earlier injunction’”). “The law is that if the change is sufficiently obvious – if the original decree did not even arguably require the additional task or obligation, so that the district court’s interpretation of the decree is ‘blatantly or obviously wrong’ – then we have jurisdiction to review the order.” *Id.* (citing *Birmingham*, 280 F.3d at 1293) (holding that Eleventh Circuit had jurisdiction to review order).

145. See K. Todd Butler, *Appellate Practice and Procedure*, 54 MERCER L. REV. 1335, 1338-43 (2003) (reviewing Eleventh Circuit decisions regarding appellate practice and procedure for 2002 term). For a discussion of the jurisdictional analysis set forth in *Birmingham*, see *supra* notes 71-80 and accompanying text. For a discussion of the Eleventh Circuit’s jurisdictional analysis in *Sierra Club III*, see *supra* notes 116-32 and accompanying text.

146. See Butler, *supra* note 145, at 1339 (explaining purpose of section 1292(a) and how functional analysis furthers purpose). The proper analysis under section 1292(a) is a functional analysis where the appellate court determines if the lower court’s clarification or interpretation acted as a functional equivalent of a modification. See *id.*

147. See *Sierra Club III*, 296 F.3d at 1029 (reviewing Eleventh Circuit’s decision in *Birmingham*).

In *Birmingham*, the Eleventh Circuit found that the district court did not modify the injunction; thus, the court lacked jurisdiction to hear the appeal.¹⁴⁸ The interpretation at issue in that case concerned the lower court's understanding of a clause that specified a city's responsibility for creating new non-discriminatory hiring procedures.¹⁴⁹ Due to the clause's ambiguity, the *Birmingham* court determined that both the appellant's and the lower court's interpretation of the clause were plausible; consequently, the lower court's interpretation could not amount to a blatant misinterpretation of the consent decree.¹⁵⁰

The interpretation at issue in *Sierra Club III* is distinguishable from *Birmingham* because, here, the decree lacks the kind of ambiguity that multiple plausible interpretations can resolve.¹⁵¹ The consent decree in this case provided that if Georgia failed to establish TMDLs, EPA was required to do so.¹⁵² The inexorable fact, which the Eleventh Circuit correctly recognized, was that the consent decree did not mention, either expressly or by reference, any EPA implementation responsibilities.¹⁵³ The Eleventh Circuit's decision, that it possessed authority over the interpretation as a modification, is consistent with legal precedent.¹⁵⁴

Furthermore, the Eleventh Circuit avoided the errors that plagued the district court's analysis by properly adhering to precedent.¹⁵⁵ In previous cases, the Eleventh Circuit noted that courts

148. *Birmingham*, 280 F.3d at 1294 (applying section 1292(a)(1) analysis to district court's interpretation of consent decree).

149. *See id.* at 1292-94 (applying jurisdictional test). The Wilkes class' interpretation of the clause in *Birmingham* — "it shall be the City's responsibility to ensure" its selection procedures do not have an adverse impact — sought to impose an evidentiary burden on the city to show the absence of adverse impact. *Id.* at 1294 (applying jurisdictional test). The lower court placed the burden of showing an adverse impact on the plaintiffs as courts commonly place that burden on plaintiffs in employment discrimination suits. *Id.* at 1292 (applying jurisdictional test).

150. *See id.* at 1294 (applying jurisdictional test).

151. *See generally*, *Sierra Club v. EPA*, Civ. Action File No. 94-CV-2501-MHS (N.D. Ga. July 17, 1997) (detailing terms of consent decree).

152. *See id.* at 10-14 (detailing terms of consent decree).

153. *See generally id.* (detailing terms of consent decree); *see also Sierra Club III*, 296 F.3d at 1030 (discussing whether district court's interpretation was blatant misinterpretation).

154. *See supra* notes 144-76 and accompanying text for a discussion of how the Eleventh Circuit's decision is consistent with precedent.

155. *See Sierra Club III*, 296 F.3d at 1028-32 (applying precedent in discussing whether district court modified consent decree). In finding that the consent decree required EPA to implement TMDLs, the district court read the purpose of the CWA, establishing clean water, into the consent decree even though that purpose was absent from the consent decree's express language. *Id.* at 1031.

generally employ contract principles when interpreting consent decrees because they are a form of contract.¹⁵⁶ Following these principles, the court confined its analysis to the four corners of the decree.¹⁵⁷

In confining its search to the consent decree itself, the Eleventh Circuit avoided confusing the decree's purpose with either the statutory purpose or the Sierra Club's purpose for bringing the action against EPA.¹⁵⁸ The Eleventh Circuit appropriately followed the Supreme Court's repeated directive that "any command of a consent decree or order must be found within its four corners, and not by reference to any purposes of the parties or the underlying statutes."¹⁵⁹ Appealing to the Law of Contracts, this decision reflects a court's recognition that it should hesitate before modifying a decree entered by consent of the parties.¹⁶⁰

B. The District Court Abused Its Discretion in Modifying the Consent Decree

In addressing the merits of the appeal, the Eleventh Circuit properly cited the flexible approach recognized by the Supreme Court and rejected Sierra Club's arguments on appeal.¹⁶¹ In *United Shoe Machinery*, the Court warned against using *Swift's* grievous

156. See *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000) (reviewing contract interpretation).

157. See *Sierra Club III*, 296 F.3d at 1029-32 (looking within consent decree's four corners and finding no ambiguity to justify using extrinsic evidence for interpretation). For a discussion of consent decree interpretation and the Eleventh Circuit's analysis of the specific consent decree's purpose, see *supra* notes 81-115, 140-43 and accompanying text.

158. See *Sierra Club III*, 296 F.3d at 1029-32 (illustrating Eleventh Circuit's desire to continue four corners analysis).

159. See *id.* at 1031 (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233 (1975)) (explaining that district court's analysis completely disregards Supreme Court's instructions).

In *Atlantic Refining*, the Court rejected a liberal interpretation of the consent decree, even though it might better effectuate the purposes of the laws violated. 360 U.S. 19, 23 (1959). In *Hughes v. United States*, the Supreme Court declined to recognize an alleged purpose of the decree where the purpose was absent within the four corners. 342 U.S. 353, 356-57 (1952). In this case, the Eleventh Circuit faced a similar, narrowly drafted decree and a statute with broad purposes. See *Sierra Club III*, 296 F.3d at 1030-32. Appropriately, the court applied the same approach and refused to attach the purpose of achieving clean water to the consent decree's narrowly drafted terms. See *id.*; see also *Atlantic Refining*, 360 U.S. at 23.

160. *Sierra Club III*, 296 F.3d at 1029-32 (incorporating contracts concepts to determine purpose of consent decree); see also *Jost*, *supra* note 61, at 1129 (urging stability in final judgments approach for consent decree modification).

161. *Sierra Club III*, 296 F.3d at 1033-34 (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)) (illustrating need for changed facts or law and proposed modification is suitably tailored to changed circumstance).

wrong standard, noting that the strong language must be read in light of the context.¹⁶² The Court restated the *Swift* holding as follows: a court cannot change a decree in the interests of the defendants if the purposes of the decree have not been achieved, omitting the grievous wrong hyperbole.¹⁶³ Although the flexible approach is less stringent than the *Swift* analysis, “[i]t does not follow that modification will be warranted in all circumstances.”¹⁶⁴ While courts and commentators recognize justifiable modification where changes in law and fact occur, the Eleventh Circuit correctly determined that Sierra Club failed to meet its burden.¹⁶⁵

1. No Change in Factual Circumstances

The court, following precedent, acknowledged that changed factual circumstances justify modification.¹⁶⁶ In *Rufo*, the court remanded the action for the district court to determine whether a prison population upsurge was in fact a new or significant change in circumstances.¹⁶⁷ An inconsistent record prevented the Eleventh Circuit from characterizing the rise in prison population as pre-existing or unforeseeable.¹⁶⁸ Here, no need to remand existed as the record clearly indicated a history of non-compliance by both Georgia and EPA.¹⁶⁹ In fact, Sierra Club’s brief provided ample evidence that Georgia’s non-compliance in developing and implementing TMDLs was foreseen; consequently, Sierra Club could not provide a justifiable basis for modifying the decree.¹⁷⁰

162. See *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968) (explaining district court’s misconstrued interpretation of *Swift*).

163. See *id.* (explaining and restating *Swift* holding).

164. See *Rufo*, 502 U.S. at 383 (holding that district court should exercise flexibility in considering requests for modification).

165. See *Sierra Club III*, 296 F.3d at 1033-34 (showing that Sierra Club failed to show change in law or factual circumstances after consent decree was entered); Jost, *supra* note 61, at 1115 (noting that most courts permit modification to: (1) maintain congruence between decree and law it effectuates; (2) relieve obligor from unfair, oppressive, or inefficient decree; (3) effectuate rights of beneficiary; and (4) serve public interest).

166. See *Sierra Club III*, 296 F.3d at 1033-34.

167. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1991) (expressing confusion over whether upsurge in prison population changed circumstances due to inconsistent record).

168. *Id.* 385-86 (instructing district court to determine whether population upsurge was foreseen).

169. See *Sierra Club III*, 296 F.3d at 1033 (finding no change in factual circumstances).

170. See *id.* (citing Brief of Appellee Sierra Club at 3).

2. *No Change in Law*

In finding the absence of a change of law to justify modification, the Eleventh Circuit's decision remained consistent with precedent.¹⁷¹ In *Systems Federation*, the Supreme Court noted that a court possesses wide discretion; new circumstances involving a change in law, rather than facts, circumscribe that discretion.¹⁷² Nevertheless, the Eleventh Circuit correctly refused to modify the consent decree in *Sierra Club III*.¹⁷³ Unlike the facts of *Systems Federation*, Sierra Club failed to demonstrate any change in law justifying modification.¹⁷⁴ The proposed rule and final rule offered by Sierra Club failed to receive funds for implementation, and EPA withdrew the rule.¹⁷⁵ Shortly stated, the law had not changed.¹⁷⁶

VI. IMPACT

The success of a motion to modify a decree hangs in the balance of a court's discretion.¹⁷⁷ Commentators raise concerns of deferential treatment to the defendant's professional judgment and a lack of deference to the district court's determination of the decree's primary purpose when an appellate court reviews a modified decree.¹⁷⁸ The Court has aptly recognized that only parties have

171. *Cf. Systems Federation No. 91 v. Wright*, 364 U.S. 642, 648-52 (1961) (holding that amendment to Railway Labor Act constitutes change in law justifying modification).

172. *Id.* at 648 (discussing effect on modification of consent decree after amendment to Railway Labor Act).

173. *See Sierra Club III*, 296 F.3d at 1034 (finding that district court abused its discretion).

174. *Id.* at 1032-33 (reviewing district court's modification of consent decree).

175. *See* Act of July 12, 2000, Pub. L. No. 106-245, 114 Stat. 511, 567 (2000) (showing failure of proposed rule and final rule to receive funds for implementation); *see also* 66 Fed. Reg. 41,817 (Aug. 9, 2001) (delaying effective date of 65 Fed. Reg. 43,586 by 18 months); 65 Fed. Reg. 43,586 (July, 13, 2000) (revising Water Quality Planning and Management Regulation and National Pollutant Discharge Elimination System Program); 64 Fed. Reg. 46,012 (Aug. 23, 1999) (proposing revisions to Water Quality Planning and Management Regulation).

None of the funds made available for fiscal years 2000 and 2001 for the Environmental Protection Agency may be used to make a final determination on or implement any new rule relative to the Proposed Revisions to the National Pollutant Discharge Elimination System Program and Federal Anti-degradation Policy and the Proposed Revisions to the Water Quality Planning and Management Regulations Concerning Total Maximum Daily Load, published in the Federal Register on August 23, 1999. Act of July 12, 2000, Pub. L. No. 106-245, 114 Stat. 511, 567 (2000).

176. *Sierra Club III*, 296 F.3d 1033 (holding that there was no change in law).

177. *See* Jost, *supra* note 61, at 1161-62 (concluding that decisions regarding modification must be reached through principled analysis).

178. David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible*

purposes, suggesting that the above concerns are misplaced.¹⁷⁹ Furthermore, Justice Cardozo noted that “the courts task is to give full effect to the judgment . . . without going beyond its four corners . . . [t]o interpret is to explain and elucidate, not to add or subtract from the text.”¹⁸⁰

Due to the fact specific nature of a decree, a decision regarding a decree’s appropriate modification cannot be reached through rigid, formal analysis.¹⁸¹ Nevertheless, principled decisions evaluating modification are necessary to foster institutional legitimacy.¹⁸² One commentator suggests flexibility as a means to effectively enforce decrees.¹⁸³ As *Sierra Club III* demonstrates, however, the judgment of the district court is not enough and flexibility can only go so far.¹⁸⁴ The Eleventh Circuit’s decision in *Sierra Club III* utilized principled analysis in applying the flexible approach.¹⁸⁵ Due to such principled analysis, the Sierra Club did not receive the result it desired.¹⁸⁶

As a result, only 14% of Georgia’s river and stream miles are currently monitored, and 60% of those fail to meet water quality standards.¹⁸⁷ The 16% of 70,150 miles of streams that support no aquatic life should be cause for concern.¹⁸⁸ Nevertheless, Georgia lacks incentive to comply with the mandates of the CWA.¹⁸⁹ Amidst

Test, 58 BROOKLYN L. REV. 1239, 1278 (1993) (questioning whether flexible approach will manifest commentators concerns).

179. See *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (recognizing that only parties have purposes).

180. See Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZO L. REV. 235, 252 (1988) (displaying copy of Justice Cardozo’s hand-written draft of the *Swift* decision).

181. See Jost, *supra* note 61 at 1161 (concluding that decisions regarding modification must be reached through principled analysis).

182. *Id.* (concluding that decisions regarding modification must be reached through principled analysis).

183. See Levine, *supra* note 178 at 1250, 1255 (explaining Professor Fiss’ views on modification).

184. See *supra* notes 116-77 and accompanying text (reviewing Eleventh Circuit’s analysis).

185. See *supra* notes 116-77 and accompanying text (reviewing Eleventh Circuit’s analysis).

186. See generally *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002).

187. Clean Water Campaign, *Did you know?*, available at <http://www.cleawatercampaign.com> (last visited March 9, 2004) [hereinafter Clean Water Campaign].

188. *Id.*

189. See *Sierra Club v. Hankinson*, 939 F. Supp. 865, 867 (N.D. Ga. 1996) (explaining factual background of case).

these circumstances, EPA, the agency charged with protecting our nation's environment, refuses to take further action.¹⁹⁰

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190. See *Sierra Club III*, 296 F.3d at 1027-28 (highlighting EPA refusal to implement TMDLs).

