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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02–626. Argued January 14, 2004—Decided March 23, 2004

Congress established the Central and South Florida Flood Control Project (Project) to address drainage and flood control problems in reclaimed portions of the Everglades. Five Project elements are at issue here. The first, the "C–11" canal, collects ground water and rainwater from an area that includes urban, agricultural, and residential development. The second Project element, pump station "S–9," moves water from the canal to the third element, an undeveloped wetland, "WCA–3," which is a remnant of the original South Florida Everglades. Petitioner, the Project's day-to-day operator (hereinafter District), impounds the water there to keep if from flowing into the ocean and to preserve wetlands habitat. Absent such human intervention, the water would flow back to the canal and flood the C–11 basin's populated areas. Such flow is prevented by levees, including the "L–33" and "L–37" levees at issue here. The combined effect of L–33, L–37, C–11, and S–9 is artificially to separate the C–11 basin from WCA–3, which would otherwise be a single wetland. The Project has an environmental impact on wetland ecosystems. Rain on the western side of L–33 and L–37 falls into WCA–3's wetland ecosystem, but rain falling on the eastern side absorbs contaminants, including phosphorous from fertilizers, before entering the C–11 canal. When that water is pumped across the levees, the phosphorus alters the WCA–3 ecosystem's balance, stimulating the growth of algae and plants foreign to the Everglades. Respondents (hereinafter Tribe) filed suit under the Clean Water Act (Act), which prohibits "the discharge of any pollutant by any person" unless done in compliance with the Act, 33 U. S. C. §1311(a). Under the Act's National Pollutant Discharge Elimination System (NPDES), dischargers must ob-

tain permits limiting the type and quantity of pollutants they can release into the Nation's waters. §1342. The Act defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source," §1362(12), and defines "'point source'" as "any discernible, confined and discrete conveyance" "from which pollutants are or may be discharged," §1362(14). The Tribe claims that S–9 requires an NPDES permit because it moves phosphorus-laden water from C–11 into WCA–3, but the District contends that S–9's operation does not constitute the "discharge of [a] pollutant" under the Act. The District Court granted the Tribe summary judgment, and the Eleventh Circuit affirmed. Both rested their holdings on the predicate determination that C–11 and WCA–3 are two distinct water bodies.

Held: The case is remanded for further proceedings regarding the parties' factual dispute over whether C–11 and WCA–3 are meaningfully distinct water bodies. Pp. 6–14.

(a) Each of three arguments advanced by the District and the Federal Government as *amicus* would, if accepted, lead to the conclusion that S–9 does not require an NPDES permit. P. 6.

(b) The Court rejects the District's initial argument that the NPDES program covers a point source only when pollutants originate from that source and not when pollutants originating elsewhere merely pass through the point source. The definition of a point source as a "conveyance," §1362(14), makes plain that the point source need only convey the pollutant to navigable waters. The Act's examples of point sources—pipes, ditches, tunnels, and conduits—are objects that transport, but do not generate, pollutants. And one of the Act's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants, which treat and discharge pollutants added to water by others. Pp. 7–8.

(c) The Government contends that all water bodies that are navigable waters under the Act should be viewed unitarily for purposes of NPDES permitting. Because the Act requires NPDES permits only when a pollutant is added to navigable waters, the Government contends that such permits are not required when water from one navigable body is discharged, unaltered, into another navigable body. Despite the relevance of this "unitary waters" approach, neither the District nor the Government raised it before the Eleventh Circuit or in their briefs respecting certiorari, and this Court is unaware of any case that has examined the argument in its present form. Thus, the Court declines to resolve the argument here. However, because the judgment must be vacated in any event, the unitary waters argument will be open to the parties on remand. Pp. 8–12.

(d) The District and the Government believe that the C–11 canal

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and WCA–3 impoundment area are not distinct water bodies, but are two hydrologically indistinguishable parts of a single water body. The Tribe agrees that, if this is so, pumping water from one into the other cannot constitute an "addition" of pollutants within the meaning of the Act, but it disputes the District's factual premise that C–11 and WCA–3 are one. The parties also disagree about how the relationship between S–9 and WCA–3 should be assessed. This Court does not decide here whether the District Court's test is adequate for determining whether C–11 and WCA–3 are distinct, because that court applied its test prematurely. Summary judgment is appropriate only where there is no genuine issue of material fact, but some factual issues remain unresolved here. The District Court correctly characterized the flow through S–9 as nonnatural, and it appears that if S–9 were shut down, the water in the C–11 canal might for a brief time flow east, rather than west. But the record also suggests that if S–9 were shut down, the area drained by C–11 would flood, which might mean C–11 would no longer be a distinct body of navigable water, but instead part of a larger water body extending over WCA–3 and the C–11 basin. It also might call into question the Eleventh Circuit's conclusion that S–9 is the cause in fact of phosphorous addition to WCA–3. Nothing in the record suggests that the District Court considered these issues when it granted summary judgment. If, after further development of the record, that court concludes that C–11 and WCA–3 are not meaningfully distinct water bodies, S–9 will not need an NPDES permit. Pp. 12–14.

280 F. 3d 1364, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, Parts I and II–A of which were unanimous, and Parts II–B and II–C of which were joined by REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ. SCALIA, J., filed an opinion concurring in part and dissenting in part.