

Opinion of SCALIA, J.

SUPREME COURT OF THE UNITED STATES

No. 02–626

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

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

[March 23, 2004]

JUSTICE SCALIA, concurring in part and dissenting in part.

I join Parts I and II–A of the Court’s opinion, which hold that a point source is not exempt from the NPDES permit requirement merely because it does not itself add pollutants to the water it pumps. I dissent, however, from its decision to vacate the judgment below on another ground, Part II–C, *ante*, and to invite consideration of yet another legal theory, Part II–B, *ante*. Neither of those actions is taken in response to the question presented. I would affirm the Court of Appeals’ disposition of the question presented without reaching other issues.

Parts II–B and II–C are problematic for other reasons as well. In Part II–B, the Court declines to resolve the Government’s unitary-waters argument on the ground that it was not raised or decided below. See *ante*, at 11. In my judgment, a fair reading of the opinion and briefs does not support that contention. See, *e.g.*, 280 F. 3d 1364, 1368, n. 5 (CA11 2002) (“We reject the Water District’s argument that no addition of pollutants can occur unless pollutants are added from the outside world *insofar as the Water District contends the outside world cannot include another body of navigable waters*” (emphasis added)); Brief for Appellant in No. 00–15703–CC (CA11), p. 10 (“The S–9

pump station merely moves navigable waters from one side of the Levee to another”). That the argument was not phrased in the same terms or argued with the same clarity does not mean it was not made. I see no point in directing the Court of Appeals to consider an argument it has already rejected.

I also question the Court’s holding in Part II–C that summary judgment was precluded by the possibility that, if the pumping station were shut down, flooding in the C–11 basin might ultimately cause pollutants to flow from C–11 to WCA–3. *Ante*, at 13–14. To my knowledge, that argument has not previously been made. Petitioner argued that WCA–3 and C–11 were historically part of the same ecosystem and that they remain hydrologically related, see Brief for Petitioner 46–49, but that is quite different from arguing that, absent S–9, pollutants would flow from C–11 to WCA–3 (a journey that, at the moment, is *uphill*). Nothing in *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986), requires a district court to speculate *sua sponte* about possibilities even the parties have not contemplated. Cf. Fed. Rule Civ. Proc. 56(e) (opponent of summary judgment must “set forth specific facts showing that there is a genuine issue for trial”).

I would affirm the judgment below as to the question presented, leaving the Government’s unitary-waters theory to be considered in another case.