IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA
FOURTH DISTRICT

On Appeal from the Nineteenth Judicial Circuit
in and for Martin County, Florida

MAGGY HURCHALLA,

Appellant,

vs.

CASE NO.: 4D18-1221

L.T. CASE NO.: 2013-001321-CA

LAKE POINT PHASE 1, LLC,
and LAKE POINT PHASE II, LLC,
Florida limited liability companies,

Appellees.

_____/

AMICUS CURIAE BRIEF OF BULLSUGAR.ORG, FLORIDA WILDLIFE FEDERATION, FRIENDS OF THE EVERGLADES AND THE PEGASUS FOUNDATION IN SUPPORT OF THE APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE

Bullsugar.org ("Bullsugar") is a Florida non-profit membership organization. Its mission is to educate the public about water quality and related environmental issues, and advocate for policies that further this mission. Bullsugar informs citizens and public officials about threats to clean water, and advocates for policies to improve water quality. Its mission also includes discouraging dredging and filling of wetlands because of the crucial functions wetlands provide to the environment, including flood protection and water quality enhancement. Environmental policies are often the subject of competing scientific opinion and perspectives. Bullsugar's communications with public officials would be greatly hindered should it face potential legal liability for good faith advocacy statements made to government decision-makers about actions Bullsugar perceives as environmentally-damaging.

Florida Wildlife Federation, Inc. ("FWF") is a Florida non-profit corporation, with approximately 60,000 members and supporters in Florida. FWF pursues its mission to conserve the natural resources of the state, advance environmental education, ethical outdoor recreation and sustainability by advocating before governmental bodies and litigating in state and federal court. FWF and its members often voice opinions as to the environmental impacts of proposed actions. FWF frequently relies on technical and scientific information produced by third parties to

support its positions. Potential tort liability resulting from good faith statements made to government decision-makers would greatly restrict FWF's advocacy.

Friends of the Everglades, Inc. ("Friends") is a Florida non-profit corporation, which pursues its mission to preserve, protect, and restore the Everglades by advocating before government bodies, including the courts, for compliance with environmental laws. Friends' members have environmental, recreational, property, economic, health, and aesthetic interests in the outcome of this advocacy. Friends has initiated litigation or intervened as a plaintiff at many levels of governmental action, and relies on technical and scientific information gleaned from legitimate sources, much of which is disputed and debated. Potential tort liability resulting from good faith expression based on such information and analysis if any public statements are ultimately rejected in favor of an opposing view on a debated environmental issue would restrict Friends' advocacy.

The Pegasus Foundation ("Foundation") is a not for profit Massachusetts corporation with a mission to improve animal welfare through grant-making and education in the United States, the Caribbean, on Native American lands, and in Africa. In Florida, the Foundation helps homeless and abandoned dogs and cats with medical needs. It advocates for better services for animals and for preserving critical wildlife habitats. The Foundation is currently advocating to stop ongoing pollution that is harming the Indian River Lagoon and its human and animal

inhabitants. Participation in environmental policy issues is critical to the goals of the Foundation and would be thwarted if citizens face legal liability for scientifically supported statements made to government.

As environmental advocates who regularly advance their organizations' positions by speaking to and before governmental bodies and courts, all Amici have experience with and important perspectives on the complex, debatable, and ever-changing nature of environmental issues, like those involved in this case.

SUMMARY OF THE ARGUMENT

The statements upon which the "falsehood" element of the "tortious interference" claim was based in this case concerned differing and disputed scientific conclusions. Scientific or environmental "facts" have a unique character. Considerations such as whether certain parcels of lands are "wetlands", or whether a proposed restoration project will benefit the environment are of an inherently different character than those "facts" which are, by their nature, "objectively verifiable."[1] Facts concerning the environment are infused with opinion, reflecting analysis that is inherently subject to debate and uncertainty, and are often points of contention between citizens, industries, and government officials. Debates about the

1 *Faltas v. State Newspaper*, 928 F. Supp. 637, 648 (D.S.C. 1996), aff'd 155 F. 3d 557 (4th Cir. 1998) (unpublished).

character, quality, and importance of particular properties or water bodies play out constantly before federal, state, and local governments, and judges. Courts have consistently recognized the scientific uncertainties that inherently underlie environmental issues. A non-prevailing advocate or party can hardly be considered to have uttered an actionable "falsehood" when their claims do not ultimately win the day. Courts have recognized that disputes about environmental facts are more appropriately resolved in scientific and non-judicial forums, rather than by judicial tort litigation. If citizens can be deemed to have made legally actionable false statements simply because government officials, agencies, or courts reject their good-faith assertions regarding environmental issues, then legitimate citizen participation in important government decisions will come to a screeching halt.

ARGUMENT

JUDICIAL PRECEDENT RECOGNIZES THE INHERENTLY IMPRECISE NATURE OF SCIENTIFIC FACTS

A. Courts Throughout the Country Recognize the Inherently Uncertain and Debatable Nature of Scientific Facts

Florida faces significant environmental and public safety threats, in the form of pollution, scarcity of drinking water supplies, sea level rise, climate change, and other issues that involve uncertain or debated science. Each of these issues is the subject of scientific uncertainty and debate. If citizens are financially liable for publicly expressing their supportable views on these issues in an effort to protect

their communities and environment, the laws and policies intended to ensure the public health and safety will be a nullity.

Science engenders "much debate and disagreement…."[2] Good faith uncertainty and dispute are inherent to the nature of scientific "facts." Government agencies and courts must regularly choose amongst competing views and conclusions.[3] Courts recognize that scientific conclusions are inherently subject to good faith debate, and that judges are ill - suited to resolve these disputes.[4] In *Ecology Center v. Castaneda*, the Ninth Circuit considered a dispute over timber sales on public lands. 574 F. 3d 652 (9th Cir. 2009). Addressing the competing scientific positions of the parties, the court found that "it is not our role to weigh competing scientific analyses." *Id.* at 659.

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2 *See, e.g., Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202-03 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985) (holding claims that a doctor was a fraud were protected First Amendment speech because "medical science, is at best an inexact science…" and thus speech on such matters is protected "[r]egardless of the merit of [those] opinion[s].").

3 Richard Grosso, *Regulating for Sustainability: The Legality of Carrying Capacity – Based Environmental and Land Use Permitting Decisions,* 35 Nova L. Rev. 711, 768 (Summer 2011).

4 *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F. 3d 1108, 1119 (9th Cir. 2004), amended by 402 F. 3d 846 (9th Cir. 2005); *Lands Council v. McNair*, 537 F. 3d 981, 987 (9th Cir. 2008); *Balt. Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Island Harbor Beach Club, Ltd. v. Fla. Dep't of Natural Resources*, 495 So.2d 209, 223 (Fla. 1st DCA 1986); *Davis v. Sails*, 318 So.2d 214, 222 (Fla. 1st DCA 1975); *City of Miami Beach v. Lachman*, 71 So.2d 148, 152 (Fla. 1953) (en banc) (per curiam); *Graham v. Estuary Props.*, 399 So.2d 1374, 1379 (Fla. 1981).

In *Lands Council v. McNair*, the Ninth Circuit found it improper for a court to "act as a panel of scientists that … chooses among scientific studies … and orders the agency to explain every possible scientific uncertainty." 537 F. 3d 981, 988 (9th Cir. 2008).

Next, in *Greenpeace Action v. Franklin*, the Ninth Circuit ruled that, as a court of law, it was "unqualified" to decide which of the competing party expert views "have more merit." 14 F. 3d 1324, 1333 (9th Cir. 1992).

In *Haire v. Fla. Dep't of Agriculture & Consumer Services*, the Florida Supreme Court also explained the reticence of courts to resolve scientific debates, and upheld Florida's citrus canker eradication program against scientific challenges. 870 So.2d 774, 777 (Fla. 2004). The trial court had invalidated the state's program of destroying canker-infested citrus trees, disagreeing with the study from which the destruction radius was derived. *Id.* at 786. The Florida Supreme Court reversed, ruling that the trial court "erred in rejecting the legislative choice based on its own view of the scientific evidence [as to what constituted] the best available science." *Id*.

The Court emphasized the existence of scientific debate and or uncertainty:

> "That there was conflicting evidence presented to the trial court regarding the appropriateness of [the Study's] methods indicates that the issue of whether to adopt [the Study's] conclusions was a matter of debate for the Legislature."

Id.

For similar reasons, in *NMAC N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, a New Mexico court upheld the state's numeric human health standard for uranium in groundwater, rejecting a challenge to its scientific basis. 150 P. 3d 991 (N.M. Ct. App. 2006). The standard had been subject to extensive expert debate. The appellate court rejected the challenge, recognizing that scientific uncertainty allowed the agency to make any decision that was supported by any "reputable scientific thought…." *Id*. at 1002.

An important aspect of the judicial recognition of the inherently debatable nature of environmental conclusions is the court's validation of the "precautionary principle" – the resolution of doubt in favor of the protection of natural resources. The *NMAC N.M. Mining Ass'n* decision recognized the need to "use conservative assumptions in interpreting the data … risking error on the side of overprotection rather than underprotection." 150 P. 3d at 1002.

In *In re Water Use Permit Applications*, the Hawaii Supreme Court upheld a state agency's limited grant of water use rights, noting "[w]here there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation." 9 P. 3d 409, 466 (Haw. 2000). Awaiting certainty, wrote the court, "will often allow for only reactive, not preventive, regulatory action." *Id.* The "absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures

designed to further the public interest." *Id*. at 476. Erring on the side of allowing greater environmental impacts could allow "unknown impairment and risk…." *Id*. at 470-71. The court recognized the scientific uncertainty involved, and that the agency should make cautious assumptions where the science is debated. *Id*.

Finally, in *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, the D.C. Circuit upheld the U.S. Environmental Protection Agency's authority to regulate in the face of scientific uncertainty, and noted "the special judicial interest in favor of protection of the health and welfare," stating that:

> ***"Questions involving the environment are particularly prone to uncertainty.*** Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable. […]
>
> Undoubtedly, certainty is the scientific ideal—**to the extent that even science can be certain of its truth**."

541 F. 2d 1, 24-25 (D.C. Cir. 1976) (emphasis added).[5]

These cases highlight why it is wholly inappropriate to find that a citizen committed an actionable falsehood tort if a jury later finds that her statement that an area was a wetland was inaccurate. In such an area subject to scientific debate, the existence of *any* valid basis for her claims (as in this case, the supporting opinions

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5 *See also Lead Indus. Ass'n v. Envtl. Prot. Agency*, 647 F. 2d 1130, 1152-56 (D.C. Cir. 1980); *Les v. Reilly*, 968 F. 2d 985 (9th Cir. 1992); *see generally* Gregory D. Fullem, Comment, The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty, 31 WILLAMETTE L. REV. 495 (1995).

of two wetland experts, the statements of the federal wetland agency, and statements of an agent of the mining company) should automatically preclude civil liability when the jury resolves the debate in favor of the opposing view. This is particularly true given the importance of erring on the side of protection, given the purpose of environmental laws and programs to prevent human and environmental harm.

B. Whether an Area Contains Wetlands is Often an Issue of Good Faith Differences in Judgment.

Whether lands are "wetlands" is frequently a matter of scientific uncertainty and subject to debate, dependent upon several interrelated factors. The determination of whether an area of land is considered a wetland is subjective and debatable. Florida's statutory definition of "wetlands"[6] is contained in §373.019 (27), Fla. Stat., (2018) and includes those areas that:

> "are inundated or saturated by surface water or groundwater at a *frequency and a duration sufficient* to support, and under normal circumstances do support, a *prevalence of vegetation* typically adapted for life in saturated soils. Soils present in wetlands *generally* are classified as hydric or alluvial, or *possess characteristics* that are associated with reducing soil conditions. The *prevalent* vegetation in wetlands *generally* consists of … macrophytes that are *typically* adapted to areas having soil conditions described above. … Florida wetlands *generally include* swamps, marshes, bayheads, bogs, cypress

6 Recently, in *City of West Palm Beach v. Palm Beach County, et al*, 2018 WL 3769192 (Fla. 4th DCA 2018), in a wetland permitting case, this is Court recognized "Florida's policy to protect and conserve our water is a matter of great public importance…."(reversing an agency final order approving an Environmental Resource Permit [wetland permit] due to the agency's failure to strictly enforce a water quality standard, and emphasizing the legislative policy to "to preserve natural resources, fish, and wildlife." (citing § 373.016 (3) (g), Fla. Stat.))

> domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps *and other similar areas*." (emphasis added).[7]

The Florida Department of Environmental Protection ("Department") acknowledges that "[b]ecause the term wetland can mean different things to different people, it is necessary to have a technical definition to standardize the concept."[8] Wetlands are "those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils."[9]

The state wetland delineation rule expressly directs and acknowledges that the delineation of a wetland requres the use of "reasonable scientific judgment" [10] The dictionary definition of "judgment" includes "the process of forming an opinion."[11]

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7 These definitional terms are, by their plain language, subjective and indefinite.
8 Florida Department of Environmental Protection, *Wetland Evaluation and Delineation,* https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/wetland-evaluation-and (last visited September 17 8, 2018).
9 *Id.*
10 R. 62-340.300; 62-340.300 (2)(a)3; (2)(b)3; (2)(c); (2)(d); (3)(a); (3) (b), Fla. Admin. Code.
11 *Judgment*, MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, https://www.merriam-webster.com/about-us (last updated Aug. 26, 2018). It is appropriate to refer to dictionary definitions when construing land use terminology. *1000 Friends of Fla., Inc. v. Palm Beach County and Bergeron Sand & Rock Mine Aggregates, Inc.*, 69 So.3d 1123, 1126 (Fla. 4th DCA 2011).

The Department explains that "rarely are two noncontiguous properties exactly alike", and "hydropatterns of Florida wetlands are quite variable, differing both by type and location. Because of this, there is no single criteria by which the observation of water alone can be rationally and efficiently used to deduce wetland delineation."[12]

Florida law provides that formal wetland delineations are performed by the Department.[13] Recognizing the legitimate room for dispute over the establishment of a line between jurisdictional wetlands and non-regulated uplands, landowners and permit applicants may challenge the agency's binding wetland delineation in a formal administrative hearing. §373.421(5), Fla. Stat. (2018). The law also recognizes that wetland boundaries change over time. Formal wetland delineations are binding for up to five years "**as long as physical conditions on the property do not change** …" §373.421(3) and (6) (e), Fla. Stat. (2018) (emphasis added).[14]

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12 Katherine M. Gilbert, *et al., The Florida Wetlands Delineation Manual, available at:* https://floridadep.gov/sites/default/files/delineationmanual.pdf. (last visited September 17, 2018). *Id*. at 5.

13. §§ 373.421(2) and (6), Fla. Stat. (2018).

14. In *Fla. Dept. of Env. Prot. v. Hardy*, 907 So.2d 655 (Fla. 5th DCA 2005), the court overturned a jury's finding of tort negligence and award of $1.5 million in damages that had been based on a plaintiff landowner's claim that a state employee had negligently and erroneously asserted wetlands jurisdiction over portions of its property. The owners had claimed that a requirement to restore the destroyed wetland resulted in lost profits, repossession of heavy equipment, and property foreclosure. The Fifth District Court of Appeal overturned the verdict, finding that the state employee's delineation of a wetland jurisdictional line and enforcement of

Similarly, the delineation of a "wetland" for purposes of federal jurisdiction is often subjective, involving the exercise of "good judgment."[15] The Federal Government has permitting jurisdiction over wetlands that "either alone or in combination with similarly situated lands in the region, *significantly affect the chemical, physical, and biological integrity* of "waters of the United States," whether or not the wetlands have a continuous surface connection with "waters of the United States." *U.S. v. Donovan*, 661 F. 3d 174, 187 (3d Cir. 2011) (emphasis added).[16] Hydrology is one key to wetland classification, which depends upon the extent of saturation, methodology, and visual observation. *U.S. v. Deaton*, 332 F. 3d 698, 713 (4th Cir. 2003).[17]

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wetland regulations "involve a basic governmental policy of protecting the state's natural resources," that his actions were "essential to the state's policy objectives," and "required the exercise of basic policy evaluation, judgment, and expertise…." *Id.* at 662.

15 U.S. Army Corps of Engineers, *Wetlands Delineation Manual*, at page 8, available online for public review at: https://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf (last visited Aug. 29, 2018).

16 Again, these terms are, by their plain language, subjective and indefinite.

17 Lands may be "wetlands," but not considered a "jurisdictional wetland" subject to state or federal permitting processes. *Johnson v. Gulf County*, 26 So.3d 33, 41-43 (Fla. 1st DCA 2007) (holding that a county's comprehensive plan requiring mandatory development setback from "wetlands" applies to all wetlands, and not only those within state or federal government wetland permitting jurisdictions).

C. The *Greenpeace* Case Dismissal of Falsehood Tort Claims Against Environmental Advocates Rules That Good Faith Statements Regarding Disputed Scientific Issue of Public Concern Cannot Constitute Tortious Interference.

A recent federal district court ruling in *Resolute Forest Products, Inc., et al., v. Greenpeace International, et al.*, ("*Resolute Forest Products*"), reiterates that liability for "tortious interference" cannot flow from citizen's statements about environmental issues unless the speaker knowingly and maliciously utters falsehoods. United States District Court, N.D. Cal., Case No. 17-cv-02824 (2017). On October 16, 2017, a Federal District Judge in the Northern District of California, addressing matters similar to the issues in this case, dismissed tortious interference and related claims against environmental organizations and individual advocates.[18] The order convincingly explains why statements reflecting an honestly held understanding of environmental facts – even if later deemed to be incorrect – are not actionable. (App. Ex. A).

In *Resolute Forest Products*, a logging company sued environmental organizations, their officers and certain employees, alleging claims for, among other theories, defamation and tortious interference with prospective and contractual business relations. N.D. Cal., Case No. 17-cv-02824 at D.E. 173, (Order Granting in

18 The dismissal was with leave to amend. An Amended Complaint has been filed, and a ruling is pending on a Motion to Dismiss the Amended Complaint. Civil Docket, Case No. 3:17-cv-02824-JST, U.S. District Court, No. Dist., California.

Part Defendants' Motions to Strike, Granting Defendants' Motions to Dismiss) (Oct. 16, 2017). The Court dismissed or struck all claims. *Id.* (App. A, at p. 6 of 32).

The plaintiff logging company ("Resolute Forest Products") alleged that the defendants "had targeted the company with a number of media campaigns designed to reduce the forestry company's profits through false or misleading statements about [its] impacts on the environment and on indigenous communities." *Id.* at p. 7 of 32. (Internal quotation marks omitted). Resolute Forest Products claimed the environmental defendants had published a "false report" accusing it of logging in a forest protected by the Canadian Boreal Forest Agreement, and had later admitted that that the claim that the company had breached the agreement was erroneous. The lawsuit was also based on what the plaintiff described as the environmental defendant's alleged campaign referring to Resolute Forest Products as:

> "Resolute Forest Destroyer," in which it fabricated "phony photographic evidence" and misrepresented the location of Resolute's logging. [] According to Resolute, the term "forest destroyer" is false because the company harvests only a small portion of the Boreal forest. [] Resolute accuses Greenpeace of "bad faith" because the organization once reported that a logging moratorium to which Resolute was a party protected woodland caribou habitat, but then later described Resolute's logging activities within that area - which Resolute characterizes as "miniscule" - as "endangering" the caribou. [] Resolute accuses Greenpeace of falsely criticizing the forestry company's relationship with indigenous communities, when in fact the company employs community members, notwithstanding lay-offs "result[ing from] economic and market realities." [] Finally, Resolute claims that Greenpeace committed additional bad acts when volunteers placed banners … claiming injustice by Resolute, and when supporters presented Resolute with a "guardian tree" containing 61,000 signatures

> asking Resolute to protect the forest. [] In sum, Resolute alleges that Greenpeace publishes "whopping lie[s] . . . misrepresenting Resolute's harvesting as a major climate change risk."

Id. at pgs. 7 and 8 of 32. (internal docket citations omitted).

Next, Resolute Forest Products claimed that the defendant's "tactics show that the organization does not 'actually care about . . . real environmental protection,' has no 'genuine interest' in protecting the forest, and that 'science and truth are not important to Greenpeace.'" *Id.* at p. 8 of 32. Finally, it alleged that it lost profits as a result of the environmental defendant's statements. *Id.* at p. 9 of 32.

Amici recommends the federal court's rulings to this Honorable Court upon which it dismissed the lawsuit as an inappropriate effort to turn public statements about disputed environmental conclusions into an actionable tort.

Mistaken Understandings Are Not Actionable Falsehoods

In *Resolute Forest Products*, the district court addressed the allegation that the defendant "concocted a scheme to falsely accuse" the logging company of breaching a governmental forestry agreement, redraw maps and rewrite geographical delineations to make "false claims about where Resolute harvested." *Id.* at p.18 of 32. The court distinguished between actual knowledge of "faked" photographs and "mistaken" belief in their accuracy, holding that "the plausible inference from this allegation is that **"Greenpeace made a mistake, not that it acted with malice**." *Id.* (emphasis added). The Court added that:

> Resolute claims that Greenpeace knowingly made false statements that [it] was "a controversial logging company" responsible for "significant degradation" of the forest. [] Resolute does not, and likely cannot, claim that the Greenpeace speaker responsible for this statement "in fact entertained serious doubts as to the truth" of this statement, as it **appears to be a claim that Greenpeace held honestly. []** In sum, fatal to its ability to show actual malice, Resolute "does not provide any specific allegations that would support a finding that [the Defendants] harbored serious subjective doubts as to the validity of [their] assertions."

Id.[19] (emphasis added)(citation omitted).[20]

The district court specifically addressed the issue, squarely present here, of statements regarding disputed scientific conclusions, observing that many of Greenpeace's publications … **rely on scientific research or fact."** *Id.* at p. 21 of 32. (emphasis added).

Furthermore, the district court found that the logging company's submission of two expert declarations contradicting the environmental defendant's statements,

> makes more manifest, not less, the degree to which the challenged statements are protected by the First Amendment. **These declarations illustrate the extent to which the challenged statements (a) concern matters of public importance and (b) are subject to professional debate.**

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19. The district court dismissed the claim for actual malice because it was not supported by specific allegations that the maker of the mistaken statements "knew this evidence was fake" or relied on information that the maker "knew to be false at the time they made the claim." *Id* at p. 19 of 32.

20 In this case, the Appellant did not entertain serious doubts as to the truth of her statements, which were supported by the fact and showed that the lands at issue had been determined to contain wetlands by an agent of the Appellee and Appellant's expert witnesses.

Id. at p. 21 of 32. (emphasis added).

The disputed issue concerned the "stewardship" certification of the company's timber harvesting practices. Regarding the dispute between the parties' opposing expert declarations as to whether the company's practices qualified for such certification, the Court observed that:

> **"[t]he academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind**."

Id. at p. 22 of 32. (emphasis added).

The court noted that the disputed statements involved the "complex" and "uncertain" science of "sustainable biodiversity" and "healthy forests,"[21] and that:

> "**scientific controversies must be settled by the methods of science rather than by the methods of litigation**." *Underwager v. Salter*, 22 F. 3d 730, 736 (7th Cir. 1994). "[C]**ourts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context**."

Id. (citation omitted) (emphasis added).

The *Greenpeace* decision compellingly explains that environmental conclusions are more accurately categorized as "disputed," and neither "true" nor "false." Relative to the environmental and scientific statements such as those in this case, whether a particular site contains "wetlands" and whether such wetlands should be permitted to be impacted, are policy matters subject to frequent and rigorous

[21] *Id*. at p. 22 of 32, fn. 11.

debate in Florida. Citizens and environmental organizations often provide public comment, either verbal or written, to public officials, stating their opinions on whether lands subject to development contain wetlands, including advocacy for the denial of permits or other authorizations to develop wetlands.

Citizen engagement is an essential part of environmental regulation. The legislative history of the 1977 federal law regulating mining includes an important statement about the importance of citizen advocacy that rings true today:

> **The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens** …. The [agencies] can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or … elicited at a hearing. [] [**C]itizen involvement** … **will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information**. [] Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the **participation of private citizens is a vital factor in the regulatory program** ….[22]

In this case, even if the jury disagreed with the Appellant's expert-supported assertion that the lands at issue were wetlands, the Constitution does not allow financial tort liability against a citizen who asserts one side of a disputed

22 Surface Mining Control and Reclamation Act of 1977, Report of the Comm. on Interior and Insular Affairs, House of Rep., Together with Additional, Concurring, Separate and Dissenting Views to Accompany H.R. 2 (Including the Congr. Budget Office Cost Estimate) April 22, 1977. Id. at 88-89 [1831-1832] (emphasis added).

environmental conclusion as they petition their government for redress.[23] Statements made about a scientifically – debatable issue do not constitute grounds for liability. Such a judgment in this case will have an inappropriate and devastating effect on environmental advocacy in Florida in any forum. This chilling effect will impact every citizen who speaks publicly at agency meetings or hearings, including neighbors, communities, environmental advocates, and recreationists, who will now have to live in fear of facing a substantial judgment whenever an agency, court, or jury "finds" to the contrary of an environmental conclusion asserted while seeking to influence their government. Consequently, public participation in the agency decision-making process will cease on these matters of crucial public importance. Public debates about environmental issues frequently pit lower-income neighborhoods and communities against economically advantaged individuals, corporations, and industries. Citizens' fears of tortious liability will result in a significance imbalance of the equities in agency decision making and will effectively silence a crucial perspective and information source in these types of decisions.[24] If

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23 Citizens have a First Amendment right to communicate with public officials about matters of public policy. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

24 *See, e.g., Pinecrest Lakes v. Shidel*, 795 So.2d 191, 207-08 (Fla. 4th DCA. 2001) rev. den., 821 So.2d. 300 (Fla. 2002) (explaining that the financial interests of a developer will tend to outweigh those of an opposing neighbor seeking to protect the intangible benefits of their homestead, neighborhood, and sense of community).

the $4.3 million judgment levied against the Appellant is not reversed, most environmental advocacy in Florida will likely cease to exist.

CONCLUSION

This case reveals the need for great caution in applying false claims related liabilities to statements concerning environmental issues. When supported by any rational basis, statements made to governmental entities in furtherance of environmental protection do not constitute "tortious interference." This Honorable Court should reverse the judgment below, and rule that, in cases involving a "falsehood tort," statements made by the defendant that have any colorable basis in valid scientific information or opinion are protected First Amendment speech.

Respectfully submitted this 18th day of September 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2018 the foregoing was electronically filed with the Clerk of Courts using the Florida Courts E-filing Portal, , and served via email in conformity with Fla. R. of Jud. Amin. 2.516 (E): to the service list below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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