PEER

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PAVING PARADISE

How Florida's Wetland Protections Were "ERPanized"

An Insider Account of Malfeasance Within the Florida Department of Environmental Protection

July 1997

About PEER

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources.

PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. **Organize** a strong base of support among employees with local, state and federal resource management agencies;
2. **Inform** the administration, Congress, state officials, the media and the public about substantive issues of concern to PEER members;
3. **Defend** and strengthen the legal rights of public employees who speak out about issues of environmental management; and
4. **Monitor** land management and environmental protection agencies.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

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About This Report

This PEER white paper is written by employees within the Florida Department of Environmental Protection (DEP). They detail how the very agency charged with protecting Florida's diminishing wetlands has deliberately aided in their illegal destruction.

This report is the first in a series of PEER white papers written by DEP employees documenting political manipulation of environmental regulation within DEP. Collectively, the authors represent more than a century of experience in the administration of environmental law within the state of Florida.

The authors remain anonymous not only to avoid the inevitable retaliation but also because of their firm belief that the facts within this report speak for themselves. The employee authors in many instances have directly witnessed the events described herein but all representations in this report are independently verifiable.

According to these professionals, DEP's strategy over the past four years has been one of destroying, or "ERPanizing," their own wetlands protection staff. "ERP" stands for "Environmental Resource Permit," the state permit issued for constructing in or altering surface waters, including wetlands and other aquatic habitats. The word "ERPanizing" is used by the authors to convey the severity of treatment afforded DEP's wetlands staff, the implication being that they have been euthanized by the agency.

It is our hope that this white paper will help the remaining wetlands protectors at DEP have the courage to do their jobs and serve the public. At the very least, the story of their demise has now been told.

PEER is working with a growing network of professionals within DEP who are assembling accounts of the inner workings of the department and its top managers. These employees represent a range of disciplines but are united in their desire to reform environmental protection of Florida's precious natural heritage.

PEER would like to extend a special thanks to Linda Young, Southeast Coordinator of Clean Water Network, for her assistance in assembling the permit data found in Chapter IV of this report.

PEER is proud to serve conscientious public employees who have dedicated their careers to the faithful execution of the law.

Jeffrey Ruch
PEER Executive Director

I. Executive Summary

Protections enacted to safeguard the remaining half of Florida's wetlands are failing not primarily because of inadequate laws but due to a deliberate campaign to obstruct and subvert those laws by the very agency charged with their enforcement–the Florida Department of Environmental Protection (DEP). Under the rhetorical guise of "common sense" regulation, compliance based enforcement and Ecosystem Management, DEP has systematically gutted wetlands protections and dismantled its staff of regulators. The results are striking:

➢ penalty revenue from wetlands violators has nose dived yet there is no evidence of increased compliance with wetland protection laws;

➢ criminal referrals of wetlands violations have virtually ceased while DEP is bending over backward to "mediate" enforcement cases–with settlements or consent orders immunizing future violations, ignoring ongoing violations or containing recoveries of pennies on the dollar –or avoid enforcement altogether;

➢ a review of wetland dredge and fill applications reveals very few denials among a sea of approvals–a regulatory rubber stamp for development with few conditions, little mitigation and no analysis of the cumulative impact of the continued stream of construction within protected wetlands.

As of July 1, 1997, the public may no longer be able to track wetland permitting as the DEP database has been decommissioned.

DEP management, led by Secretary Virginia Wetherell, has unleashed a torrent of political, fiscal and legal assaults on their own wetlands program rules and staff:

➢ **Dispensation**- Application of wetland rules are routinely and illegally set aside by DEP management in order to accommodate development. In many instances, DEP staff is directed to write the justifications for inappropriate but politically favored projects. Improper "package deals," "pilot projects," and "conceptual approvals" are ordered to paper over contravention of law and regulation.

➢ **Deregulation**- Delegation of wetland enforcement to water management districts has effectively eliminated checks on many projects negatively affecting wetlands. DEP has also increasingly used sweeping "general permits" as a means to classify wholesale habitat destruction as a "minor impact" unworthy of regulatory review.

➢ **De-emphasis of Enforcement**- Despite protestations to the contrary, DEP has abandoned more than token enforcement efforts for wetlands rules. Bringing of enforcement cases is actively discouraged by DEP management.

In order to intimidate its own recalcitrant civil servants who persist in trying to enforce wetlands laws, DEP has embarked upon a strategy "ERPanizing" their own wetlands protection staff. "ERP" stands for "Environmental Resource Permit," the state permit issued for constructing in or altering surface waters, including wetlands and other aquatic habitats. The word "ERPanizing" is used by the authors to convey the severity of treatment afforded DEP's wetlands staff, the implication being that they have been euthanized by the agency:

➢ Much of the wetlands staff has been disbanded through DEP-sponsored budget cuts;

➢ Many of the most experienced wetland regulators have been reassigned to make-work positions in units like Ecosystem Management or selectively "cross-trained' to work in areas where they cannot apply their expertise.

➢ Political attacks upon the remaining wetlands staff (including a recent legislative effort to eliminate 19 named staff positions) have been compounded by legal attacks in the form of personal injury suits filed against

DEP employees by the few developers who are unhappy with the treatment accorded their projects. Rather than vigorously defending their employees against these attacks, DEP management exploits the growing feeling of expendability of its own employees to signal that staff simply should not make waves.

The net result is a wetlands enforcement program that is underfinanced, understaffed and under constant personal and professional attack. For Florida's diminishing wetlands, the official state policy of "no net loss"does not reflect the reality of the steady, state sanctioned paving of paradise.

II. Setting The Scene

The Importance of Wetlands

Wetlands are at the interface between aquatic and terrestrial environments. Wetlands are highly productive in terms of species diversity and density and are extremely important and necessary for recharging aquifers, cleansing water, and controlling foods. Wetlands often link together and benefit other aquatic habitats, such as estuaries, which are vital to fisheries and home to species like the Florida manatee. Without wetlands, Florida's water bodies would suffer greatly, and even more of Florida's precious freshwater supply would needlessly flow out to sea. Without healthy aquatic grassbeds, both recreational and commercial fishing in Florida would be things of the past, and our lives, and that of many other animals, would be a far cry from that pictured in the travel brochures. We all have a stake in protecting Florida's wetlands and aquatic habitats. When they are destroyed, all Floridians lose.

The Demise of Florida's Wetlands

Despite their immense ecological value, Florida's wetlands are rapidly being destroyed. Apart from the conversion to agriculture, one of the primary reasons for massive wetland loss is that it's generally much cheaper for developers to acquire and build in wetlands than on existing uplands. Another reason for wetlands disappearing so rapidly is that builders find it more attractive and renumerative to market homes constructed directly on or near the shoreline. Between the mid-1970's and the mid-1980's, Florida had a net loss of 260,300 acres of wetlands. Almost all of these losses were the result of the conversion of wetlands to agriculture (175,100 acres) and urban and other forms of development (66,000 acres). 9.3 million acres of Florida's wetlands have been lost as of 1990. Currently, natural habitat in Florida is being destroyed at twice the rate of Brazil's rainforests. As a result, Florida today has only about half of its original wetlands. The other half have been lost, forever.

Since entering the Union in 1845, Florida's economy has in large part been literally built on encouraging draining and development in wetlands and along the fragile coastline. From land give-aways, to railroads, to U.S. Army Corps of Engineers flood control projects, to federal flood insurance programs, heavily subsidized government programs have been transforming Florida's natural wetlands areas out of existence.

Prior to massive development and the influx of people, there was a place near Orlando, the Merritt Island area (back then known as Mosquito County) where one could actually anticipate over 100 mosquitos alighting on you in a single minute. This was a characteristic not uncommon to other areas of Florida. One method of making the area more hospitable to people was implementing a massive mosquito eradication program, encompassing everything from draining wetlands and applying pesticides to the construction of mosquito impoundments. This was but one more way in which Florida's wetlands were carved up and decimated.

Marjory Stoneman Douglas' classic book on the Everglades, *River of Grass*, published in 1947, marked a turning point for Florida's wetlands. For the first time, a public awareness began to develop as to how important wetlands are to the long-term well-being of Florida. (Ironically, DEP's headquarters just happens to be named after Ms. Douglas.) It has gradually become clear to Floridians that wetlands are vital to both the state's ecological and economic health, and that government should neither encourage development in wetlands, nor ignore the harmful impacts of construction in wetlands.

Governmental Approaches to Wetlands

Federal Approach & the Army Corps of Engineers

Since the late 19th century, the U.S. Army Corps of Engineers (CoE or the Corps) has regulated the construction or placement of any structures within the navigable waters of the United States.

When the Federal Water Pollution Control Act was amended in 1972, it assigned to the Corps dredge and fill regulatory authority that was

originally intended for the then fledgling U. S. Environmental Protection Agency (EPA). But because the Corps, the federal government's premier dredgers and fillers, could be counted on to give a positive response of approval for wetland dredge and fill proposals, Congress relegated the Federal Water Pollution Control Act's section 404 program of EPA to the Corps. The 1972 amendments were titled the Clean Water Act and subsequent amendments have carried that same title.

Thus, federal regulation of wetlands development is exercised through Section 404 of the Clean Water Act of 1977 (the most recent revision), with the Army Corps of Engineers the primary federal agency responsible for regulating wetlands development under Section 404. Section 404 authorizes the Corps to issue or deny permits for the discharge of dredged or fill materials into U.S. waters. If the Corps finds a project to be out of compliance with permit requirements, they may take enforcement action against the violator. Such enforcement action may include civil, criminal, or administrative penalties or permit suspension and revocation sanctions authorized under the Act.

For nearly a quarter century, the Corps of Engineers has grudgingly governed the "regulation" of dredging and filling our nation's wetlands under the Clean Water Act. The Corps did not disappoint its legislative sponsors who gambled that the Corps would be far less aggressive with the charge of protecting wetlands than the EPA. For three years, the Corps administratively interpreted the extent of its wetland dredge and fill authority to be confined to its Historic Rivers and Harbors Act jurisdictional limit, that being the mean (ordinary) high water line of "navigable waters." Not until 1975, when environmental litigation forced the Corps to acknowledge otherwise, did the Corps agree to regulate wetlands above average flood and headwater elevations. Even then, however, the Corps sought to delay and diffuse the court-ordered implementation, by spreading it out over three more years, spurring presidential intervention and a myriad of anti-environmental suits and countersuits.

In Florida, the Corps never shed its mantle of the reluctant warrior in the fight to preserve wetlands. Numerous reports by both private and governmental agencies have documented the systematic non-enforcement by the Corps. The most recent report is a PEER white paper, *Rotten at the Corps* (January 1997), written by current and former Corps employees in Florida. Among other things detailed in this earlier PEER report, it is noted that 99 percent of permits considered by the Jacksonville District of the Corps (covering all of the Florida) are approved. Moreover, the report documents that the Corps rarely, if ever, takes enforcement action against developers for illegal construction without a permit.

As of this writing, a citizen suit filed by PEER and local citizen organizations against the Corps seeking enforcement of the Clean Water Act is pending in federal court.

State Approach & the Birth of DEP

For more than a generation, the State of Florida has made protection of its wetlands an important public policy. The State of Florida has historically not relied upon federal law for protection of its wetlands, instead relying upon its own definitions, its own preservation program and its own, separate permit system.

Because Florida's government will never have enough money to preserve all the state's remaining wetlands by direct purchase or through landowner subsidies such as tax breaks, regulation ultimately is the last best hope to protect the state's wetlands. Although some state wetlands regulations were imposed during the 1970s and 1980s, one unfortunate result was to create a scapegoat of those trying to protect the wetlands. When Florida's economy slowed, environmental regulation, particularly regulation that affected development, became the target of critics clamoring for development. Florida's politicians never let DEP's predecessor, the Department of Environmental Regulation (DER), go far in protecting wetlands.

Historically, wetlands permitting in Florida was handled by both DER and four of the five water management districts (Northwest District excluded), and in a few cases, by local governments. Florida's previous wetlands regulations (Part VIII of Chapter 403, Florida Statutes and Chapter 62-312 of the Florida Administrative Code, which still applies in the Northwest District), were clearly not designed to guarantee outright protection of wetlands.

One of the first things addressed in the regulations was exemptions from the rule. Rule 62-312.050 offered an exemption from the permitting process for 22 distinct and separate ways to dredge and fill wetlands. The statute specifically included a gaping exemption for agricultural activities. In addition to exemptions are allowances for general permits. (To this day, in the Northwest Florida Water Management District, which encompasses the entire Florida Panhandle, there is no ERP regulation of "isolated" wetlands by the state at all). Anyone who didn't fall into one of these "exemption" categories was required to get a permit. At DER–just as with the water management districts and the U.S. Army of Crops of Engineers–however, permits did little to slow down the development of wetlands.

The "dredge-and-fill" permitting system was more often than not a system designed to permit all but the very worst projects. According to data compiled from DER and the state's water management districts, *very few* applications to dredge and fill in Florida's wetlands were not issued. For the most part, projects were simply allowed to go forward.

For those projects that didn't get permitted, "after-the-fact" permits, often in the form of Consent Orders, were standard operating procedure, particularly for wealthy landowners, powerful developers and politically connected Floridians.

Sometimes conditions were attached to the agency's permit authorization, such as requirements to pay a pitifully small fine or to provide "mitigation," usually in the form of an optimistic plan to "create" new wetlands, somewhere, somehow. This mitigation generally proved insufficient, allowing net losses of wetlands to occur and more valuable natural wetlands to be "replaced" by newly created low areas known as artificial wetlands. Furthermore, mitigated wetlands were almost always poorly conceived, rarely considered non-biological factors such as recharge potential, and were usually also very poorly monitored. Many "created" wetlands were simply left to silt up and return to their natural state.

While the idea of artificially created mitigation sites may sound good on paper, special environmental conditions are needed for the formation of real wetlands, having to do with hydrology, vegetation and particular soil characteristics. Early on, when wetlands creation was in its infancy, many mistakes were made. Simply removing soil to bring the substrate to a low enough elevation to provide standing water (i.e. wet conditions) is generally not sufficient to support a wetland plant community. These are dynamic natural communities which take years to reach stability. Thus, all the time that existing wetlands were being decimated in exchange for "wetlands-to-be," overall net loss of wetlands was occurring. So much for messing with Mother Nature.

Another type of mitigation pioneered at DER and still practiced at DEP is "preservation." The philosophy here is that a section of wetlands can be obliterated if the rest is spared by placing the wetland parcel into a "conservation easement." By its very nature this approach also results in an overall net loss. (If you take something away from a group and do not return anything to the group, there's less in the group than when you started). If the whole wetland is under the "protection" of the Department, one has to wonder how something is protected by giving part of it away. Federal agencies certainly don't accept this type of "preservation" as mitigation.

Over the years, state sovereign submerged lands received sporadic extra protection from the then-Department of Natural Resources (DNR), which presided over leases and other uses of public land. However, DNR generally had difficulty saying "no" to proposed uses or to taking enforcement actions–because it answered directly to the Governor and the Cabinet, which often approved a number of politically popular but environmentally destructive projects. During the late 1980s and early 1990s, DNR and the water management districts simply refused to enforce their regulations, deferring instead to then-DER.

Prior to 1993 (when DER and DNR merged to form DEP), the state did little more than symbolically jam the occasional finger of a wetlands enforcer into the most visible cracks of the porous regulatory dike, holding back only a trickle of the development gushing forward in the state. While some important victories were won in the cause of wetland and aquatic protection, these were hard fought and were usually only in the most obvious of circumstances, and only then when particularly assertive DER employees forced the issue.

III. "ERPanasia" : Presiding Over Wetland Destruction

If someone wanted to devise a way to demolish Florida's wetland protection program, they would immediately face a dilemma–Floridians overwhelmingly want to protect their environment and, therefore, an overt frontal assault might be politically difficult. A much wiser strategy would be to launch a more subtle attack, perhaps make it appear that the undertaking was environmentally enlightened and somehow necessary in the best interest of wetlands protection.

Instead of viewing the problem of wetlands and aquatic destruction as being one of too little regulation combined with inadequate public spending policies, DEP has decided to pull its regulatory fingers from the dike–leaving only a few bodies in place to give the appearance that regulation is still in place. The result has been a systematic undermining of wetlands protection, disguised by DEP officials as progress, and sold to frightened DEP employees as self-preservation.

Accordingly, DEP management's strategy to remove regulatory teeth from its program has been one of neutralizing, or "ERPanizing," their own wetlands protection staff. "ERP" stands for "Environmental Resource Permit," the state permit issued for constructing in or altering surface waters, including wetlands and other aquatic habitats. The word "ERPanizing" is used to convey the severity of treatment afforded DEP's wetlands staff, the implication being that many have been euthanized.

De-escalation

The message Governor Lawton Chiles appeared to be sending when he appointed former state legislator Virginia Wetherell to manage the newly-created DEP (upon the departure of Carol Browner in 1993 to head the United States Environmental Protection Agency) was that he wanted to de-escalate the mild offensive Carol Browner had been launching to improve the protection of Florida's environment. Secretary Wetherell and those agency representatives she thought could be trusted to advance her new agenda were immediately sent around the state to conduct a series of "Reality Check" workshops.

Department staff were required by upper management to go and listen to the comments from the public, but were not allowed to respond. The employees were told to get a list of complaints (on the little forms provided) and the citizens' names, and to respond to their specific concern at a later time.

There were some unexpected but serendipitous outcomes from these "Reality Check" workshops. Granted, there were some acerbic comments here and there from disgruntled individuals, but the surprising part was the large number of citizens who said they wanted MORE environmental protection. These observations didn't get much coverage in the Secretary's final report on the workshops. Upper management adopted the rhetoric that Florida's citizens do not want enforcement of environmental regulations despite the contrary experiences of wetlands field staff. Reality didn't matter because the rules, as well as the staff, were now in the process of being eliminated.

The message that regulations were unpopular was brought to the district offices by Jeremy Craft, then-Division Director of the Wetlands program in Tallahassee. He went to each district to explain how things were going to be done. He stated that there was not enough time and/or manpower to address all the violations (at least this was an acknowledgment that violations were occurring). Therefore, field staff were to start using "common sense" when addressing (or even identifying) violations, and "to just let some cases go."

Staff already knew all too well about "doing more with less," so this was not a big surprise. Even though the Secretary has the authority to prioritize the work of agency employees, the regulations governing the work of wetlands staff do not permit field staffers to ignore a violation once it has been identified. None of this direction was put in writing, of course, but staff were being directed to ignore the very rules their jobs required them to enforce. In short, under Wetherell's watch, DEP staff were expected to violate the law.

The Secretary and her management team repeatedly expressed to the public how important enforcement was, and that the Department would not slow its efforts in that regard. That promise was not kept. During this period, Division Bureau Chief Mike Ashey was working on an Operations and Procedures Manual (OPM) for wetland permitting. Mr. Ashey admonished that those procedures were to be followed, period. The development of the OPM, which is made up of four 3-inch thick binders, took over a year and a half to complete. During this time, no efforts were made to produce an enforcement manual.

Internally, staff were sent a mixed message. On the one hand, a Division Director made a point of saying, "Forget the rules. Use common sense." On the other hand, the Bureau Chief is insisting, "Do not read anything into these projects, simply follow the procedures." This left staff in an untenable position. If field staff used common sense and knowledge from professional experience to address an issue outside the rigid framework of the rules, then that staff person could come under fire for not following the rules explicitly. If a staff member applies the rules strictly, even realizing that the rule is not the best solution (environmentally or otherwise), they could likewise come under fire for not using common sense and for being inflexible.

Delegation & Deregulation

Secretary Wetherell strongly supported widespread delegation of state wetlands regulatory authority to the water management districts. The water management districts are regional agencies run by unelected boards with heavy industry representation. These districts are regarded as being comparatively weak in enforcing permitting standards and even weaker in taking enforcement actions to protect wetlands. Under Secretary Wetherell, delegation agreements were reached in 1994 with the South Florida, Southwest Florida, St. Johns River and Suwanee River Water Management Districts.

Historically, the Water Management Districts (WMDs) have done little if any enforcement. It is no surprise that the Secretary, with her pro-development approach, wanted to have the wetlands section emulate the WMDs. Prior to the merger, the Department actually had regulatory oversight of the WMDs. Afterwards, the WMDs became essentially autonomous, and DEP has no more point of entry than any other citizen. In point of fact, the WMDs are not specifically charged with protecting and preserving the resources of the State. But DEP, which is, has decided to act as if it is not.

In 1993 Secretary Wetherell actively supported the repeal of the Warren S. Henderson Wetlands Protection Act of 1984 (formerly Part VIII of Chapter 403, Florida Statutes) and the restructuring of state wetlands protection laws to give wetlands administration authority to water management districts (Chapter 373, Florida Statutes). The end result is that, under the guise of "efficiency," many more permits are being processed by the water management districts, which despite their largely competent staffs, are even less well-equipped politically than DEP to deny permits.

The trend within DEP is to replace regulation with general permits wherever possible. General permits are written to allow as much development as possible while minimizing regulatory oversight and omitting opportunities for mitigation. DEP's current ERP program now has a special administrative code chapter (62-341) devoted to setting forth "noticed general environmental resource permits." Despite the assumption that these projects have "minimal impacts," they actually can result in significant unmitigated wetland and habitat losses. One increasingly popular general permit defines filling 4,000 square feet and clearing 6,000 square feet of "isolated" wetlands as "minor activities."

For a program founded on concern for the "cumulative impacts" of wetlands loss, these general permits are an abdication of scientific, if not legal, responsibility. And to the flora and fauna destroyed by these activities, their impacts are certainly not "minor." Nor is it a "minor" impact to be living in an urbanized area with flooding problems exacerbated by piecemeal wetlands destruction.

Another disastrous example of deregulation was the legislature's effective granting of authority to mangrove destroyers to regulate themselves. In 1995, "professional mangrove trimmers" were given special general permitting authority to trim mangroves. DEP's management did nothing to try to prevent this short-sighted law,

which has resulted in the widespread death of trees the law itself recognizes as fulfilling "an important ecological role," one that "contribute[s] to the economies of many coastal counties in the state."

Recently, under legislative pressure, DEP "cut a deal" with a prominent campaign contributor who had "trimmed" the red mangroves from 25-foot trees down to stumps at four waterfront homesites. DEP has not taken enforcement action in order to test this developer's theory, one rejected by all mangrove experts, that the stumps may one day grow back into trees.

Denigration

Perhaps the most effective method for those determined to dismantle protections for Florida's wetlands is to denigrate those who are trying to protect these wetlands. One wetlands enforcement site (Ocie Mills in Santa Rosa County) received sensationalized national press during the early 1990s after the violator was imprisoned on federal wetlands violations. In this particular instance, enforcement directed at a purposefully contrived and intentional violation was portrayed by the news media as the victimization of an innocent person by an overreaching government bureaucracy.

Another wetlands site (the Vatalaro case in Orange County) spurred a *Florida Trend* article in 1993 in which state wetlands representatives were referred to as "a bunch of god-damned Gestapo bastards!" Early in the 1995 legislative session, a legislative hearing was convened to discuss the Vatalaro case. This case was also a frequent and inflammatory topic at meetings of a property rights task force established by the Legislature during the previous legislative session.

Ms. Vatalaro's son, who coordinated much of the development on the subject property, was the Chief Building Inspector for Orange County, the county where the violation occurred. Curiously, the legislative committee never questioned his claim that he had no knowledge of state or county wetlands regulations in force at the time. It should be noted that the question of DEP's jurisdiction or the existence of a violation was never questioned. DEP staff were subjected to a legislative lambasting precisely because they had properly enforced the law.

In DEP, it is a common "joke" with staff in the wetlands section that they are the "bastard red-headed stepchildren" of the Department. They are rarely if ever in favor, and regardless of how well staffers do their jobs, particularly regarding professionalism and courtesy, someone is always going to get upset, and some become very vocal about it. If violators actually faced penalties, advocates of development in wetlands found and exploited sympathetic "poster children," portrayed as "victims" of "excessive government bureaucracy", and the myths created around these events were used to bash government bureaucrats.

Interestingly, the overwhelming majority of wetlands violations arise from citizens reports to authorities, an indication that the public is concerned and wants protection of natural resources.

By the 1995 legislative session, everyone knew that it was "open season" on government bureaucrats because even Governor Lawton Chiles was in on the act. He referred, in the first major speech of his second term, to the frustrations and difficulties he encountered in trying to get a permit for his infamous "cook shack." Criticizing government regulation was an easy way for Governor Chiles to show that not only was he a "He-coon," he was also a "he-man."

Soon after his speech, he demanded, and received, the dismantling of much of Florida's administrative regulations. These messages were not lost on Secretary Wetherell's middle management and field staff. Bureau chiefs, deputy general counsels and district supervisors scrambled to parrot the theme that things were going to be very different, that regulation was no longer popular–particularly enforcement–and that whoever did not get on the "Virginia [Wetherell] train" was going to get run over by it. Unfortunately, not all of the environmental professionals Secretary Wetherell inherited from the former DER were sufficiently "pliable." And they paid the price.

Without an environmental advocate to head DEP, an intellectual vacuum was created that was instantly filled by developer lobbyists. Their efforts soon bore fruit. One of the worst property rights laws in the country, the Bert J. Harris, Jr. Private Property Rights Protection Act of 1995–advocated by Governor Chiles–passed

with no opposition from DEP management. This law (which reaches to all levels of government and regulatory areas) effectively froze DEP's ability to strengthen environmental protection, including wetlands protection, by potentially subjecting government to lawsuits and damages for protecting the environment in the absence of a "common law nuisance." DEP artfully deferred to another state agency, the Florida Department of Community Affairs, to voice any environmental concerns, choosing not to be a player in the shaping of the law's anti-environmental language (purportedly to protect the public's rights).

Still more troubling was what happened in the closing hours of the 1995 Legislature at the behest of Secretary Wetherell. Last-minute DEP-drafted language was slipped into a bill that removed career service protection from DEP's middle management. This meant that the DEP supervisors who directly oversee most of the wetlands and other environmental decisions could be fired "at will" by Wetherell and her management team.

Meanwhile, while the state's remaining dedicated environmental protection employees were being demonized at the Legislature and at other public forums, they were also being personally attacked in private lawsuits for doing their jobs. Numerous personal lawsuits have been filed against DEP wetlands protection employees who were guilty of nothing more than trying in good faith to enforce state law.

The use of personal injury lawsuits filed against DEP employees has become common and isthe favorite tool of one notorious "property rights"attorney in particular. This attorney filed one lawsuit against a DEP wetlands employee personally in the Northwest District, alleging a multitude of nefarious, conspiratorial and illegal acts. That attorney used virtually the same document when filing suit against another wetlands employee in the Central District. In fact, the complaint filed in the Central District still had the names, language and circumstances included from the case in the Northwest District.

Instead of the Department defending itself and its staff vigorously against these suits, the cases have languished. The tactic of lawsuits seems to be working, however, as the Department has yet to enforce rules where the original violations occurred over half a decade ago. Meanwhile, embattled employees are left with lawsuits hanging over their heads. Aside from the anxiety caused by being sued, those employees now have their credit history clouded and have difficulty in obtaining loans, mortgages or refinancing. Thus, for doing their jobs as prescribed by law, they are being punished directly, while DEP upper management does nothing.

In another case (FDEP v. Leisa Youel, M.D.) litigated by the same lawyer, the Office of General Counsel attorney was directed to "resolve the case"–a nice nebulous phrase for "make it go away." Even though the individual (an orthopaedic surgeon) knew *prior* to purchase of the property that the lot was a wetland (Flood Zone A on Federal Emergency Management Administration maps, used for insurance purposes), she placed fill there anyway without a permit from DEP. The violation occurred in 1991, and the first shovel of unpermitted fill has yet to be removed, even though the Department executed a Notice of Violation and Final Order in the case.

The first lawsuit in this case filed against DEP staff personally was dropped after nearly a year, with nothing having been done by either side. No meetings, no depositions, no discovery, no nothing. Those complaints were dropped, and new litigation was then filed against DEP employees, citing violations or infractions of other laws. The posture of DEP again has been to sit back and wait for matters to be "resolved" while Department staff are left twisting in the wind. If the current trend continues, the cases will be resolved all right–through attrition–since the litigation seems to be lasting longer than the average tenure of a Department employee.

The Department contends that enforcement of the Final Order is included in its countersuit against Youel. This would be marvelous *if the Department was acting upon that lawsuit.* Meanwhile, more than six years after the initial violation, nothing has been done. It should also be noted that a significant portion of the Pollution Recovery Trust Fund money allocated to the Central District for one fiscal year was spent addressing flooding problems for the Little Wekiva River, an Outstanding Florida Water. The subdivision where the violation occurred

includes a section of the Little Wekiva River, and the stream that runs through Dr. Youel's property is a direct tributary. Thus, the Department is advocating the spending of money to correct flooding problems in the same area where they have failed to enforce the violations from filling in the wetlands, a cause of flooding.

Depopulation & Dislocation

Florida's population has continued to grow at a high rate during Secretary Wetherell's tenure at DEP. Florida currently has the nation's fourth highest growth rate, with a population increase of up to eight million anticipated by the year 2020. Each new resident results in roughly one-half acre of additional development. DEP is doing its part to ensure that more and more of these newcomers, with their four million acres of development, will live and work in converted wetlands.

At the end of the 1996 legislative session, Secretary Wetherell personally engineered, purportedly as a cost-saving measure, the first steps of the wholesale disbanding of DEP's Tallahassee ERP Division. (Interestingly, Wetherell has somehow been able to obtain millions of dollars in funding to be used to build a new complex of DEP buildings). The Governor's office pleaded ignorance of Secretary Wetherell's move. As a consequence, dozens of ERP Division employees saw their positions disappear, forcing them out of DEP or into other programs.

One of the overriding assumptions of the 1997 legislative session was that the final elimination of the ERP Division would be implemented. Those remaining ERP employees not laid off were transferred to the Water Facilities Division where the wetlands program could flounder. Moreover, an effort to eliminate additional millions of dollars from the wetlands programs as well as the positions of 19 named employees was stopped only in the final days of the just-completed legislative session.

In addition to the direct impacts of disbanding the ERP Division, there have been indirect impacts as well. All remaining DEP wetlands personnel, both in Tallahassee and the districts, are now keenly aware that their responsibilities are unpopular, not only with the Legislature but also with DEP upper management–and that if they do not tread lightly, their jobs can easily go the way of the ERP Division. DEP wetlands supervisors have told remaining staff that they must go easy on applicants and violations "in order to save the program."

Closely akin to the strategy of disbanding the ERP Division is DEP's effort to dislocate "troublesome" wetlands employees to other programs or simply out of DEP altogether. A favorite buzzword used to describe one form of dislocation is "cross-training." Employees with insufficiently "kind and gentle" reputations have been reassigned to other sections where they have to learn new jobs, while inexperienced employees fill their spots, if their spots are filled at all.

Another favorite buzzword associated with dislocating wetlands employees is reassigning them to work on "Ecosystem Management". Ecosystem Management has become a black hole for many talented DEP wetlands experts. Since its adoption as Secretary Wetherell's professed guiding theme, numerous employees who could otherwise have been doing regulatory functions are now studying and explaining the meaning and benefits of Ecosystem Management. These include some of DEP's most experienced wetlands experts.

As used at DEP, "Ecosystem Management" emphasizes preservation of a few important natural areas as the trade-off for allowing development in other less critical wetlands. The policy can best be described as "institutionalized net loss."

A large number of former wetlands employees have simply quit the agency or moved on to other programs. But DEP management is not adverse to showing the door to any employee unpopular with the legislature or members of the regulated community (e.g. Tom Brown, who was head of DEP's successful Aquatic Exotic Plant Control program, and unpopular with certain legislators, was recently forced by Secretary Wetherell to choose between "resigning" or seeing his program eliminated. He chose to "resign."). It is not too hard to see why rather than waiting for the ax to fall, many DEP wetlands employees have "voluntarily" left, in droves, the jobs they love.

Distraction

Remaining DEP wetlands protection employees have been saturated with new internal training and "new age" sounding mantras. One new regime imposed upon all employees is "Total Quality Leadership" (TQL) training. TQL is another new budgetary black hole at DEP. Former Navy Admiral Paul Moses now heads a staff whose job it is to study and utilize TQL principles at DEP. (Ironically, a prior TQL evaluator at DEP, outside consultant Ed Popovich, was let go by the Department after he criticized DEP management for not practicing TQL themselves).

Another of the tools inflicted on DEP employees is called "Charm School." In a trade newspaper, Governor Chiles was quoted as saying he was going to send his uncouth DEP employees to "Charm School" (his term). All employees have now been sent to a mandatory week-long Public Service Training Program, referred to as "Charm School." The course, which started in 1995, brings DEP employees to Tallahassee for a week long training session in communication, courtesy and techniques for defusing hostile situations. Among the skills taught is how to effectively answer the telephone (taught by an instructor who cheerfully suggested that everybody give their telephone a 'pet name' so they would be oh-so-happy to answer the phone).

The wetlands staff were the first to receive this "educational opportunity." Essentially, individuals who lacked any technical expertise or field experience were telling staff how they were performing their jobs wrongly. Part of the training included filling out a questionnaire, which asked in part, "Why do you think you are here?" The consensus response from staff was that they were being punished for doing their jobs "too well."

These employees have also been required to take "Ecosystem Management (EM)" training to make EM their guiding philosophy. With so many new lessons to be learned, it's little wonder that DEP wetlands protectors have been distracted from doing their supposed jobs.

Dispensation

Like papal representatives, DEP's upper managers, including its District Directors, routinely grant what amounts to dispensation to wetlands applicants and violators from irksome parts of the laws and rules. One typically "bothersome" part of the wetlands program, as provided by statute, is the requirement that the applicant justify the wetlands destruction. The applicant must carry the burden of proof for providing "reasonable assurance" that projects will not violate water quality standards or be contrary to the public interest. Projects in Outstanding Florida Waters must be "clearly in the public interest." (Similar heightened scrutiny is also required to projects in "aquatic preserves" under DEP's state sovereign submerged lands authority.)

On controversial and noncontroversial projects, both large and small, a DEP upper-level manager will give the word that a permit should be granted, directing staff to come up with a justification.

For example, a landowner who had extensively filled into Lake Tarpon, in Pinellas County, was allowed to keep his filled land with a fresh, new after-the-fact permit and a fine. The landowner did not have to justify the destruction because he had been given dispensation.

Another infamous case where the Department bent over backwards to subsidize, at public expense, development in wetlands, is the permitting of "Bo's Bridge," a bridge across Escambia Bay, pushed through the Legislature at the behest of former Florida House Speaker Bo Johnson. It is sadly notable that the Department's permit review staff originally proposed denial of the application for the bridge. The water quality in that area did not meet the minimum standards, and the installation of the bridge would likely have caused even more water quality problems. In accordance with the requirements of law, let alone good conscience, the staff could not issue a permit. Mr. Johnson, however, was granted "an audience" with Secretary Wetherell, and shortly thereafter word came down that the permit WOULD be issued –find a way to make it so.

In this instance, public money is being used to pay to destroy wetlands and other aquatic habitats that the public has already paid to preserve. Secretary Wetherell's DEP, in cooperation with the Florida Department of Transportation, has done everything could to support building this "bridge to nowhere."

Bo's Bridge is a prime example of how political expediency railroads scientific, technological and regulatory expertise at DEP. This case illustrated the unspoken and, naturally, the *unwritten* policy regarding how staff were to defer to those with power and/or influence.

The move away from enforcement is unmistakable. In the late 1980's in Lake County, the Department repeatedly went to court to force a violator to remove a seawall on the St. Johns River and rebuild it in a more landward location. More recently, in Volusia County, there are five adjacent waterfront properties where the owners have erected contiguous seawalls. These revetments were extended out into wetlands, and no permits were obtained for their construction. The amount of encroachment and subsequently appropriated wetlands far and away exceeds that of the Lake County case. However, the Department has not made any formal efforts to require these landowners to remove the structures, and no formal efforts are planned. The walls, and backfill, can stay where they are.

In one case which looked to be somewhat problematic, the District Director simply suggested that the field inspector "lose the file."

A particularly unpleasant but revealing situation involves the "H-Shaped Canal," abutting the Banana River Aquatic Preserve–a critical manatee habitat. Residents in the Merritt Island area fought for over a decade to have this canal connected to open water, for boat access reasons. The requests and proposals would pop up every couple of years or so. For more than a decade, Department staff (DER/DEP) studied these requests, finally concluded that this project could not meet water quality standards and denied the request. More recently, however, local officials started bashing DEP for its position on this project. As a result of this pressure, it now looks as if the canal will be opened soon–as a "pilot project.".

The H-Shaped Canal has become such a political hot spot that DEP lets other violations in the area go unaddressed for fear of further riling the local officialdom. Rather than proceeding with one recent potential enforcement case, DEP closed the proposed enforcement case even before it started due to its proximity to the H-Shaped Canal.

Not surprisingly, staff are often selected to work on a project or taken off a project based on their willingness to come up with the expected justification. Promotional opportunities are not forthcoming for employees who come to the wrong conclusions. Nevertheless, some stubborn employees cannot be trusted to come up with the "right" answers. When this happens, as in the case of another recent Banana River project, the case is simply reassigned.

Dispensations can come in various guises. Sometimes, like uttering a magic phrase, the District Director credits the dispensation to "Ecosystem Management." Other times, the dispensation simply involves pressuring a DEP employee to ignore the laws and rules defining DEP's wetlands jurisdiction.

One striking instance of politics creating poor environmental policy is the Sunset Acres case in the Florida Keys. The project consists of three dead-end canals along the shoreline of Florida Bay on Key Largo. The canal system was originally permitted as a land-locked system separated from state waters by a perimeter berm. In 1979, Sunset Acres applied for a permit to open the canal system directly to Florida Bay. The application was denied on account of persistent water quality violations in the stagnant, polluted canals.

After years of negotiations, Sunset Acres took DEP to administrative hearing and lost. Sunset Acres filed "exceptions" to the hearing officer's Recommended Order, and those arguments were specifically rejected in Virginia Wetherell's Final Order, issued in September of 1996. Then the attorney for Sunset Acres requested that the Final Order be referred to appellate mediation. Without filing an appellate brief or giving an explanation of the grounds for appeal–and over the objection of then-South Florida DEP District Director Peter Ware (who has since been fired by Wetherell)–the Final Order was "mediated." On the order of Assistant Secretary Kirby Green, DEP agreed to permit the direct connection of the foul canals to Florida Bay, a direct reversal of long-standing policy and of the Secretary's own Final Order.

Still another example of ERPanasia in the making is the "conceptual" approval of a huge privately-run naval dry dock facility in the Fort Clinch State Park Aquatic Preserve, which is in

Outstanding Florida Waters and Critical Manatee Habitat. This facility, proposed by Metro Machine of Florida, Inc. is located on the Amelia River, in Nassau County, near the City of Fernandina Beach. Staff had strongly recommended disapproval, finding that "the proposed location conflicts directly with Statute, several provisions of rule, Board of Trustees policies, [and] the adopted aquatic preserve management plan." Nevertheless, after the applicant's attorney wrote DEP's Kirby Green on August 8, 1996, staff mysteriously switched its recommendation to "conditionally approve" and deleted most of the negative analysis from the initial staff remarks. Now, the local citizens live in fear that they will have a next door neighbor stripping paint from the hulls of 1,400 foot-long U.S. Navy ships and spewing toxic waste into state waters required by law to be preserved.

A growing area of dispensation involves mitigation. Under Secretary Wetherell, DEP has not been demanding as high ratios of mitigation acreage to wetlands acreage destroyed as it used to. Adding to this, special mitigation deals exist between DEP, the water management districts and local governments, allowing the agency to bypass the normal mitigation rules and the mitigation "bank" process. These "package deals" usually involve the enhancement (e.g. exotic species removal) and management of existing wetlands. Preestablished mitigation rates, almost always discounted from what should normally be required by rule, are established for wetlands within certain geographic areas. When the destruction occurs, the destroyer simply writes out a check and is thereafter relieved of further obligation.

The main purposes of these programs are to (1) avoid the mitigation bank process; (2) make life easier for developers; and (3) avoid the creation of new wetlands (remember, the object for developers is to get developable land, not more wetlands). These programs usually result in a net loss of wetlands, because although a wetland gets filled, all the mitigation is done on a selected existing wetland. Dade County, for instance, loves these programs. Among other things, they have an Everglades Exotic Removal Program and the M.E. Thompson Melaleuca Removal Program. Other times, needed mitigation has simply been omitted altogether.

The end result of all this is that Secretary Wetherell and her people receive their political benefits, while the wetlands or aquatic habitats receive more fill, bulldozing, industrial waste, concrete, and/or boat propellers. The DEP ERP permit denial rate is microscopic, with no sign of rising, as DEP managers grant more and more dispensation. The cumulative impact of this additional environmental destruction will be suffered forever.

Decriminalization

DEP's wetlands enforcement efforts have been subsumed by another new DEP headquarters program known as the "Compliance Initiative." Under the Compliance Initiative, DEP employees have been told to look for "new ways of measuring compliance." DEP's Deputy General Counsel for Enforcement, Larry Morgan, admitted in a recent article in the *St. Petersburg Times* that DEP has no evidence to show this "initiative" is resulting in greater compliance. Nonetheless, the agency has transferred people to work full time in Tallahassee on the Compliance Initiative in this search for new beans. This initiative was inspired by yet another outside consultant, Harvard's Malcolm Sparrow.

While the new bean counts are being developed, DEP employees are left wondering if by generating a traditional bean, such as a case report, an NOV, or a significant civil penalty proposal, they will simply be laughed at, be placed on a "cross-training" list, or blackballed.

With the subtle and not so subtle intimidation of supervisors as an incentive, it is not particularly surprising that DEP's wetlands inspectors are no longer zealous to take on a recalcitrant violator. When a wetlands or aquatic violator refuses to budge, such as by refusing to restore wetlands or move an illegal seawall, it is far easier for DEP to simply ask the violator to pay a small fee comparable to the cost of a permit.

"Short form" Consent Orders have been quite useful in this regard. Using a short form Consent Order, a resolution can be reached by the payment of a small fine and without any compliance ever being achieved (all without any oversight by DEP's Office of General Counsel prior to entry).

Since short form Consent Order use was authorized by DEP in 1995, total penalties collected by ERP sections have nose-dived. "Long-form" ERP consent orders, where prospective compliance actions can be imposed, have similarly declined, as use of the short-forms has increased. DEP also is afraid to call violations "violations." Staff must now use "non-compliance" letters. Language in warning letters also has been watered down to avoid possibly giving offense.

While the illegal sites being forced into compliance through consent orders or other formal enforcement actions has drastically decreased, DEP management suggests that this could be because (a)there are simply less violations occurring (because of increasing industry voluntary "cooperation" or other Wetherell innovations); or (b)more violations are being resolved "in the field."

The former hypothesis is unsupported by any data and is, moreover, illogical if one assumes that higher civil penalties and strict restoration requirements have deterrent effect. Conversely, violators who are knowledgeable about wetlands rules often choose to ignore them because the down-side of getting caught is a nominal "surrogate permit application" fee and, at most, restoration back to a "permittable" design. Examples abound of applicants who proceed with work while their applications are still pending in order to avoid slowing down their projects.

The latter hypothesis (more violations being resolved in the field) undoubtedly is true. But because wetlands inspectors may be chastised if they have problems with property owners, they have an incentive to resolve cases in the field for less restoration than they would otherwise obtain if they had more supportive management. And by definition, cases resolved "in the field" do not even result in minimal mitigation or "surrogate permit application" fines because acceptance of fine money requires the entry of at least a short-form Consent Order to document the payment.

Meanwhile, DEP has virtually stopped making criminal referrals in wetlands cases. DEP is not likely to force the issue against an Ocie Mills-type violator through civil or administrative enforcement action. The chance of DEP referring such a wetlands case for criminal prosecution is extremely low. This means that those who would intentionally destroy our common heritage can sleep a lot easier, knowing that Virginia Wetherell has effectively decriminalized ERP violations.

Desensitization

When faced with a collusive and uncaring administration in Tallahassee and in the District Director's offices; with frightened and battered middle managers; with fewer co-workers and no support from a decimated ERP program in Tallahassee; and with no way of getting ahead other than getting along, it is not surprising that many capable and good wetlands field inspectors and permit reviewers are less than enthused to take on violators and applicants.

After a while, even the most hardy DEP wetlands enforcer can be tempted to mutter, "Why bother?" "ERPanasia" has been completed when good DEP wetlands protectors are desensitized or quit, and when the wetlands exploiters are happy.

None of the aspects of ERPanasia described above are irreversible. Nor does ERPanasia occur only when one or two of these circumstances occur. ERPanasia can only occur in a state wetlands program that has been rendered completely unhealthy.

IV. The Proof Is In The Pudding

Florida has lost nearly half its original wetlands. Thanks to FL DEP's hands-off approach to wetlands protection, the other half may not be far behind.

State wetlands permitting in Florida is handled by either DEP or four of the state's five water management districts (NW district excluded), and in a few cases, local governments. In the Florida Panhandle, east of Tallahassee to the Florida/Alabama state line, there is no regulation of isolated wetlands at all by the state, only of 'adjacent' wetlands (wetlands located next to a water body). Except for exemptions to the rule (Chapter 62-312.050 offers 22 distinct and separate exemptions for dredging and filling wetlands), general permits (group permits generally assigned to certain types of projects), or projects that are grandfathered in, anyone who wants to dredge or fill a wetland in Florida must apply for a permit. Then it's up to DEP (or the water management districts) to decide whether issuing such a permit is consistent with "the preservation and protection of Florida's wetlands."

How is DEP doing? The data in the chart above, obtained from DEP files, shows the status of all dredge and fill applications received by the agency during a one year period, beginning June 1995 and ending May 1996. A cursory look at the chart will show not only the enormous number of dredge and fill permits being applied for, but also how ***almost none*** of the applications are being denied by the agency.

In addition to the wetlands destruction being permitted by DEP, the state's water management districts also issued a startling number of dredge and fill permits during this same time period. For instance, in the South Florida Water Management District, of 1075 applications received, 780 were issued outright, with only four being denied.

The Chiles Administration's 1993 push to make the wetlands permitting process quicker, cheaper and easier has proven to be a huge success – *for developers.* DEP's wetlands permitting program has essentially become a rubber stamp process for accommodating business interests that would rather buy and destroy cheap, wet lands than pay more for expensive dry lands, which are more appropriate for development. The chart above, and this report, will show just how little real "Environmental Protection" is occurring at Florida's Department of 'Environmental Protection.'

The data gathered for the above table had to be gathered from each district, and the districts were not consistent in their reports. Nonetheless, the data was available but may soon not be. The computer system DEP has utilized for years to track wetlands permitting is being decommissioned. Consequently, DEP staff and the general public may no longer have access to this type of wetlands permitting information after July 1, 1997.

District Office	Issued	Denied	Exempted	Withdrawn	General Permits	Pending	Total
Northwest	435	30	528	18	112	155	1,278
Southeast	54	7	111	14	4	NA*	190**
Northeast	95	2	71	5	18	NA*	191**
Southwest	75	3	345	6	28	59	516
Central	114	20	79	5	23	NA*	241**
South	17+	1+	85+	0+	14+	1+	118+

\+ complete numbers not available from DEP (only covers several months during 1995)
* numbers not available from DEP
** number does not include pending applications