WHITE PAPER

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# *ROTTEN AT THE CORPS*

## The Army Corps of Engineers Presiding Over the Death of the Florida Keys

January 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 documents the systematic and deliberate dereliction of duty by the Army Corps of Engineers in protecting the wetlands of South Florida from unlawful destruction. This is a story not only of an agency willfully refusing to enforce the law but of an agency punishing members of its staff who are doing no more than the job they were trained and hired to do.

This white paper was prepared by current and former employees of the Corps based out of the Jacksonville District. The cases reviewed reflect their personal experience.

This report was reviewed by a committee of current and former Corps employees based in other districts. PEER wishes to thank these dedicated professionals for volunteering their time and expertise.

The authors of this report remain anonymous in order to avoid any further retaliation by the Army Corps of Engineers as well as by private developers and public agencies whose projects have been facilitated by the Corp's failure to enforce wetlands protection statutes. Moreover, both the authors and PEER firmly believe that the record of the Corps in South Florida should stand on its own without protective distractions or obfuscation.

Some of the cases described in this white paper are also the subject of a citizen suit filed by PEER and local citizen organizations against the Army Corps of Engineers seeking enforcement of the Clean Water Act.

PEER is proud to serve conscientious public employees who have dedicated their careers to faithful execution of the laws that protect our natural resources.

Jeff Debonis
PEER Executive Director

# I. Executive Summary

According to its own employees, the Army Corps of Engineers is presiding over the destruction of the ecosystem of the Florida Keys. Through a deliberate and thoroughgoing policy of non-enforcement of federal wetlands protections, the Corps is allowing hundreds of illegal construction projects to go forward. The cumulative consequences of this illegal but permitted development is the piecemeal loss of irreplaceable habitats of threatened and endangered wildlife unique to the Keys.

By implementing a policy of applicant advocacy, termed "plausible issuability," in which all doubts are resolved in favor of construction, the Corps has become a rubber stamp of approval for despoilage of critical wetlands. Ninety-nine percent of permits considered by the Jacksonville District of the Corps are approved. Even in cases in which construction proceeded illegally without a permit or without a permit application, the Corps in South Florida still turns the other way, often issuing after-the-fact permits in order to legitimize violations.

The Corps own technical staff confirm that the Corps in South Florida:

- ignores repeat offenders. Usually, the more blatant the offense, the more accommodating is the Corps response.
- dodges taking jurisdictional responsibility for construction projects if it can at all avoid it. The Corps has created a welter of internal policy exceptions, categorical exemptions, enforcement guidelines and Nationwide Permits which it uses to evade its statutory duty to protect wetlands.
- winks at fictional promises of mitigation as a condition of permit approval. Usually the applicant will agree to create new wetlands in an amount of acreage equal to that destroyed by the construction project. This compensation scheme allows the Corps to claim that there has been no net destruction of wetlands when, in fact, the mitigation project has never been started, let alone completed. The few completed mitigation projects have not been successful in replacing the wetland ecological values which have already been lost.

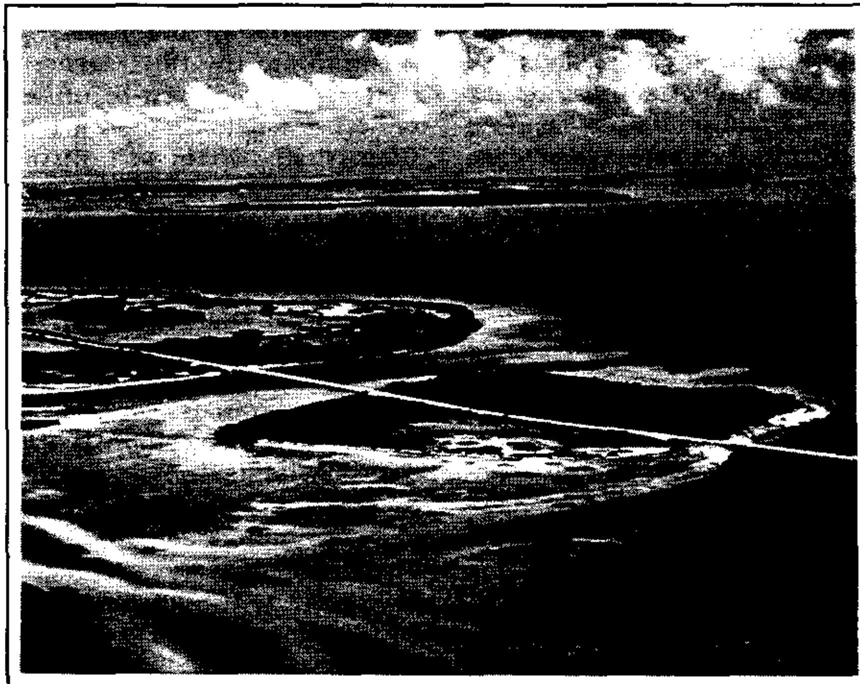
Earlier reports by the General Accounting Office (GAO) in 1988 and The Wilderness Society in 1992 which documented these same abuses by the Corps elicited vows of reform from the Corps but no steps in that direction.

If anything, the internal atmosphere toward reform within the Corps has worsened dramatically in that time. Permit files maintained by the Corps have been systematically purged of dissenting views, critical evaluations or adverse findings from Corps staff. Often such dissonant internal memoranda are placed in separate "set aside" files and shielded from public review. Corps staff who author critical memos or attempt to enforce wetland protections are themselves the objects of harassment, isolation and professional estrangement.

Federal resource agencies, such as the Environmental Protection Agency and the U.S. Fish & Wildlife Service, can effectively veto or force further review of Corps permitting decisions but are bullied out of intervening by the combined forces of the Corps and the developer. As a result, Corps permit decisions are not commonly challenged either internally or externally.

This white paper traces the Corps' uncomfortable twenty year history as an environmental regulatory agency and explains how the agency's internal dynamics militate against tough enforcement of wetlands protections. The Corps' performance in South Florida, and particularly in the Keys, is documented from ground level and aerial views by current and former agency employees.

Several of the more recent egregious decisions made by the Corps in the Keys are the subject of a citizen suit brought by PEER asking the federal courts to force the Corps to abandon its posture of non-enforcement of the wetland provisions of the Clean Water Act.



**FLORIDA KEYS OF MEMORY.** The Keys as they used to look before rampant development—clean water, vibrant seagrass beds and white sands set in a healthy and productive marine environment.

# II. Wetlands Protection: The Unwelcome Burden

***"I believe this should be our national goal—no net loss of wetlands. We can't afford to lose the half of America's wetlands that still remains."***

—President George Bush in a June 6, 1989 speech before a Ducks Unlimited symposium

Wetlands, which include swamps, bogs, marshes, estuaries and similar areas, have for much of this country's history been considered watery wastelands which should be filled or drained in order to become useful. In recent decades, however, the vital ecological role of wetlands has been recognized. With that recognition came legal protections that are an integral part of the Clean Water Act (CWA). The clear policy behind the CWA's protection of wetlands can be found in the Act's preamble (33 U.S.C. 1251 (a)):

**RIVER OF GRASS.** The Everglades requires slow flowing clean water to maintain its ecological balance.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that...(1) it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985..."

Since the discharge of fill into wetlands was defined as a form of pollution, this "zero discharge" by 1985 goal extended to dredge and fill from and on wetlands. It is now more than a decade since that goal has been eclipsed by inaction.

## The Corps & the Clean Water Act

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.

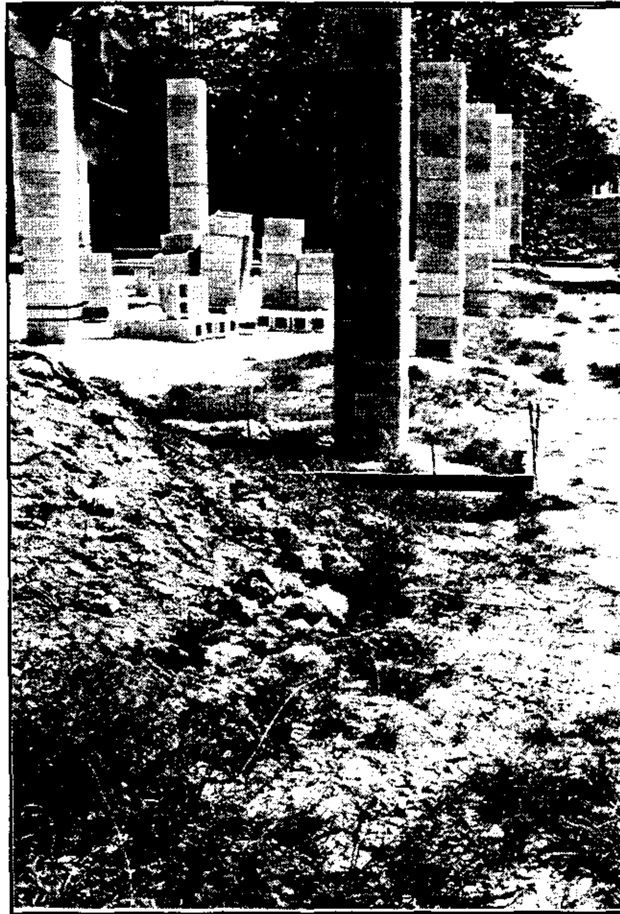
The Section 404 regulatory program is composed of two basic elements—permitting and enforcement. Permits are issued to authorize discharges of dredged and fill materials into waters of the United States, including lakes, rivers, streams as well as wetlands. Corps regulations state that the discharge of dredged material includes both the deposition of material on specified discharge sites located in waters of the United States as well as the runoff or overflow from a contained dredged material disposal area. Fill material, according to Corps regulations, includes any material used primarily for replacing an aquatic area with dry land or changing the bottom elevation of a body of water. Subsequent to permit issuance, Section 404 requires that permits be enforced and authorizes the use of civil and criminal penalties for failing to adhere to permit requirements.

### Reluctant Warriors

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. In the beginning, it was difficult to get the slow-moving Corps bureaucracy to adopt its new charge. Now, after turning the concept of "regulating" wetlands on its head, it's nearly impossible to get the agency to stop.

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.

The Corps then set out to reinterpret the definition of wetlands and aim its "regulatory" efforts toward assisting the dredging and filling of wetlands, despite the plain meaning of the law and the growing body of judicial interpretations to the contrary.



**THE CORPS IN INACTION.** Illegal "dream house" being built in wetlands.

One case in point that has haunted the Corps to this day involved residential housing. Under Section 404 guidelines, if a fill proposal is not water-dependent (that is, does not have to be located in waters/wetlands in order to fulfill its basic purpose—like a pier or marina, and if there are practicable (that is upland) alternatives, the permit application must be denied. Early in its CWA history, having been forced to decide the

issue of a housing project's water-dependency in the case of the Marco Island development in Florida, the Corps correctly decided that residential housing was not dependent upon location in wetlands to fulfill its basic purpose. But despite this posture, the Corps has continued to authorize countless individual and developmental residential fills in wetlands throughout the nation (instead of denying them outright as its regulations intend and the courts have decided), for more than 20 years.

**BREAKING EGGS TO MAKE AN OMELET.** Although this construction debris will be removed, the damage is done.

Only very recently, and then only under the threat of litigation has the Corps agreed to substantially narrow its policy of uniformly approving residential projects.

Another example of the Corp's creative reluctance to enforce the law emerged from a case arising out of its Jacksonville district. When decided, this case determined that dragline drippings were a regulated discharge of dredged or fill pollution. Despite no appeal of the case, the Corps unilaterally decided to consider the "drippings"(i.e, materials dripping from earth moving equipment over, across or through wetlands) as *de minimis* (minimal) and refused to regulate, even within the Jacksonville district, where it had "won" the case. As a result, if dredgers hauled away a majority of the non-dripping spoil from drainage excavations, they could convert vast tracts of wetlands into uplands, and then fill them as non-wetlands at heir future convenience.

Similarly, but on a vaster scale, in the Avoyelles Sportsman's League case out of Louisiana, the Corps lost a decision by saying that cut bottom land (wetland) hardwood forest vegetation was not fill, when actually it was, as determined by the court. Because it did not want to acknowledge and regulate downed vegetation as wetland fill, the Corps decided to comply with the court decision only in the area of the Circuit Court of Appeals covering Louisiana, but nowhere else in the nation.

### Plausible Issuability

The Corps has literally thousands of loopholes honeycombed into its laws, regulations, policies, guidance, definitions and procedures that contribute to a practice called "plausible issuability." Plausible issuability employs policies and procedures so tortuous and obtuse to the general public that they are unfathomable often to its own regulatory employees, requiring constant retraining exercises. These loopholes include (but are not limited to) congressional exemptions (mining/forestry, road fills, etc.), categorical exclusions (for federal or federally funded agency/projects), letters of permission, general permits, advance identification projects, Nationwide Permits (such as Nationwide Permit 29 for residences) and finally, simply not asserting authority at all.

These self-declared loopholes give the Corps plenty of leeway to side with any applicant (who are often also violators) by issuing any permit, often after-the-fact. In other cases, the Corps will conveniently circumvent the problem altogether by refusing to assert its authority in the first place. The Corps can do this because,

contrary to its own laws and regulations, the agency operates under an internal policy of applicant advocacy embodied by the unwritten understanding, "when in doubt, don't regulate." Such a policy confuses the issue to such a degree that effectively pursuing enforcement becomes infeasible, in that sufficient doubt exists to create the pretext for affirmative authorization, allowing the permit to be plausibly issued.

## Past is Prologue

In 1988, the General Accounting Office (GAO) issued a report entitled Wetlands: The Corps of Engineers Administration of the Section 404 Program which examined five Corps districts including the Jacksonville district. That report criticized the Corps for improperly narrow delineation of wetlands and refusal to assess cumulative impacts of its issuance policies. The Corps was further accused of undue reliance upon the applicant's representations of a project's water-dependency, and the availability of practicable alternatives.

GAO also detailed a devastating picture of Corps non-enforcement, finding that the CoE:

- did not usually detect unauthorized dredge and fill and generally failed to investigate discovered instances of suspicious filling;
- did not inspect permits for compliance with permit conditions;
- revoked or suspended few, if any, permits for violations;
- used "administrative" rather than civil or criminal remedies in cases of serious violations. Even the records of the administrative enforcement were cited as spotty. GAO found that the most likely outcome for a violator was the issuance of an after-the-fact permit.

In 1992, The Wilderness Society conducted an update of the GAO review ( Federal Wetlands Regulation in the Florida Keys: Net Losses in a Special Place) and found that nothing had changed:

"Our review indicates that program deficiencies identified in the General Accounting Office's 1988 national report on administration of the Section 404 program continue in the Keys."

PEER's review indicates that little has changed since 1992.

# III. Out of Control

***"The Corps and resource agencies appear to be in the grip of a deep and profane dereliction. The Corps' permit and enforcement program has become a rogue, rewarding the violator while penalizing the compliant."***

—Anonymous wetlands specialist quoted in 1992 Wilderness Society report

Although EPA, in its role as the primary implementing agency under the CWA, can veto Section 404 permits issued by the Corps, both GAO and The Wilderness Society found that this veto power is exercised rarely, if at all. Similarly the U.S. Fish & Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) may also veto projects if either agency finds that a proposed activity would jeopardize a federally-listed endangered or threatened species. Such vetoes are few and far between.

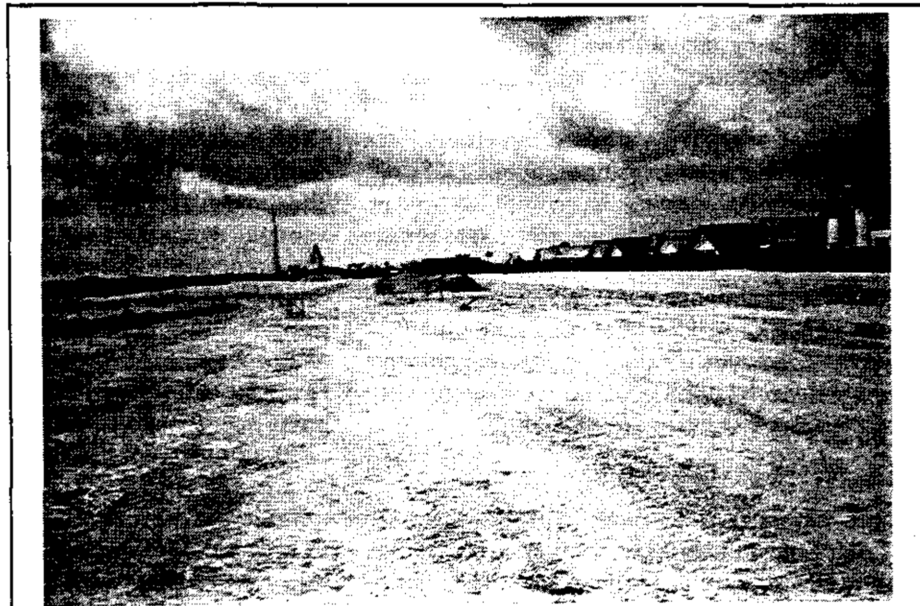
As a practical matter, oversight of the Corps by these federal resource agencies is practiced through a kind of bureaucratic jawboning that consists of recommended modifications of a project or, less typically, a recommended denial of a project. While the Corps generally considers federal resource agencies' comments on permit applications, they usually do not adopt recommendations that would lead to project modifications or denial. This rather dry finding fails to convey the truly vicious bureaucratic infighting which occurs on a day-to-day, project-by-project basis in South Florida.

The Corps consistently bullies EPA (as well as any other contributing agency) representatives into acquiescence by creating endless correspondence exercises, countless "resolution" meetings, impossible to meet deadlines, executive challenges at more malleable "higher authority" levels, interagency meetings with insistent applicants/violators present, as well as covert threats from Corps executives to other agency representatives or their supervisors, all designed to "get out the permit" or reach a positive result on behalf of the applicant's interest. Even the most stalwart agency/representative will eventually wither under this concerted and relentless assault by applicant/violators and their Corps sponsors.

Not surprisingly, both the GAO and The Wilderness Society found the Jacksonville district routinely ignored recommendations that permits be denied and was the least likely of virtually every district in the country to adopt recommendations that projects be modified.

### The Mitigation Scam

The most common tactic used by the Corps to lubricate approval of permits is to condition the permit on the performance of certain mitigative measures. In this all too common scenario, the



(PHOTO FROM USFWS REPORT)

**MITIGATION ILLUSTRATED.** Area which should have been mitigated as a permit condition. This permit expired in 1993.

Corps will authorize an applicant to fill wetlands if the applicant agrees to compensate, through a mitigation plan, for the adverse impacts to wetlands. Mitigation, in this context, includes restoration, enhancement or creation of wetlands.

On paper, this approach appears to serve the goal of no net wetland loss but on the ground it is a disaster. Not surprisingly, the Corps in South Florida is as lax in enforcing compliance to mitigation conditions as they are enforcing other aspects of Section 404. A July 1994 study by the U.S. Fish & Wildlife Service Ecological Services branch in Vero Beach (Follow-Up Report on the Effectiveness of the Corps of Engineers Regulatory Program in Mitigating the Loss of Historic East Everglades of Dade and Broward Counties) found an astoundingly low rate of mitigation compliance or success:

"Field audits of 23 mitigation projects on March 22-25, 1994, revealed that: 1) four sites had not been constructed, 2) three sites had been partially constructed, and 3) the remaining 16 sites had completed construction. Of these completed sites, only 142 wetland acres of the required 537 acres (27%) had been created and enhanced. The remaining seven sites represent a noncompliance rate of 37 percent. The site inspections also revealed low mitigation success rates. Of the 19 mitigation sites completely or partially constructed, only 8 (42%) successfully replaced lost wetland functions. As a result, the actual wetland losses are greater than those indicated by the permitted losses."

These findings by USFWS raised eyebrows but caused no change in Corps operations. USFWS has no direct 404 permit enforcement power so their study could easily be ignored. There is no reason why the Corps could not or should not be monitoring compliance with its own permit conditions. The Corps does not adequately monitor projects, especially in South Florida, and rigorous compliance with permit conditions is the very last thing the Corps wants to see happen.

### Life Within the Corps

The vehemence with which the Corps resists outside criticism is mild in comparison with its treatment of its rare internal critics. Any Corps regulatory employee who suggests faithful compliance with the Corps' own espoused laws, regulations and policies is in for a rough ride. This is because s/he is the only player over which the Corps has complete control.

The district engineer is a military officer commanding a mostly civilian workforce. This hybrid seems to produce, from an employee's rights point of view, the worst of both military and civilian worlds. Regulatory field staff occupy the bottom rungs on the hierarchical, military organization charts.

If a field employee expresses dissatisfaction with the lack of compliance or enforcement, it is usually first suggested by regulatory management that "perhaps you don't belong here." If the employee persists, s/he may soon be made to feel even more uncomfortable through negative performance reviews. The now marked employee will be passed up for promotion, awards or assignment to personally preferred positions. If this doesn't produce the desired result, oftentimes an excessive workload will be assigned, in full anticipation of resultant employee deficiencies and mistakes, which can then be duplicitously ascribed to the employee, warranting a reprimand or worse.

The pressure will continue to increase until the employee feels compelled to resign or accept reassignment. The excessive workload may cause an embattled employee to commit enough errors to plausibly justify measures leading to the employee's demotion or removal. At this point, the employee usually capitulates.

Conscientious employees in a situation such as this feel that they have no hope of redemption. The procedures for righting internal wrongs seems daunting and the prospects for relief dim. The employee's first line recourse is an internal appeal to Corps executives. The chain of command of the Corps locks arms and invariably reinforces middle management's measures to punish the conscientious employee. The employee's next resort is the grievance process. Grievances are handled by personnel officers, many of whom will unabashedly admit that they actually represent management.

If an employee chooses to appeal outside the Corps chain of command, his or her prospects may be even bleaker. Blowing the whistle to inspectors general will mark the employee as a pariah and usually will not correct the problem. The Army Inspector General is actually part of

the Army chain of command and, not surprisingly, has a long record of protecting that chain of command. The Department of Defense Inspector General, while independent of the Army chain of command, has an questionable record of policing environmental violations of a defense establishment that is arguably one of the biggest polluters in the world.

In practice, the inspector general usually delegates any actual investigation back to the district from which the complaint emanated. Consequently, the only concrete result of an employee complaint to an inspector general usually is an investigation of the whistleblower rather than the reported misconduct.

Whistleblowers' referrals of such matters to the independent U.S. Office of Special Counsel (OSC), which is supposed to police against violations of civil service merit principles, is often no more productive. As with the inspector general, OSC will generally defer to the technical judgment of the agency and accept the fruits of agency management investigating itself. The agency will naturally decide the issue favorably on its own behalf and happily report the positive result of back to the OSC which routinely endorses it.

While immediate retaliation following a formal whistleblower complaint is uncommon for obvious reasons of avoiding the appearance of illegal retribution, the way is now open for sophisticated (and often surreptitious) reprisal actions to be taken against the recalcitrant employee. This fate is sometimes called "the death of a thousand paper cuts."

With nowhere left to turn, the employee either conforms or quits.

### "Set Aside" Comments

The absence of realistic internal appeal options for Corps regulatory employees strengthens the hand of managers who issue illegal orders purging permit files of any written sign of dissent or concern. Written recommendations from the field to deny, revoke or suspend permits are declared "set aside comments" and literally set aside from the file and shielded from public view. In South Florida, Corps managers used to put directives to remove troublesome memos from files in writing but now the drill is so ingrained that such orders are made orally.

Despite the Freedom of Information Act and declarations of a policy of openness by the Clinton Administration, the Corps remains a black box of nondisclosure. In those cases where dissonant internal memos can be pried from the Corps, the public gets the facts usually too late to affect the outcome.

Why is the Corps like this? It is simply because the Corps is beyond effective control. No legislative or executive branch agency exists to counter the Corps' internal agenda. In fact, they usually reinforce it. And what little counterbalance does exist is efficiently thwarted by the Corps' intransigence, posturing and its ability to simply wear down its opponents.

**THE CORPS SHRUGGED.** This wetland has been destroyed by illegal roadfill. This case file contains no hint of the objections raised by Corps regulatory staff.

# IV. How It Works in the Keys

***"[The Corp's South Florida office] apparently not only continues to conduct virtually no enforcement, but has resorted to actually conducting an expedient permit-advocacy and issuance policy, contrary to the Corps' own regulations."***

— A. Earl Cheal, 18 year Corps employee in Florida and former Monroe County commissioner quoted by Ted Williams in the March-April 1995 issue of *Audubon*

During calendar year 1995, the Jacksonville District of the Corps of Engineers issued final determinations on 92 permits for work and structures in navigable waterways. Of the 92 permit decisions, the Corps issued only one denial and that only because the applicant lacked a state permit. In addition to approved projects, the Jacksonville District llows much construction to proceed without permit review and willingly grants after-the-fact permits in lieu of any enforcement action. While these figures reflect only final permit decisions and do not include pending projects, they do give a fair representation of the Corps' user-friendly and facilitative posture.

These statistics only hint at the extent of the environmental consequences stemming from the virtually unfettered construction in federally protected wetlands. What follows is a description of some of these projects in the Florida Keys, their history and results.

### Florida Department of Transportation: Profiles in Malfeasance

Worse than any private developer in its disrespect for wetlands protection in the Keys is the Florida State Department of Transportation (FDOT). For example, the Harrison Tract Project of upper Key Largo was stopped from illegal filling in the early seventies. Instead of being completely restored, its remaining illegal work was slated for removal in the Florida Department

**FDOT HARD AT WORK.** Cleaning up this site will count as mitigation credit for future wetlands destruction.

of Transportation's up-front "mitigation" for future wetland destruction under its plan to widen U.S. Highway 1 along an 18 mile stretch which is the main route into the Florida Keys.

Yet, when conducting this up-front mitigation work, the Transportation Department's contractor conducted (and the tax-paid environmental oversight consultant failed to prevent) turbidity violations; turbidity screen non-deployment; errant, additional illegal fill discharges and miles of unremoved perimeter fill berms. The contractor then attempted to camouflage the violations with the hay bale remnants originally intended for turbidity retention.

The significance of these violations is magnified by the fully anticipated failure (like most mitigations throughout Florida) of its "mitigative" mangrove seedling planting program. Similar failures are anticipated at Transportation Department sites at the Plantation Key weigh-station and the Windley Key (Whale Harbor) bridge approach.

### Piers & Plugs

Cumulative consequences of incremental regulatory retreats add up to widespread environmental degradation. At the Ocean Reef Club, a wealthy enclave on Upper Key Largo, the Corps allowed a private permittee to hack down mangroves in a wetland preserve "protected" by a Corps permit in order to construct a pier from his landlocked lot to a foul, but otherwise navigable artificial waterway disingenuously authorized by the Corps over two decades ago, despite its known deficits (a prime example of the Corps' "when in doubt don't regulate" policies).

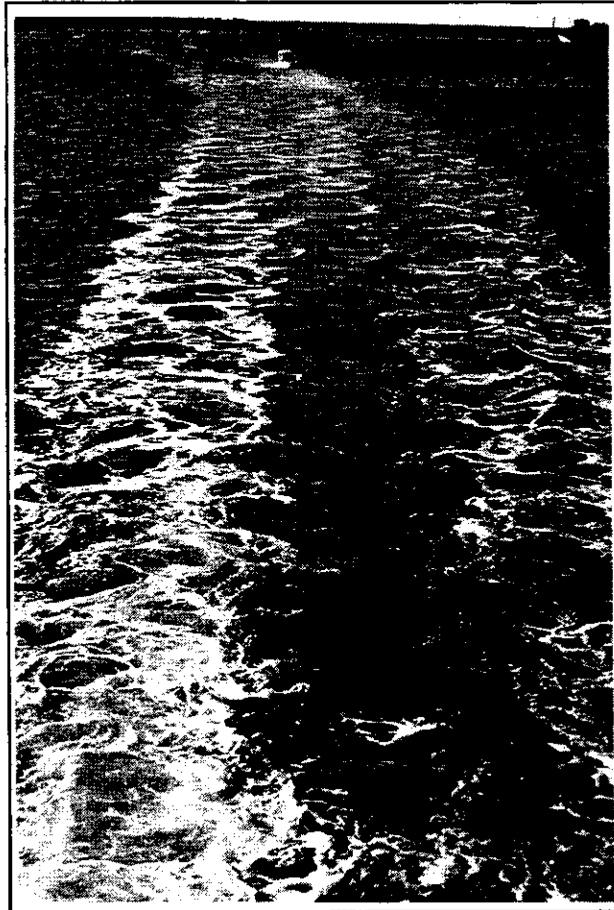
Incremental regulatory cave-ins are perhaps best illustrated by the instances of illegal canal connections (plug removals) to navigable and less contaminated waters throughout the Florida Keys. In the JHT, Sexton Cove, Sunset Acres, and Cahill Pines and Palms canals, their former isolating plugs remain removed, despite years of deferential and inconsequential Corps enforcement efforts towards their replacement.

Years have also passed on Corps pursuit of other navigational impediments and related illegal fills such as one of the fixed floating hotel complex at the Monroe County line on the 18 mile stretch of U.S. Highway 1. After installing these floating hotel rooms with permanent solid shore mounts, which the Corps stated would be removed, the developer then began discharging fill onto adjacent wetlands after applying for, but not receiving, Corp permits. Although no Corps permits have been issued, all these illegal works still remain, half a decade later.

**NOTHING COUNTS LIKE SUCCESS.** FDOT's mangrove seedling planting program has been a resounding failure as illustrated above.

### Prop-Dredging

Careless and intentional grounding and related propeller-dredging is quite common in the Florida Keys. From Port Largo in the north, Pine Channel in the middle and Sugarloaf Sound in the south, charter vessels, a fleet of sponge boats and an armada of residential boats hourly churn up biologically valuable bottom resources of the Keys. This ongoing destruction of shallow water habitat erodes the resource base on which their economy depends. All of these activities are illegal but are ignored by the Corps.



**STIRRING THINGS UP.** Prop dredging churns up the bottoms of shallow Keys channels.

### When in Doubt...

More egregious examples of "when in doubt ... don't assert jurisdiction" are the cases of incremental wetland violations associated with burgeoning residential and commercial developments.

Although wetland elevation is not a pertinent criterion, the Corps has repeatedly used elevation to disclaim jurisdiction, after initial assertions of authority, claiming developments were "too high" to be wetland-jurisdictional. In so doing, the Corps ignored onsite ponding, water marks, and the overwhelming prevalence of wetland plant species throughout, as well as multiple incidents of illegal wetlands fills by contractors with multiple prior violations. Corps performance in these cases stands in contrast to the weak but partially successful Corps pursuit of similar sites in Parks Banks on Big Pine Key.

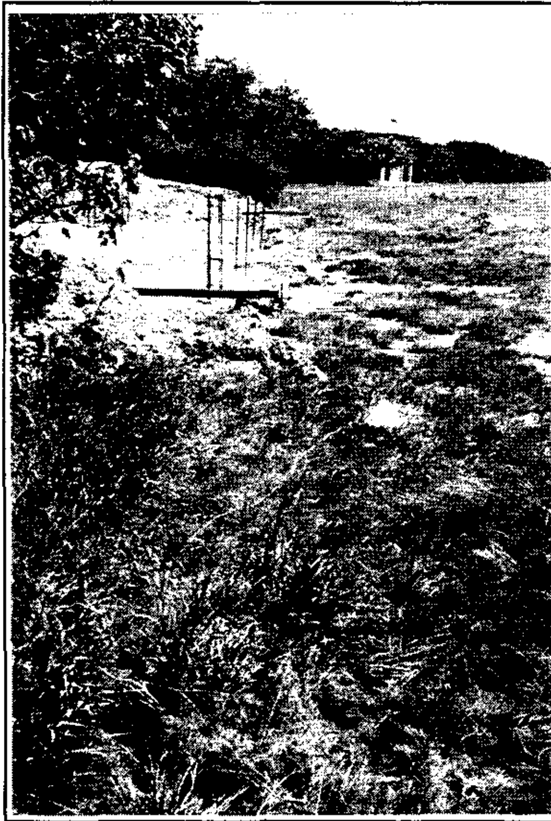
**ONSITE PONDING.** The Corps used elevation of this site as an excuse to disclaim jurisdiction.

After 12 years of continuous violations, the Banks case was litigated to achieve only partial restoration. About half the wetlands were restored and the remainder negotiated to court-ordered authoriza-

BIT BY BIT. Wetland meadows suffering illegal fill.

tion. Unfortunately, this is typical for violation "resolutions" by the Corps in the Keys and elsewhere. Applicants who attempt to follow the law endure lengthy and comprehensive review while noncompliant, politically embarrassing projects are expedited.

For example, a seawall with backfill fronting a narrow fringe wetland required full individual permit application review, while a similar seawall (with eventual illegal backfill) fronting flourishing mangrove wetlands across the street was inappropriately authorized for a seawall through an expedited Nationwide Permit (NWP 3, which authorizes repair and rehabilitation of existing structures). When repeatedly advised of the inapplicability of NWP 3, the Corps executive decision was to press on, adopting the mistake and tacitly endorsing the illegal seawall and backfill.



INEXORABLE EXPANSION. Steady development pressure forces both the wetlands and the Corps into retreat.

Sunrise Isle development in Marathon Key resulted in piecemeal destruction of wetlands for recreational amenities within an estate-home, island subdivision. Corps action, or lack thereof, will continue to cause cumulative elimination of the remainder of this migratory waterfowl stopover. The Corps has authorized further destruction by permitting a new channel through offshore grassbeds. Such regulatory dereliction guarantees multiple net wetland losses and perpetuates a continuing rise in cumulative impacts to the aquatic environment.

Throughout the Keys, house by house, cumulative wetland destruction by illegal wetland fills becomes more and more routine. Recently, for example, multiple upland fills were illegally expanded into the surrounding wetland meadows of Niles Channel on Big Torch Key. None have been restored to pre-project wetland function, despite being located in areas important to the endangered Florida Key Deer and Silver Rice Rat.

In or outside the context of subdivisions, this lot-by-lot destruction of wetlands is sanctioned

by the Corps. Internationally recognized wetland functions and values, such as wildlife habitat and productivity, water quality maintenance, and storm/flood damage prevention, are disappearing to the detriment of the people of the United States.

## Adding Insult to Injury

Issues of abuse through residential subdivision development are only part of the picture. When the Florida Keys Wild Bird Rehabilitation Center abandoned its location in a subdivision on Plantation Key, it opted instead to relocate the facility on pristine wetlands in Tavernier, Key Largo. Rejecting adequate uplands with Corps approval, the chosen site was a limited, low hammock upland surrounded by an ecologically valuable buttonwood mangrove/air plant forest.

After agreeing to locate the access road entirely on uplands, the facility proceeded without authorization to construct the road and other features of the facility in wetlands within the site. Consecutive unauthorized fills continued despite repeated warnings to cease. As a consequence, nearly all of the site's wetlands have been disturbed or destroyed. The irony, of course, lies in providing amenities for sick and injured birds, while diminishing the vital habitat for healthy migratory waterfowl and wading bird populations. To date, no effective action, either to recoup wetland functions or to assess penalties has been pursued by the Corps or EPA.

A similar campaign of unauthorized activities has been waged in the wetlands and navigable waters of Pine Channel. After obtaining a homesite already in violation, a developer installed a series of illegal fences in affected and restored aquatic sites vital to the marine food web, as well as to the normal migration routes of the endangered Florida Key Deer. Even after having removed unauthorized fills, the illegal fencing remains, a migratory impediment to Key Deer who may be entrapped and drown within the fence enclosure by the incoming spring tides.

Perhaps the most egregious incremental sequence of unauthorized work has been conducted on Sugarloaf Key. After submitting an application for two lots, the developer began work in violation, well before permit issuance. First, he cut down two forests of red, black and white, and buttonwood mangroves on the lots, contrary to State of Florida law (merely paying a state fine). Despite this, and contrary to Corps policy, his application process continued. Additional violations included earthen fill stockpiles on regulated areas and slurried concrete and auger hole spoilfills throughout one lot. The violations continued without cease until ultimately authorized. The developer thereafter exceeded his authorization by illegally installing side fills on the lot, with extensions out through the salt-marsh to the shoreline. Although instructed to cease, he then placed additional reinforcement fill around the perimeter of the lot, having meanwhile applied for a pier to cover the remainder of the mangroves. Instead of ordering any restorative or punitive action, the Corps rewarded the developer with a permit for his pier.

Meanwhile, the developer had placed illegal earthen fill, concrete slurry, and auger spoil fill throughout wetlands of the second lot. The Corps' only reaction to these knowing and willful continuations of illegal fills was to authorize them through an after-the-fact permit inappropriately using Nationwide Permit (NWP 29). NWP 29 actually prohibits such fill if located on a non-primary residence in tidally influenced wetlands. Moreover, prerequisite Florida State water quality certification for NWP 29 had not been met, thus invalidating the Corps permit.

Such cumulative capitulations also occur in numerous clusters in the Upper Sugarloaf Key where development pressure is intense. Sometimes those pressures are exerted through public agency projects, such as the expansion of the Monroe County School. Despite location in freshwater wetlands as well as ignoring the existence of a practicable alternative of vertical construction on existing uplands (previously agreed to by the Monroe County School Superintendent), the school construction managers continued pressing for permission to build on the wetland. The issues were further muddled by the presence of several state-protected endangered species, such as white-crowned pigeon, mud turtle and sausage cactus.

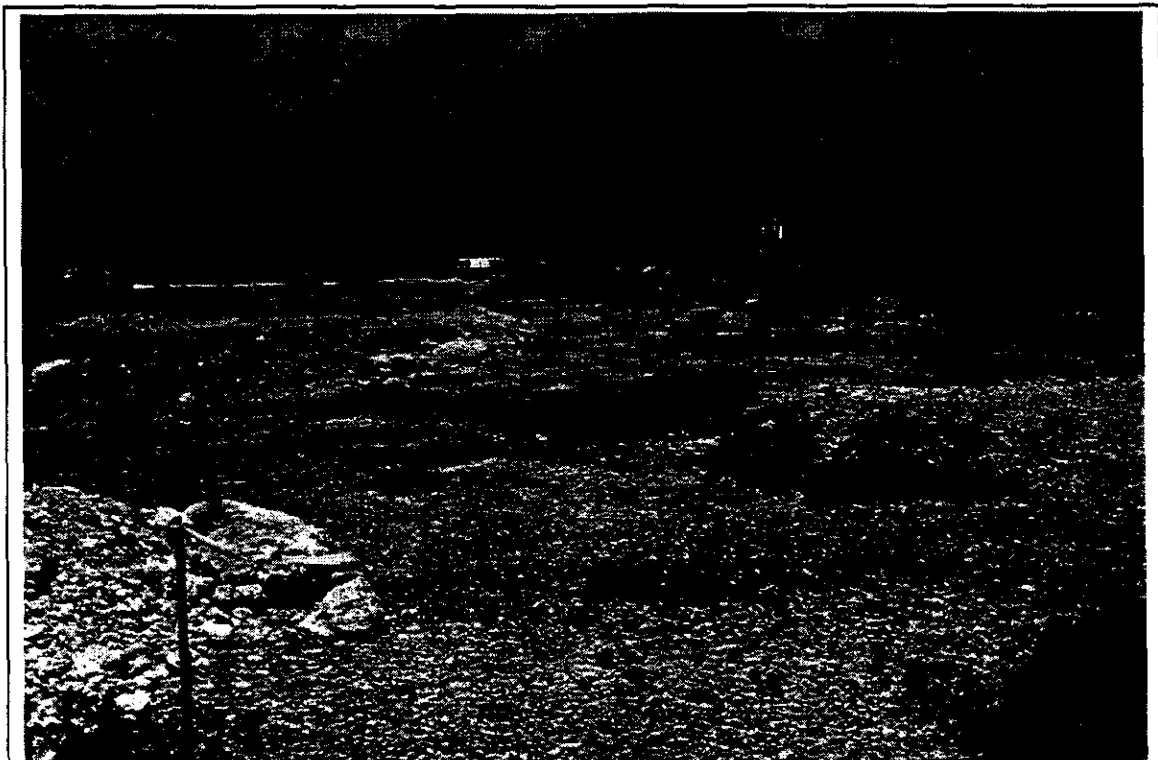
The county, Florida State Department of Community Affairs (DCA) and the Corps executive staff collaborated in expediting the work to permit with mitigation. But then, instead of

requiring actual equivalent mitigative wetland creation, the Corps and EPA acceded to an $88,000 contribution to an unrelated wetland alteration effort that was already under way and independently authorized. The "mitigative" wetlands on Big Pine Key were former freshwater wetlands altered by saltwater intrusion from mosquito ditching and canal construction, and then abandoned for years. Now, impounded by fill, they are again being reconverted into freshwater regime in order to cosmetically compensate for the acres of freshwater wetlands being destroyed by the construction of the school. The result is a significant net loss of wetlands' functions and values for the Keys.

This destructive process continues unabated and with full knowledge and complicity of the Corps. Residential projects, churches, radio stations, road fills and related piers continue to destroy the natural resources of Upper Sugarloaf Key.

The same pattern of collaboration between regulatory and development interests weaves a spreading quilt of environmental capitulation among disparate, but cumulatively destructive projects throughout the Florida Keys. Other illegal projects include the widening of U.S. Highway 1, Cudjoe Key (FDOT), Plantation Key Weigh Station, Jolly Roger Estates, Cudjoe Acres, Palm Villa (Florida Keys Aqueduct Authority), and Breezeswept Beach Estates. The Corps has imposed no penalties. The Corps has made no attempts to avoid excessive wetland losses and, apparently, there is no hope for a change in the dynamic of bureaucratic cowardice.

These cases represent only a fraction of hundreds of comparable Corps failures throughout the Keys.



**THE DIE IS CAST.** Upper Sugarloaf Key is marked for further development.

# V. Paving Paradise: Death of the Keys Ecosystem

*"They've paved paradise and put up a parking lot."*

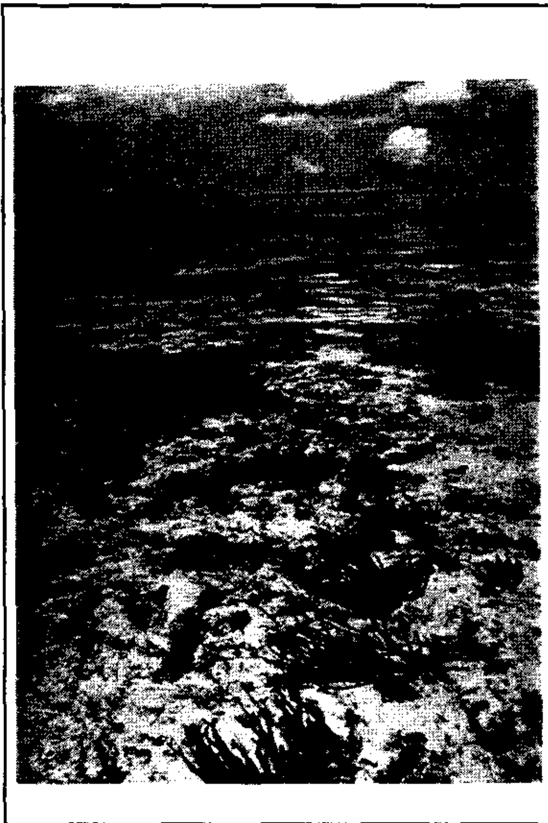
—Joni Mitchell, song lyric from *Big Yellow Taxi*

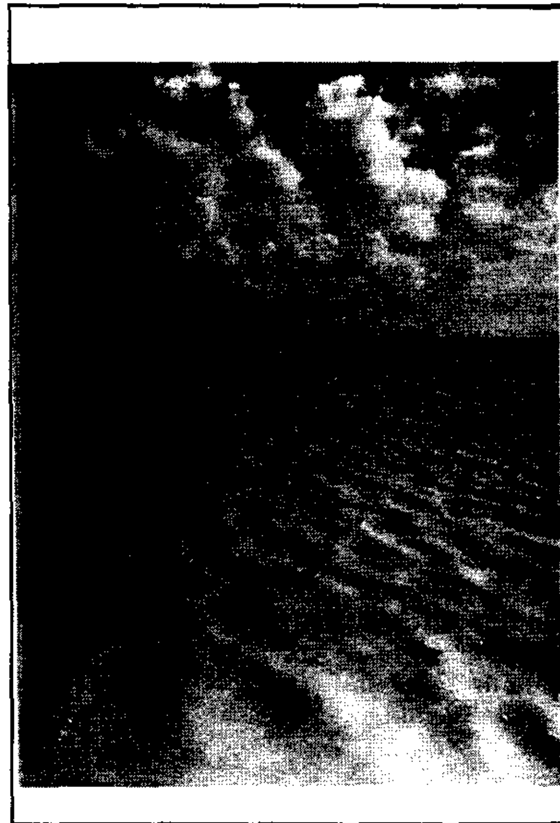
Wetlands nationwide have been disappearing at the rate of about 300,000 to 500,000 acres a year. In South Florida, the rate of destruction is even greater.

While the Corps blunders along, South Florida's ecosystems continue to unravel at an alarming rate. At the Corps of Engineers in the late, late 20th century, what comes around, goes down. And what is going down are our Everglades, our bays, our islands, our seagrass meadows, our coral reefs. The collapse of South Florida's entire natural ecosystem diminishes the quality of human life, in clear violation of the stated intent of Congress as articulated in the preamble National Environmental Policy Act:

"The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the

**THE KEYS TODAY.** Aerial photos show cumulative impact of development. Both commercial (*top*) and residential (*bottom*) construction are eating up the Keys shrinking wetlands.





**UNDERWATER DESERTIFIACTION.** Before and after photos show the Florida Bay hard bottom; first as a varied and living habitat and today as dead.

health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation..."

The Clean Water Act, potentially the nation's most effective environmental law, mandates a stance of foreclosure on the destructive replacement of our aquatic resources with pollutants, but this and other environmental laws are being ignored by the Army Corps of Engineers. As written, the Clean Water Act envisioned the elimination of pollution discharges to our waters by 1985, but more than a decade after that deadline we have institutionalized the practice of pollution for economic gain.

Nowhere in the nation has this environmental collapse been recently more precipitous or acute than in the waters surrounding and sustaining the Florida Keys. Nearshore waters are dying, conchs can't produce progeny, jewfish can no longer be taken and are disappearing, seagrass has retreated past the Hawk Channel threshold and the coral reefs are predicted to be dead by the turn of the century.

The damage to South Florida's ecosystem is cumulative in an acceleration of the aquatic ecosystems' collapse. The Corps is playing the lead role in this sordid drama. As this is being written, the Corps is conducting a post-mortem "carrying capacity" study for the Florida Keys.

The Corps has knowingly deceived the public for twenty years which coincidently is the approximate age of the regulatory program. The public has been paying hundreds of thousands of dollars to Corps employees over those years for protection of that one vital element of life—clean water. The Corps is responsible and, like all of us, the Corps should be held accountable for its actions.

**DIE OFF OF FLORIDA BAY.** Satellite photo with color enhancement showing a collapsing ecosystem. Spreading dead zones and lethal algae blooms represent a shameful and unprecedented environmental disaster.