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May 18, 2009

Commissioners Nancy Argenziano, Lisa Polak Edgar,
Matthew M. Carter II, Katrina J. McMurrian, Nathan A. Skop
Public Service Commission
2540 Shumard Oaks Boulevard
Tallahassee, Fl. 32399-0850

Re: PSC Docket # 090189-SU
Objection to Petition of Water Management Services, Inc.

Dear Public Service Commissioners:

This letter is a formal objection to Water Management Services, Inc. being granted certification for a wastewater treatment plant pursuant to Section 367.045, Florida Statutes, and additionally, to the variance requested by the applicant to portions of Section 25.30.033(1), Florida Administrative Code.

The Apalachicola Bay and River Keeper, Inc. d/b/a Apalachicola Riverkeeper is a not-for-profit conservation organization dedicated to protecting and restoring the integrity of the Apalachicola Bay and River ecosystem. The mission of the Apalachicola Riverkeeper is to provide stewardship and advocacy for the protection of the Apalachicola River and Bay, its tributaries and watersheds, in order to improve and maintain its environmental integrity, and to preserve the natural, scenic, recreational and commercial character of these waterways. Therefore, the Apalachicola Riverkeeper's interests in the outcome of this application are greater in kind and degree than that of the general public.

The Apalachicola Riverkeeper's service area is the watershed of the 107-mile Apalachicola River and the 35-miles of coastal and estuary waters from Indian Pass to Alligator Harbor. This includes the waters adjacent to St. George Island. The Riverkeeper has approximately 700 members, 32 of whom live on St. George Island, Florida and at least 2 of whom have businesses in the "commercial district" of St. George Island.

My client's objections to this permit fall into seven main categories: 1) a lack of documented need for the facility; 2) lack of information as to the cost, charges, and physical and financial plans to operate the facility; 3) the negative impacts on density that a wastewater treatment plant would allow and encourage, which impacts would be inconsistent with the Franklin County Comprehensive Plan (Land Use Element) and state laws pertaining to growth management policies; 4) increased pollution from stormwater runoff and other sources as a result of density increases; 5) introduction of chlorine and other toxins, as well as a concentration of nutrients and pathogenic viruses that would be released into the Bay and shallow aquifer lens; 6) the inappropriateness and environmental vulnerability of the chosen site in an area categorized as a

"coastal high hazard area" in the Comprehensive Plan, along with the failure to evaluate alternative sewage treatment methods that would pose fewer financial and environmental risks in the event of natural disaster, flooding or malfunctions; and 7) questions about the company's liquidity and ability to pay for major repairs or to compensate injured parties in the event of an environmental disaster.

As you may know, the application has been proferred based on water quality reports on the beach side of St. George Island. No correlation with wastewater has been made. Other potential sources of the problems are being investigated and include: Stormwater, wildlife and pet waste on the beach, and naturally occurring sources of coliform. My client believes that it is not sound policy to correct one problem by creating new and potentially worse problems, which unfortunately seems to be the case here. The better policy would be to investigate environmentally and financially sounder alternatives. Moreover, the justifications stated by the applicant for the plant being necessary could be dealt with in a variety of low-tech and efficient ways. For example, the County or State enforcement arms could insure that the small number of out-of-compliance businesses (fewer than 8) comply with its health laws or shut down, an incredibly cost-effective remedy that would not burden the taxpayers. Or, the small handful of businesses could convert to composting toilets or newer technologies for which grant monies might even be available.

The following list includes, *inter alia*, my client's specific objections to the application for certification and for the request for a variance:

1) In Paragraph 5 of its Petition for Certification, the applicant claims that there are no alternatives to its proposal and that if its certification is not granted, certain unspecified restaurant owners will go out of business. This assertion is not borne out by the information supplied by the applicant. The only documentation supplied with the application is a set of violation notices and lawsuits filed against seven businesses on St. George Island for poor sewage treatment. There is no indication in any of this documentation whether the businesses named are going to "go out of business" if WMSI's application is not granted. In fact, just the opposite appears to be true from the documentation supplied. The violations were issued by the Health Department in July and August of 2008. Now, almost a year later, and despite the worst economy in 60 years, all of these businesses are still in operation, which clearly shows that the applicant's claim is incorrect. Moreover, some of these businesses have now come into compliance or are in the process of doing so.

2) In Paragraph 5, the applicant also makes the unsubstantiated claim that St. George Island will "suffer economic loss" if its certification is not granted. The applicant not only offers no proof of this claim, but also neglects to calculate the economic losses that would be suffered by St. George Island if the wastewater treatment plant malfunctioned or were inundated by hurricane flooding, causing a massive sewage spill. This is not a far-fetched scenario, as the history of sewage treatment in Franklin County amply demonstrates. The City of Apalachicola's sewage treatment plant was so overwhelmed during Hurricane Opal that raw sewage was released and caused massive fish kills. A lawsuit against the City cost millions, which costs were eventually

passed on to the taxpayers and customers. Teat v City of Apalachicola, 738 So.2d 413 (Fla. 1st DCA 1999.)

3) In Paragraph 6(f), the applicant claims that its application is consistent with the Franklin County Comprehensive Plan. However, this bold declaration is unaccompanied by any proof. Further complicating the matter of determining compliance with the Comprehensive Plan is the fact that the applicant is requesting a variance and has unreasonably refused to provide any meaningful detail about the design, location and operation of its proposed sewage plant, without which it is virtually impossible for the PSC and the public to assess whether the project could actually meet the requirements of the Franklin County Comprehensive Plan. The failure to provide any detail denies the PSC the ability to assess such things as flood potential, proximity to water and wetlands, traffic concurrency, area extent of impervious surface, setback and buffering compliance, disaster preparedness, and a large array of other Comprehensive Plan issues. Yet, even without this required specificity, it is already apparent that the proposed project is inconsistent with some of the goals and policies of the Comprehensive Plan. For instance, the sewage treatment plant will facilitate increases in densities that will create more stormwater runoff, traffic, solid waste generation, loss of habitat and pollution on a barrier island with already stressed resources in an area that is vulnerable to hurricanes and flooding. The potential for a natural disaster to happen is great and the release of raw sewage would have a devastating effect on the area's economy (seafood harvesting, tourism/recreational), as well as adverse impacts on the natural resources protected by the Comprehensive Plan. Specifically, the project appears to violate Section 1.5 (Future Land Use Element) which discourages urban sprawl, Sections 2.11 *et seq.* (Infrastructure Element) which governs drainage and percolation rates for holding ponds, Objectives 4 & 5, (Coastal/Conservation Element), particularly 5.1 which prohibits development greater than 1 residence per acre on a coastal barrier island, and Objectives 12 & 13 (Coastal/Conservation Element), Section 19.1 (Coastal/Conservation Element) which limits the level of sewage service to only the "appropriate" amount. The request for sewage capacity exceeds the demonstrated need, (i.e. 7 non-complying businesses, some of which are now in compliance.) The release of chlorine in the plant's "end-process" water would violate not only the objectives of the Franklin County Comprehensive Plan to protect the bay and coastal waters, but also state laws protecting Aquatic Preserves.

4) The applicant claims that its petition is "in the public interest" because, if built, it will service the commercial area of St. George Island, allowing the commercial enterprises to have central sewer connections. However, if the applicant's "public interest" justification rests on providing central sewer for commercial enterprises which are currently not meeting health code standards, then it must fail because there is no justification demonstrated for extending service to "residential, multi-family, public authority" and others, as the company anticipates doing. Even if *arguendo*, it could be assumed that the commercial district needed central sewer and that there were no environmentally superior, less risky and less costly alternatives for such a small number of businesses, then the applicant would still not need 400 ERCs (equivalent residential connections) simply to service the commercial district. Clearly, this application is not about solving the small-scale sewage needs of the commercial district (for which low-tech solutions

would be more appropriate) but is really about gaining the means for expansion and density increases on St. George Island. Under the Franklin County Comprehensive Plan (Policies 1.3 & 8.1, Land Use Element and 5.1 , Coastal/Conservation Element), there can be no "conversion of land to a density above 1 unit per acre **unless the property is served by central sewer**… ." The construction of the sewage plant would provide the legal means to create multi-family and non-residential development, as well as far denser residential development of all kinds. In the end, any potential gains from sewage treatment would be canceled out by the inevitable losses occasioned by increases in density. The PSC needs to look beyond the four corners of the application and investigate the true agenda of this application. Policy questions about density must be addressed, including but not limited to increased run-off, increased garbage and sewage generation, increased construction on a barrier island, increased traffic and the necessity for road concurrency, evacuation of larger populations, insurance and liability questions, impacts on the seafood and recreational industries, disaster preparedness, and so on.

5) The request for a variance from portions of the PSC rules and application requirements is especially unwarranted in a situation involving fragile coastal resources. Given the sensitivity of this barrier island, it is unwise to allow the variance because it leaves unanswered so many financial, environmental, policy, and growth issues. If the variance were granted, it would allow the application to proceed despite the PSC and the public not knowing such critical details as how the plant would be funded and financed, its operating expenses, who its intended customers would be, the details of its sewage treatment, whether it would be developed in phases, where its overflow waters would go, growth projections, projected rates and costs to customers, expected return on equity, identification of routes for pipelines, location of facilities or even its proposed territory. There is nothing in the application about disaster preparedness. There is no indication that the company would post a bond in the event that there was a catastrophic occurrence, such as occurred in the City's sewage plant during Hurricane Opal. Moreover, the details of the company's financial reports are not reassuring.

A variance is held to a different standard of review than an ordinary permit or certification because it is, in essence, a request for permission to suspend the law. The petitioner for a variance must demonstrate that its granting "will not be contrary to the public interest" and that if it is not granted, the applicant will suffer an "unnecessary hardship" which "must be unique to the parcel involved… and not general in character." Metropolitan Dade County, v Betancourt, 559 So.2d 1237 (Fla 3d DCA 1990, reh. den. 1990. If the hardship is one which is common to everyone seeking a permit, then the variance should not be granted." Thus,, "a self-imposed or self-acquired hardship … and then applying for a variance is not the kind of hardship for which a variance should be granted." *Id*. The fact that the applicant has a personal preference or would find it easier or more economically advantageous, is not legally sufficient to sustain a request for a variance. Town of Ponce Inlet v. Rancourt, 627 So. 2d 586 (Fla. 5th DCA 1993.) The Florida Supreme Court has ruled in Nance v Town of Indialantic, 419 So.2d 1041 (Fla.1982), that a prerequisite to the granting of a variance is the presence of an exceptional and unique hardship,

and that the hardship cannot be self created or one of mere economic disadvantage. Josephson v. Autrey, 96 So.2d 784 (Fla.1957). Metropolitan Dade County v. Reineng Corp., 399 So.2d 379 (Fla. 3d DCA 1981); Burger King v. Metropolitan Dade County, 349 So.2d 210 (Fla. 3d DCA 1977), appeal dism'd., 355 So.2d 512 (Fla.1978).

In the instant situation, Water Management Services, Inc. offers no legally recognized justification for the granting of a variance. Its request seems to be predicated upon its own personal convenience and financial preferences. Any hardship that the company has is certainly not unique and would be the identical type of hardship that any applicant for sewage treatment certification might have. As such, the request for a variance must fail legally. The laws of Florida are presumed to exist for a reason, i.e. to protect public safety, health and welfare. Such enactments should be waived only upon a demonstration that their waiver is clearly in the public interest or that the hardship upon the applicant is so onerous and unfair that society simply cannot countenance it.

6) The applicant states that it has the ability to run a wastewater plant competently and without incident because it has run the water utility on St. George Island. As the PSC well knows, a water utility and a sewage utility are two very different operations. To begin with, if a water plant breaks down, it doesn't risk contaminating one of the most productive estuaries in the United States and threatening the livelihood of those in the seafood industry. Secondly, in a wastewater treatment plant, the employees must have different operator certifications than for a water facility. Within sewage treatment operation certification, there are different levels of certification and the lower-level certified operators are not legally allowed to perform all of the operations of the plant. Although the applicant claims that it has dedicated long-term employees, it does not state what level of certification and training any of its employees have to run a sophisticated AWT (Advanced Wastewater Treatment) plant. It should be noted that the more sophisticated the plant, the greater the skill that is required to run the plant and the greater the likelihood of malfunction or operator error. There is already a track record in Franklin County that the PSC can examine. The City's sewage treatment plant had such a difficult time finding qualified operators with the requisite level of training that it eventually turned to an outside company to run its plant. This was finally done after more than 15 years and ultimately had tragic consequences for not only the environment but also for property owners affected by the pollution from the malfunctioning plant. It should also be noted that despite the company's claims that it has successfully run its water facilities (a utility much easier to run than a wastewater plant), the company racked up over $13,000 in penalties and fines in 2008 alone.

7) The applicant's financial statement creates additional concerns that should raise a red flag. The company claims that it has very good credit and excellent ability to borrow. As proof, it points to the fact that it borrowed money to build its water facility. Yet, these are very different economic times and the borrowing climate is vastly different. The financial statement submitted with the application does not show a current ability to be responsible in the event of ecological disaster nor major repairs. As of December 31, 2008, the company shows a lack of liquidity with

less than $500 aggregate in several checking accounts and a negative cash flow of $14,892.19 in interest and dividends. The company's "total cash reserves" are negative $18,981.56. The financial statements shows that the company lost more than ¼ million dollars for the "current period income" ending in December 31, 2008.

8) Before certification should even be considered, there should be a thorough investigation of alternative sewage techniques, such as re-use (which the company has rejected as being "too expensive"), closed loop systems, composting toilets, and other technologies which carry fewer risks and are more in line with current public policy objectives. Given the sensitivity of the chosen venue for this plant on a barrier island adjacent to one of the country's most productive estuaries, every effort should be made to explore alternatives, especially ones that do not have the capacity to cause such devastating environmental consequences in the event of failure of equipment, maintenance, operation or an Act of God. Because of the small-scale needs of the island's commercial district, alternative technologies are feasible and there is probably even grant money available to retrofit a solution. The applicant's proposed technology (AWT) is especially prone to malfunction because of the large number of sophisticated operations which must be performed, many on a daily basis. The proposed infiltration beds are designed to allow rapid infiltration. This carries great risk. While rapid infiltration lowers the risk of sewage overflow, it also increases the risk of large amounts of nutrients and pathogens getting into the shallow aquifer and the bay; this is especially true in the event of a malfunction at the plant or a severe weather event. Moreover, it should be noted that numerous studies have shown that many viruses are able to bypass even AWT disinfection because they are so small that they can become micro-encapsulated in other materials. Also, heavy metals are not affected by chlorination and therefore accumulate in increasing concentrations. There is also the issue of chlorine itself. Chlorine is a poison. While it is a good disinfectant (although not fool-proof as in the case of some pathogens and viruses), it is known to leach through porous strata and make its way into open water bodies. Some studies indicate that chlorine leaching from wastewater treatment plants may be responsible for some of the bleaching effects seen in coral reefs around the state. It is certainly not an ecologically beneficial chemical to add to an estuary. Finally, this facility could become a liability during the power outages that are fairly common on St. George Island and Franklin County. This is especially true during major storm events and floods, which can threaten the centralized power grid as well as the ability to run generators. Adding a backup generator of the size necessary to back this facility up will require the on-site storage of fuel, which in the dire circumstances created by a storm surge could create an ecological disaster unlike any experienced in Apalachicola Bay.

If this proposed plant is built, it will allow significant increases in densities which will result in the company requesting periodic increases in plant capacity. It should also be noted, as a practical matter that one of the most serious side effects of malfunctioning plants is that they cannot be shut down. The State of Florida has never shut down a single malfunctioning plant! The best that the state seems able to do is to put a moratorium on new hook-ups or levy fines, the latter being a no-win situation because the money could be better spent on fixing the malfunctions.

9) The application should be denied because no financial ability has been demonstrated to post a bond to protect consumers and property owners who might be injured by a malfunctioning plant or environmental catastrophe. Moreover, if the plant breaks down, the current financial picture of the company shows that it does not have cash on hand to fix it and that it may not be in a position to borrow more money, given its lack of profitability and liquidity.

In summary, the application should not be granted because it fails to comply with Public Service Commission Rule 25-30.033 (1)(e), (f), (h), (j), (k), (m), (o), (s), (t), (u), (v), and (w), Florida Administrative Code, and Section 367.045, Florida Statutes. It is abundantly clear that too much information is missing for the Public Service Commission to make a valid judgemnet on the need for the plant and possible alternatives to the plant that may better resolve the water quality problems on the island. By this letter, my client, the Apalachicola Riverkeeper, is hereby formally requesting a Section 120.57, Florida Statutes evidentiary hearing to resolve the matter.

Please copy this office on any future pleadings or information submitted by the applicant and inform us of all public hearings and opportunities for input. Thank you for taking the time to consider the issues raised herein.

Sincerely Yours,

s/Randall E. Denker
Attorney for Apalachicola Riverkeeper
FL Bar No. 273082

s/Andrew J. Smith
Executive Director
FL Bar No. 0001650

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing objection has been sent this 18th day of May 2009 to:

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postage prepaid.

s/Andrew J. Smith