

**SIERRA CLUB DELTA CHAPTER
LOUISIANA ENVIRONMENTAL ACTION NETWORK
GULF RESTORATION NETWORK
LOUISIANA AUDUBON COUNCIL
LOWER MISSISSIPPI RIVERKEEPER
ATCHAFALAYA BASINKEEPER
OUACHITA RIVERKEEPER**

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Re: Comments on Louisiana Scenic Rivers Act Permit Applications #902 & #903 submitted by Comstock Resources, Inc. to withdraw ONRW water from the Scenic Tickfaw River for use in commercial hydraulic fracking in proximity to the scenic river

Dear Mr. Cascio,

Sierra Club Delta Chapter, Louisiana Environmental Action Network, Gulf Restoration Network, Louisiana Audubon Council, Lower Mississippi Riverkeeper, Atchafalaya Basin Keeper and Ouachita Riverkeeper, (collectively "Citizens"), oppose the issuance of Scenic River Act Permits to Comstock Resources, Inc. based on SRA Permit Applications #902 and #903 as currently proposed.

Introduction

Comstock Resources, Inc. has filed virtually identical Applications for Scenic River Act Permits, (SRA Permits), # 902 & # 903, to withdraw Outstanding Natural Resource Water, (ONRW), from the scenic Tickfaw for use in commercial hydraulic fracking wells in the proximity of the river. The fracking wells are "major private industry projects". We oppose the issuance of permits #902 and # 903 as inconsistent with the provisions of La R.S. 56:1841(A), B (1) & (2) wherein the Legislature mandated the purposes for which the Scenic River System shall be administered. The proposed commercial uses would have a significant and direct impact on the scenic and the aesthetic qualities" of the Scenic Tickfaw River and would be disruptive to the public's normal use and enjoyment of the river. The proposed uses would be an expansion toward more non-public use and availability of this important public resource which is not acceptable under the Scenic Rivers Act. The proposed uses would be degrading to the ecological regime, the wilderness qualities and the scenic beauty of the Scenic Tickfaw.

Our comments apply equally to each of Comstock's Applications and should be placed in each file. We also request that LDWF perform a field evaluation of the proposed water withdrawal sites and of the proposed fracking sites as a part of the "project evaluation" and the "modification" of its Management Plan before making a final decision on either Application. The field inspection would be at the expense of the Applicant. LAC 76:IX.117.(F) 16 (b)

(A) The LDWF's decision to issue or to deny the Applications is a management decision which the Act requires shall be made in accordance with the policies, purposes and requirements of the Scenic Rivers Act.

The LDWF's decision to grant or to deny each Application for a SRA permit is a management decision which shall be made in accordance with the Scenic Rivers Act. La R.S.56:1841 and the Louisiana Constitution Article IX, Section 1. The Louisiana Supreme Court found that this constitutional provision "requires an agency or official, before granting approval of a proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1157 (La 1984). Also, LDWF must support its final decision to issue or to deny each SRA Permit Application with evidence in the Administrative record. The Louisiana Supreme Court explained that the agency must support its "basic findings" with evidence "to assure that the agency has acted in accordance with law." *Save Ourselves*, 452 So. 2d at 1159-60. Moreover, LDWF's "ultimate findings" must "flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued. *Id.* The court noted that "[t]his is particularly so . . . where the agency performs as a public trustee and is bound to demonstrate that it has properly exercised the discretion vested in it by the Constitution and statute." *Id.*

The LDWF has Jurisdiction pursuant to the Act and duties as administrator of the Scenic Tickfaw River pursuant to the provisions of the Scenic Rivers Act, 56:1840, 1841, 1843, 1846, 1849, and the Implementing Regulations, LAC.IX.101, 111 &117.

The Jurisdiction of the Act is simply stated, "No person shall commence or engage in any activity governed by this Part or any rule pursuant thereto unless a permit is first obtained . . . for those activities that may have the potential for significant ecological degradation. La. 56:1849 (A) & (B).

The Jurisdiction of the Act is not limited to uses proposed to be undertaken on the stream or on adjacent lands within 100 feet of a designated stream if the proposed uses are "major private industry projects". The LDWF's Management Plan for the Scenic Tickfaw states at page 7 that: "Major Private Industry Projects. The seven most common intrusive activities conducted by the private sector are . . . oil and gas exploration . . . Any of these activities may require a permit depending upon the

proximity of the activity and the potential to negatively impact the Tickfaw river. Activities outside of the 100 foot buffer zone will be evaluated case-by-case.”

Comstock proposes to withdraw 12,600,000 gallons of ONRW water at each site for use in each commercial well. It would contaminate the water with 30-40 chemicals, many of them toxic, and use it as fracking water in the proximity of the river. Each hydraulic fracking well would be within the Tickfaw watershed. Each “water withdrawal” is subject to the Jurisdiction of LDWF under LAC 76:IX.117(B)(9). Each fracking well is a “commercial use, activity and access” and subject to the Jurisdiction of LDWF under LAC 76:IX.117(B)(7). It is also a “major private industry project” requiring permit evaluation on a “case-by-case” basis.

A decision to issue the requested Scenic River Act Permits must be based on basic findings of fact, it must flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued. This burden cannot be met herein. Comstock’s Applications are incomplete and inaccurate. LDWF’s Management Plan is inadequate on its face. It cannot inform the LDWF’s management decision. Accordingly, a decision to issue SRA Permits would be subject to reversal under the Administrative Procedures Act La. R.S. 49:964(G). It would be contrary to the plain intent of the Act and of the Constitution, arbitrary and capricious or characterized by abuse of discretion and not supported and sustainable by a preponderance of evidence. See generally La. R.S. 49:964 (G); *EOP New Orleans LLC., v La. Tac Comm., 2001-2966 (La. App. 1 Cir. 08/14/2002), 831 So.2d 1005*; *Schackai v La. Bd. of Massage Therapy, 99-1957 (La.App. 1 Cir. 09/22/2000), 767 So. 2d 955*

(B) Comstock Resources’ Permit Applications # 902 and # 903 are not “sufficient and complete” and must be returned to it with a description of how and why.

The regulations state that the LDWF shall provide an application form which shall contain specific details. LAC 76:IX.117(C). “Upon receipt of an Application, the LDWF shall determine whether the application is sufficient and complete in light of the requirements enumerated in Subsection C. If the application is not sufficient and complete, the LDWF shall return the application to the applicant with a description of how and why the petition is insufficient and incomplete. The applicant shall be entitled to resubmit the petition after making the necessary changes or amendment.” LAC 76:IX.117 (D).

The Regulations state that the application shall contain: “Full and through evaluation of the use’s effect on the criteria listed in Subsection (F) below.” LAC 76:IX.117(C)(7). The criteria include: Wilderness qualities; Scenic values; Ecological regimes; Recreation: Aesthetic values; Fish and aquatic life; Wildlife; Botanical resources; Water quality; Cultural resources; Economics; Compliance history. LAC 76:IX.117(F)(1)-(14).

Comstock's Applications are not sufficient and complete in light of the criteria listed in Subsection (F) above. Each section of the applications will be discussed in turn, beginning with water quantity/quality.

1. The section on Water Quality/Quantity is two pages. The evaluation of the effects of the proposed uses on water quantity and quality is based entirely on the USGS water gauge at Liverpool. Unfortunately, the gauge is "three miles downstream" at a point where "numerous tributaries downstream of the intake point recharge the Tickfaw River." application at page 6. Comstock measured the width and depth of the scenic river at the withdrawal point but used flow data from a point three miles downstream. Based on the inflated figures for flow, Comstock concludes at page six that "[T]he drawdown at the point of intake will be 0.12 to 0.41 feet, which will not prevent flow from continuing downstream". There is no mention of the cumulative impacts of two proposed water withdrawals of 12,600,000 gallons of ONRW within a mile of each other. Will the cumulative effect of two water withdrawals of 12,600,000 gallons each prevent the flow from continuing downstream?

The water quality section also states at page 4 that "Segment LA4050100 is listed on the 303(d) list of impaired waterbodies due to mercury in fish tissues and total suspended solids . . . Extraction will not contribute to the impairment . . ." This conclusion is unsupported by any data. In fact, it is directly contradicted by LDWF on its website. The DWF Scenic Rivers Newsletter states that "flow alterations" are threats to stream ecology which result in "reduced water quality". LDWF Scenic Rivers Review, Fall 2013 , page 4.

The concentration of pollution would lower water quality which would violate Louisiana's anti-degradation policy which states that "If an activity is proposed for an ONRW, the Administrative authority shall not approve that activity if it will cause the degradation of these waters. LAC 33.IX.1109(B)(4)

The measurement of flow is the key data point in the application. Evaluation of the effects of the proposed uses all depend on accurate measurement of the flow of the living river, including seasonal variations. Unfortunately, the flow at the intake point is exaggerated. Accordingly, the conclusions regarding the detrimental effects of the proposed uses on the wilderness qualities, the scenic values, the ecological regimes, the aesthetic values, the fish and other aquatic organisms, the wildlife, the botanical resources and the water quality are skewed and unsupported. LDWF must require accurate flow data at the water withdrawal points, including low flow, in order to assure that the evaluation of each criteria is accurate.

2.) The section on Economic Impact states generally that "The well may generate drilling/production of more wells in the parish." It already has and there is no evaluation of the foreseeable effects of additional proposals to withdraw ONRW for use as hydraulic fracking in the proximity of the scenic river.

3.) The section on “wilderness qualities” is four sentences. It omits any evaluation. Figure 2 shows the aerial view of the “intake” point as a heavily wooded area.

4.) The section on scenic/aesthetic values is three sentences. “Access from up or downstream is limited due to shallow seasonal depth and numerous natural barricades. There is no aesthetic value except to the landowner.” Application pg 2. Comstock’s unsupported conclusion denies the existence of public purposes of the Tickfaw. LDWF denied a permit application to Baker Pile Driving for commercial activities in a segment of the Tchefuncte River used for commercial because the proposed use was inconsistent with scenic and aesthetic values alone. Baker Pile Driving and Site Work v State of Louisiana thru the LDWF, (La App 4. Cir.1977).

5.) The section on ecological regimes denies the existence of ecological regimes to evaluate, “The river supports limited aquatic species due to the shallow depth.” Elsewhere the application includes pictures of the proposed point of water withdrawal. Figures 4,5,6 and 7 show a living river with rich ecological regimes to evaluate and to be protected. LDWF’s Scenic River Newsletter dated Fall 2013 includes an article entitled “Streams: Sensitive and Unique Habitats” which describes the importance of riparian habitat to the ecology of scenic rivers. The pictures on page two of a healthy living river are nearly identical to the pictures of the Scenic Tickfaw at the water withdrawal points.

6.) The section on recreation dismisses the existence of recreational uses. “The only direct access for recreation is controlled by the landowner. Access from upstream or downstream for swimming or boating is unlikely.” Elsewhere in the application, the intake point is described as four feet deep and forty feet wide. Application at page 5. That is deep enough for recreation, including canoeing, boating and swimming. Figure 1 shows that the intake point is three miles north of a put-in point at Highway 38 for canoeing and boating. “Canoeing is a form of recreational use intended to be protected under the Act.” *Rapides Waterworks v Broussard*, 663 So.2d. 475 (La. App. 3 Cir.,1995).

7.) The section on Fish and Wildlife in the Area denies the existence of fish and other aquatic life in the area. “The river supports limited aquatic species due to the shallow depth.” It does not mention the fact that the Scenic Tickfaw is designated for use by the Legislature for “fish and wildlife propagation”. It incorrectly denies the presence of any “protected, endangered, rare or threatened species” (PRETS) in the Scenic Tickfaw. The Natural Heritage Program list twelve PRETS in St Helena Parish. It is logical to assume the Scenic Tickfaw provides habitat to PRETS. In addition, there is no analysis of the detrimental effects of the proposed water withdrawal and drawdown and the hydraulic fracking on the propagation of fish and wildlife, PRETS or on the ecology, or other aquatic organisms - the biota, the mussels, the diatoms.

8. The applications do not consider alternatives to withdrawal of ONRW for use as water for fracking. The applicant must consider alternative sources including surface water and non-potable sub-surface water.

9. The applications incorrectly state that “the applicant has no regulatory or compliance history in Louisiana.” The DNR has a list online of compliance violations by Comstock companies with slightly different name and the same phone number

10.) Major private industry projects in the proximity to the river which may detrimentally impact the scenic river are required to be reviewed on a “case-by-case” basis. The applications fail to mention the two proposed hydraulic fracking wells except in the first sentence and in the economic impacts section where it predicts more fracking wells will follow these two. Comstock must be required to provide the following information regarding its two proposed fracking wells in order for LDWF to evaluate the effects of these uses on the river on a case-by-case as required in its Management Plan

a.) Comstock does not attach the two drilling permits it received from the Department of Natural Resources as an exhibit to its Applications. LDWF must consider the DNR drilling permits during its project evaluations.

b.) Comstock’s applications fail to set out how it will employ DWF’s Best Management Practices for the proposed hydraulic fracking wells. LDWF’s BMP’s for oil and natural gas are set out on its website homepage for Scenic Rivers. DWF’s “Oil and Natural Gas BMP’s” is the first topic on it’s Scenic rivers homepage. <http://www.wlf.louisiana.gov/oil-and-natural-gas-bmps>. BMP’s applicable to Comstock include: “Drilling. Use a closed loop drilling fluid system when drilling wells in or adjacent to the floodplain of a Scenic River.” “Liquid Products. Install shut-off valves capable of completely stopping all product flow at both the drill pipe entry and exit (i.e. on both banks of a Scenic River).”

c.) It is foreseeable that the two wells once fracked and producing would lose pressure and require re-fracking which would require more water withdrawal and compound the detrimental effects on the Scenic River. The statistics compiled by DNR regarding the 4,000 plus wells drilled in the Haynesville will provide a better understanding of the data regarding the frequency of re-fracking. These data are available from the DNR and must be a part of the project analysis. We incorporate these statistics into our comments as if copied verbatim and en extenso as part of the LDWF record in this matter. The foreseeability of the need to re-frack requires that the project evaluations include the impacts of subsequent water withdrawals of ONRW. Comstock must be required to provide this information as a part of a complete application.

d.) Comstock does not provide figures for “produced water” including “flowback” frac water and brine water which will be produced daily during operation and must be disposed of. Without these volumes, the proposed commercial activities and access, including the number of extra trucks, the levels of increased industrialization in proximity to the scenic river cannot be evaluated.

e.) Comstock does not provide the location or the components of the production facilities Each well will require separators, pipelines, oil tanks, generators, trucks.

Would the industrial site be within the Tickfaw watershed. How would the river be protected from leaks and spills, and flooding or hurricanes? Will the produced gas simply be flared off? If so, how efficient would that operation be? What types and volumes of non-volatiles would be released along the river? What would be the effect of these releases on the PRETS, and the recreational users? What would be the hours of operation? How many decibels would it be? Would there be bright lights at night?

“In determining whether or not a permit should be issued, the Administrator’s evaluation shall consider the purposes for which the System is established and shall be made with a view toward maintaining the fundamental character and unique natural values associated with the System river. Any evaluation required to be made by this section, shall fully and thoroughly consider, but not be limited to the following [14] criteria. LAC 76:IX.117(D). The project evaluation shall be a “full and thorough” “project evaluation” by the professional staff at DWF. Sierra Club vs. LDWF, 365 So.2d. 880 (La App 4. Cir., 1978).

The Act requires that LDWF return the Applications to Comstock for completion and return. Only then can it conduct a full and thorough project evaluation by the professional staff. It is reasonable under the circumstances to require that the applicant pay for a field inspection by the professional staff at LDWF. If this is done, we request public notice.

(C) The LDWF’s Management Plan for the Scenic Tickfaw River is inadequate and cannot be used to inform the it’s management decision to grant or to deny Comstock’s Applications for two SRA Permits.

The regulations require that LDWF’s Management Plan “Be consistent with the purposes, policies and provisions of the Scenic rivers Act. LAC 76:IX.111(C)(1).” The Management Plan is not consistent with the purposes, policies and procedures. The lack of an adequate Management Plan is largely due to the historical practice of the LDWF of delegating powers and duties to the professional staff without providing sufficient technical and clerical assistance. The regulations allow the LDWF to delegate powers and duties to professional staff provided that “The Administrator shall provide said individuals with sufficient technical and clerical assistance to accomplish this purpose.” LAC.76:IX.107. The lack of sufficient technical and clerical assistance to produce and implement a Management Plan in accordance with the Act prevents the evaluation of the required criteria prior to a final decision to issue or to deny the Applications. The inadequacy of the Management Plan is set out below.

- 1.) LDWF’s Management Plan for the Scenic Tickfaw does not “Provide for the continuing involvement of the public in the development, implementation, and administration of the plan. LAC 76:IX.111(B)(6).
- 2.) LDWF’s management Plan does not “Set forth a detailed program to address existing features which have been identified as important to be protected and preserved

and potential issues, problems, and needs that impact, or may impact, resources and features of the river.” It also does not “Set forth management goals, objectives, policies, standards and management guidelines for the preservation of the System River.” LAC 76:IX.111(B)(3) & (4) For example, it contains one sentence on “protected, rare, endangered, threatened species”, (PRETS) in the river, states no program, identifies no potential issues that impact or may impact the PRETS. It sets forth no management goals, objectives, policies for the preservation of the PRETS or for the propagation of the PRETS.

3.) The Management Plan is virtually identical to management plans for other scenic rivers. The Scenic River Newsletters written by LDWF following canoe trips on the Abita River, the Lacomb Bayou and the Bayou Cane contains the kind of data that the modified Management Plan needs. Scenic River Newsletter Winter 2013, Spring 2013, Fall 2013. A field inspection of the Scenic Tickfaw by canoe would provide the basis for an adequate Management Plan and allow cross checking of data provided by the applications. As mentioned above the costs of the field inspection would be paid by the Applicant.

4.) LDWF’s Management Plan contains one page regarding “existing land and water uses” and no analysis of problems and potential problems of present uses to be managed for.

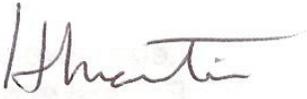
5.) LDWF’s Management Plan contains no information on the volume of the ONRW of the Scenic Tickfaw. There is no information regarding flow at various sections, no information regarding seasonal variations. No information regarding the fact that it is listed on the 303(d) list as impaired for mercury in fish tissues and suspended solids. There is no plan, no goals or objectives to manage the impaired ONRW.

6.) LDWF’s Management Plan is dated 1995 and has not been “reviewed and revised” or “modified” to reflect the changes in the Scenic Tickfaw River and the surrounding land since 1995.

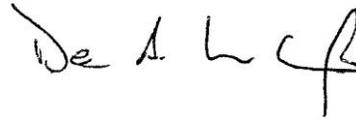
Conclusion

For all of the reasons discussed in these comments, LDWF should not issue Scenic River Act Permits to Comstock Resources, Inc. based on Applications # 902 and # 903 as currently proposed. Please contact the Citizens through the email addresses provided below.

Respectfully submitted on July 18, 2014:



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