



## STATE OF TENNESSEE

Department of Environment and Conservation  
Division of Water Resources, Natural Resources Unit  
Davy Crockett Tower, 9<sup>th</sup> Floor  
500 James Robertson Parkway  
Nashville, Tennessee 37243

### Emergency Permit for CSXT Rail Reconstruction – Nolichucky River

#### Background

On September 27, 2024, Hurricane Helene caused catastrophic flooding in the Nolichucky River resulting in severe damage to the track infrastructure of CSXT Transportation Inc. (CSXT) between Milepost (MP) Z 140.0 and Z 142.5 on the Blue Ridge Subdivision in Tennessee

The Division issued a Notice of Coverage under the Emergency Infrastructure Repair General Permit on October 16, 2024 (file # NR2406.088). The work needed to reconstruct the track infrastructure exceeded the limits of the general permit. CSXT then applied for an individual permit on November 30, 2024, to complete track reconstruction.

The CSXT application proposed to rebuild the track, roadbed, culverts, ditches, signals, and a bridge along a 2.5-mile section of active CSXT right of way in Tennessee. The project is in Unicoi County near Erwin TN, starting at Latitude 36.098123° / Longitude - 82.441840° and ending at Latitude 36.072456° / Longitude -82.417017°. The waterbodies within the project area include Nolichucky River, Mine Branch, Long Branch, Devils Creek, and unnamed tributaries.

The commissioner determined that, pursuant to rule 0400-04-07-.04, an emergency situation existed and on December 11, 2024, a permit for remedial action was issued without prior public notice. A public notice was subsequently issued on December 17, 2024. In response to that notice, a public hearing was requested. A public hearing was held in the Erwin Town Hall on March 18, 2025.

#### Response to Comments

The Division received numerous individual comments, primarily by email, within the formal comment period. Comments expressing the same substantive concerns have been grouped together for the purpose of clarity and organization. The original comments can be viewed on the Division's dataviewer. <https://www.tn.gov/environment/program-areas/wr-water-resources/water-quality/water-resources-data-map-viewers.html>. Please search the NRS24.232 and access the site page.

It is important to note that the Division's authority comes from the federal *Clean Water Act* and the *Tennessee Water Quality Control Act of 1977*. The Division's authority is therefore limited only to matters within that jurisdiction.

## **Borrowing Material from Point Bars**

**Comment 1.** . At the lost cove site, MP Z 143, near the NC/TN border, where borrowing of fill rock from the north shore of the river has been done, CSX has created a flat, "bench cut" which extends along the river channel for roughly one mile and inland from the post Helene river shoreline for 80 feet. CSX has widened the river channel at this site. The site has no remaining large cobble stones and will be prone to erosion for some time. Restoration of the river bank here, with appropriate large river rock, must be addresses along with the necessary removal of the causeway (temporary ford) that CSX constructed for the purpose of moving heavy equipment across the river to extract this rock and fill from the opposite bank.

**Comment 2.** The depositional point bars are crucial for both riverbank stability and our fragile, complex ecosystem; they should not be used as railbed or roadbed material, quarry stone should be.

**Comment 3.** CSX has already done so much harm, like digging into the riverbed below the Ordinary High Water Mark and hauling off tons of river cobble. That cobble isn't just rocks—it's part of what keeps the river healthy and stable. When it's removed, the river changes, and not for the better. This can lead to worse flooding, dirtier water, and fewer fish, which hurts everyone from local families to folks visiting for recreation.

**Comment 4.** CSX's work, specifically cobble bar mining, streambank removal, and fill activities, has already and will continue to significantly degrade fish and aquatic life habitat. Cobble bars provide important and unique habitat for aquatic life, including for endangered Appalachian elktoe. Mining cobble bars permanently degrades these habitats through direct habitat destruction and through degraded water quality by contributing to temperature, turbidity, and bar stability issues. Flattening the cobble bars to a lower point exposes the areas to regular inundation and prohibits natural varial zone riparian communities, that may include endangered Virginia spiraea, from reestablishing after Helene. In warmer months, solar heating of exposed rocks and shallow areas in the lowered bars will heat the adjacent water, causing additional harm to aquatic life that rely on cold, clean water.

**Comment 5.** Excavation below the Ordinary High Water Mark (OHWM) and excessive removal of river cobble have destabilized the riverbed, degraded water quality, and disrupted wildlife habitats. These actions jeopardize the long-term stability of the river and threaten its importance as a resource for recreation, tourism, and the local economy.

**Comment 6.** CSX should unambiguously be prohibited from removing rock from the river corridor below that level in their right of way and prohibited entirely from harvesting rock outside of their right of way in the Gorge.

**Response** Both the Division and the US Army Corps of Engineers (USACE) responded to complaints that rock was being removed in a harmful manner from the Nolichucky River. On December 4, 2024, the Division issued a Notice of Violation to CSX that required them to cease removal of rock and to apply for an individual permit to complete reconstruction of the railroad.

CSXT applied for an individual permit on November 30, 2024. A permit for remedial action on

December 11, 2024.

That permit authorized removal of rock above the ordinary high-water elevation from depositional point bars, removal of track material, and installation of 171 rail piles to form a buttress wall for the railroad bed.

### **Ordinary High-Water Mark**

**Comment 7.** To preserve the outstanding values of the Nolichucky River and uphold its obligations under the Tennessee Water Quality Control Act, the ARAP and Section 401 certification must be amended to raise the ordinary high-water mark and impose substantive permitting conditions to ensure against degradation of the river's values.

**Comment 8.** I encourage you to amend the permit's designation of the ordinary high water mark to a minimum of 6.8 feet on the Embreeville USGS gage or 6.4 feet above base flow in the Gorge which corresponds to 12,300cfs. The current ordinary high water marks set by the permit are not defensible and are not sufficiently protective of the river's ecological and recreational values.

**Comment 9.** We also highlight the lack of clarity surrounding the determination of the OHWM, which has contributed to confusion and poor decision-making during CSX's operations. In addition, CSX's work has extended beyond the railroad easement, disturbing areas both below and above the OHWM, further exacerbating the damage.

**Comment 10.** I have seen first hand construction crews excavating rock directly from the river bed as well as leveling several riverside cobble bars to almost water level, at a time when the river level is quite low. These practices both have an effect on the recreational value of the river and a huge impact on the rivers ability to handle higher water levels. Their disregard for the ordinary high water mark could have serious effects on future flooding and the stability of the railway ledge they are working to rebuild.

**Comment 11.** CSX's actions are endangering the stability of the riverbed and the quality of the river ecosystem. The removal of excessive river cobble and excavation below the OHWM undermines the natural balance of the river, with long-term detrimental effects on wildlife habitats and water quality.

**Comment 12.** CSX has repeatedly violated environmental regulations, including excavating below the Ordinary High Water Mark (OHWM) and removing excessive amounts of river cobble. These actions threaten the stability of the riverbed, degrade water quality, and harm habitats that support local wildlife. Furthermore, CSX has requested to borrow rock from above the OHWM, disturbing bedrock that is typically submerged, compounding the environmental impact.

**Comment 13.** The Nolichucky is a unique watershed, and not only an important natural resource, it is an economic resource for the region as well. Thousands of people visit our area every year to enjoy river recreation. It is vitally important that these considerations be taken into account as the railroad is rebuilt. This should include, but not be limited to, confining all excavation activities to areas above the already agreed upon historical high water mark or 5 feet above the water level.

**Comment 14.** We urge your office to take immediate action by ensuring a clear and proper definition of the OHWM, requiring CSX to restore the damaged areas, and implementing enforcement measures that hold them accountable. The local economy depends on the health of the Nolichucky River, and we must act now to prevent further harm.

**Comment 15.** To date, there is still no binding definition of the OHWM in this region and has allowed for extreme ambiguity around what work is allowed within the river channel and what work is prohibited. Areas have been mined well below the OHWM and need to be restored to their pre-mined heights and stability.

**Response** The ordinary high-water mark (OHWM) is a term used by the USACE for jurisdiction under Section 404 of the Clean Water Act. The OHWM is defined and determined by that agency. Under Sections 9 and 10 of the Rivers and Harbors Act of 1899, the ordinary high-water mark (OHWM) defines the lateral limits of federal jurisdiction for non-tidal navigable waters of the U.S. [33 CFR § 329.11(a)(1)].

The OHWM elevations used in the §401 Water Quality Certification (WQC) were determined by the USACE in an initial site visit. The WQC prohibited excavation below the OHWM. In a letter dated November 20, 2024, the USACE required CSXT to conduct further analysis of the OHWM.

**Removal** of river rock below OHWM did occur prior to the issuance of the NOV and the issuance of the WQC. However, work in Tennessee was substantially complete by the issuance of the WQC and the height of the OHWM proved inconsequential.

### **Property Ownership**

**Comment 16.** Compensation to the taxpayers for the taking of this public property must be addressed in the permit and CSX should not be permitted to conduct any work outside of their right of way (ROW) moving forward. The only exception being the retrieval of rails and rail road ties from the river.

**Response** ARAP permit NRS24.232 covers all CSXT activities at this location on the Nolichucky from the time of issuance forward. Any compensation or penalties would have to be addressed as an enforcement action, not under a permit.

Further, the ARAP permit required that prior to **removal** of rock from the depositional point bars, CSXT must demonstrate ownership in fee simple, ownership of the mineral estate, or shall have received written consent from the private property owner and shall submit documentation of such ownership or consent to the department.

### **Restoration / Remediation**

**Comment 17.** Please closely monitor the work of CSX under this permit, protect the riverbed and banks from harm, and require mitigation for impacts.

**Comment 18.** We urge your office to take immediate action by ensuring a clear and proper definition of the OHWM, requiring CSX to restore the damaged areas, and implementing enforcement measures that hold them accountable. The local economy depends on the health of the Nolichucky River, and we must act now to prevent further harm.

**Comment 19.** We need a clear plan to restore the damage already done, and we need

stricter oversight going forward. Weekly inspections by a third party would help make sure CSX follows the rules, and those inspection reports should be shared with the public. We also need to make sure the cobble they've taken is replaced and the riverbanks are stabilized.

**Comment 20.** CSX should be responsible for submitting a formal mitigation plan for the damage to our public lands and waterways their subcontractors have already done, once the rail line is restored using engineer approved, angular ballast from quarries.

**Response** On January 10, 2025, the USACE issued an Initial Corrective Measure requiring CSXT to develop and submit a restoration plan. The first draft of this plan was submitted to them February 28, 2025.

The Division has no authority to delegate inspection authority to a 3<sup>rd</sup> party; any compliance inspections will be conducted by agency personnel.

### **Oversight / Enforcement**

**Comment 21.** To protect the Nolichucky River and ensure its long-term health, we must hold CSX accountable. This includes enforcing regulations, conducting regular inspections, and restoring areas already damaged by their operations.

**Comment 22.** There has been insufficient oversight from both TDEC and the U.S. Army Corps of Engineers (USACE), allowing CSX to operate without proper accountability. Stricter enforcement, including regular inspections, is necessary to prevent further damage and ensure compliance with environmental standards.

**Comment 23.** We urge your office to take immediate action by ensuring a clear and proper definition of the OHWM, requiring CSX to restore the damaged areas, and implementing enforcement measures that hold them accountable. The local economy depends on the health of the Nolichucky River, and we must act now to prevent further harm.

**Comment 24.** We also highlight the lack of clarity surrounding the determination of the OHWM, which has contributed to confusion and poor decision-making during CSX's operations. In addition, CSX's work has extended beyond the railroad easement, disturbing areas both below and above the OHWM, further exacerbating the damage.

**Comment 25.** The Nolichucky River is a vital resource that supports recreation, tourism, and local economies. CSX's activities jeopardize these benefits by contributing to habitat loss, diminishing fishing quality, and creating flood mitigation and drinking water concerns. Additionally, their intentional avoidance of clarity regarding the OHWM and failure to operate within proper guidelines are unacceptable. TDEC and USACE have already documented violations, yet restoration efforts and stricter oversight remain absent.

**Comment 26.** TDEC and the US Army Corps of Engineers have not provided adequate oversight, allowing CSX to operate with minimal accountability. We demand increased inspections and stricter enforcement of regulations to prevent further destruction of the Nolichucky River.

**Response** Immediately after the flood, the Division became engaged in assisting the communities affected by the flooding from Tropical Storm Helene. Its resources were

committed to that assistance. Personnel were able to attend site visits that were coordinated by the USACE and other federal and state agencies.

When the Division recognized that the on-going work exceeded the limits of its emergency infrastructure repair general permit, it issued a Notice of Violation that instructed CSXT to obtain an individual permit for the remainder of the work.

The Division coordinated with the USACE on the corrective action plan and will continue to work with the federal agencies responsible for remedial or corrective actions.

### **Tourism / Economy**

**Comment 27.** Using local quarries for materials, rather than disturbing the riverbed, can further mitigate environmental impacts while supporting the local economy.

**Comment 28.** By removing or altering the cobble bars that channel the river into deeper continuously navigable areas, CSX is degrading the river's navigability and recreational values during periods of low flow in violation of the river's designated recreational use.

**Comment 29.** The Nolichucky River supports local recreation, tourism, and economies. CSX's reckless actions not only damage the environment but also jeopardize these critical industries, impacting the livelihoods of residents and local businesses.

**Comment 30.** Beyond limiting access to the river, CSX is degrading the natural scenery that people come to the Gorge to enjoy. Here and throughout the river, it is evident which areas have been mined and which have been so far spared. In all, CSX's operations are jeopardizing the recreational values of the river in violation of its designated use.

**Response** The Division agrees with the commenters that the recreational values of the Nolichucky gorge are vital to the local economy. Recreation, along with Fish and Aquatic Life Support, Drinking Water Supply and others, is a designated use of the state's waters under the Tennessee Water Quality Control Act. The Division will continue to work with CSXT, local citizens, and the other agencies to restore and protect the recreational values of the river.

### **Water Quality, Fish and Wildlife**

**Comment 31.** Flood risks, drinking water quality for nearby communities, and loss of wildlife habitats are all significant concerns tied to CSX's operations. We also worry about the detrimental impacts on fishing quality, which is crucial to the region's recreational economy.

**Comment 32.** The Nolichucky River is an essential resource, supporting diverse ecosystems, local economies, and recreational activities. CSX's repeated violations, including excavation below the Ordinary High Water Mark (OHWM) and the removal of substantial amounts of river cobble, have disrupted the natural balance of the river. These activities threaten water quality, the stability of the riverbed, and the habitat of species such as the Appalachian elktoe mussel.

**Comment 33.** CSX has repeatedly disregarded environmental protections, excavating below the Ordinary High-Water Mark (OHWM) and removing excessive amounts of river cobble. These actions have destabilized the riverbed, degraded water quality, and threatened critical wildlife habitats.

**Comment 34.** CSX's work has and continues to inflict significant damage on the resource values of the river. Although Hurricane Helene significantly changed the Nolichucky River, its recreational and ecological values remain remarkable. However, TDEC's permitting conditions fail to ensure that CSX's work will not cause unmitigated appreciable permanent losses to resource values or violate Tennessee's water quality standards.

**Comment 35.** CSX's work on the streambanks also threatens fish and aquatic life, as well as the entire riparian community. As the natural riverbanks are carved away by CSX, the remaining earth is vulnerable to erosion and will contribute to turbidity in the river and further degradation of riparian habitat, including the habitat of Virginia spiraea.

**Comment 36.** CSX's fill activities in the Nolichucky and its tributaries degrade aquatic habitat and create fish barriers. CSX has completely blocked the Devil's Creek confluence into the Nolichucky River with fill material, contributing to turbidity, and creating a barrier to water flow and fish passage. These issues all result in a lack of compliance with Tennessee's water quality criteria for the designated use of propagation and maintenance of fish and other aquatic life.

**Comment 37.** TDEC accepted CSX's assertion that the project will have de minimis effects on resource values despite CSX's stated plans to cause permanent impacts to 20,000 linear feet of streams and use 1 million cubic yards of fill across the project area, of which 2.5 miles are in Tennessee. Mining cobble, raising the railbed, filling the toe road, and building a rail pile wall along 2.5 miles of an otherwise undeveloped river without any mitigation will certainly result in an appreciable permanent loss of resource values and cannot be considered de minimis. TDEC should have required CSX to reasonably consider the full scope of practicable alternatives and should have imposed sufficient impact minimization or any mitigation measures to avoid those permanent resource value losses.

**Response** The Division issued Emergency Infrastructure Repair permit #NR2406.088, which was not based upon any "stated plans" from CSXT. When the Division became aware that CSXT was exceeding the conditions of the permit, they issued a Notice of Violation and met with CSXT and the USACE to address the situation. The Division made the decision that repair of the CSXT rail line in the aftermath of the flood met the requirements for emergency permitting and we stand by that decision. To have required an individual permit that allowed for public comment and alternatives analysis would not only have delayed restoration of a critical piece of national infrastructure, but delayed it until higher winter and spring flows made the work more difficult and dangerous, requiring more of the work to be done in the flow, and more work would have been conducted during the spawning season for most fish and mussel species.