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## Members of the Select Board

In response to the proposed new storm water ordinance, I have taken time to review the circumstances surrounding the EPA mandated storm water permit and its effects on our town. I have outlined the research I have done since considerable background is required to understand the complexities of this change.

## Background

The proposed changes to the Hollis storm water ordinance has been precipitated by the United States Environmental Protection Agency's 2017 storm water discharge permit that was issued by the EPA to the state of New Hampshire. Far from being a permit in the conventional sense, this 67 page document imposes conditions upon the "urbanized areas" of towns across the state. The permit is specifically required if municipalities with Municipal Separate Storm Sewer Systems (MS4) discharge storm water into Waters Of The United States (WOTUS). Although Hollis does not have a large storm water sewer system we do have 5 locations where we have an open outflow to a water body that may have been defined as a Water Of The United States.

In an effort to reduce duplication of effort, Hollis has paid for the services of a regional storm water coalition named the New Hampshire Lower Merrimack Valley Storm water Coalition. This coalition serves to provide shared resources for the purpose of complying with the EPA mandate. The coalition has no authority beyond the municipal agreement which instantiated it and serves in an advisory role only. Hollis participates at will for the onetime fee of \$2000.

Per the Federal EPA, Hollis is required to file a Notice of Intent (NOI) for coverage under the New Hampshire State general permit. This 18 Page NOI document lists the specific outfalls that Hollis believed it was responsible for. This NOI is generated by the Town and lists Best Management Practices (BMP)s that the town will employ to address six required Minimum Control Measures (MCM) imposed by the permit.

Minimum Control Measure	Description
1	Public Education + Outreach
2	Storm water Plan
3	Illicit Discharge Detection Elimination
4	<b>Runoff Control of Construction Sites</b>
5	<b>Runoff Control in New Development and Redevelopment post construction</b>
6	Municipal Pollution Prevention (Good Housekeeping)

This process has come to our attention since Hollis' Notice of Intent says that we will modify our regulatory structure to address the requirements of MCM 4 and 5 which deal with Runoff Control at construction sites and in new development and redevelopment post construction. Our Notice of Intent says that we will address this concern in our ordinance 2 years from the permit effective date which is July 1 2018. Based on this our self-imposed target date is July 1 2020.

## Specific Outfalls

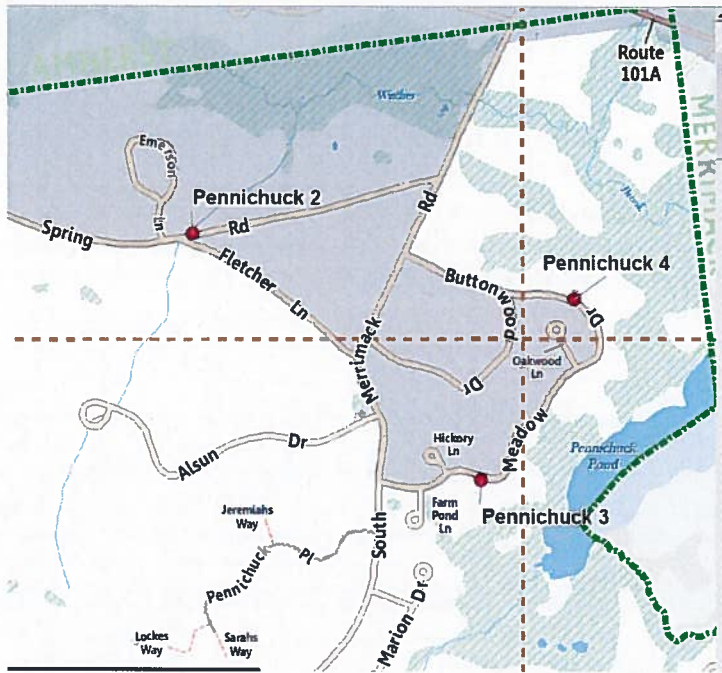
In order to understand the scope of this mandate it is necessary to understand that although Hollis has only a few municipal storm sewers, the EPA has included open runoff in ditches as part of the definition. The EPA definition of municipal separate storm sewer is included below.

According to 40 CFR 122.26(b)(8), "*municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):*

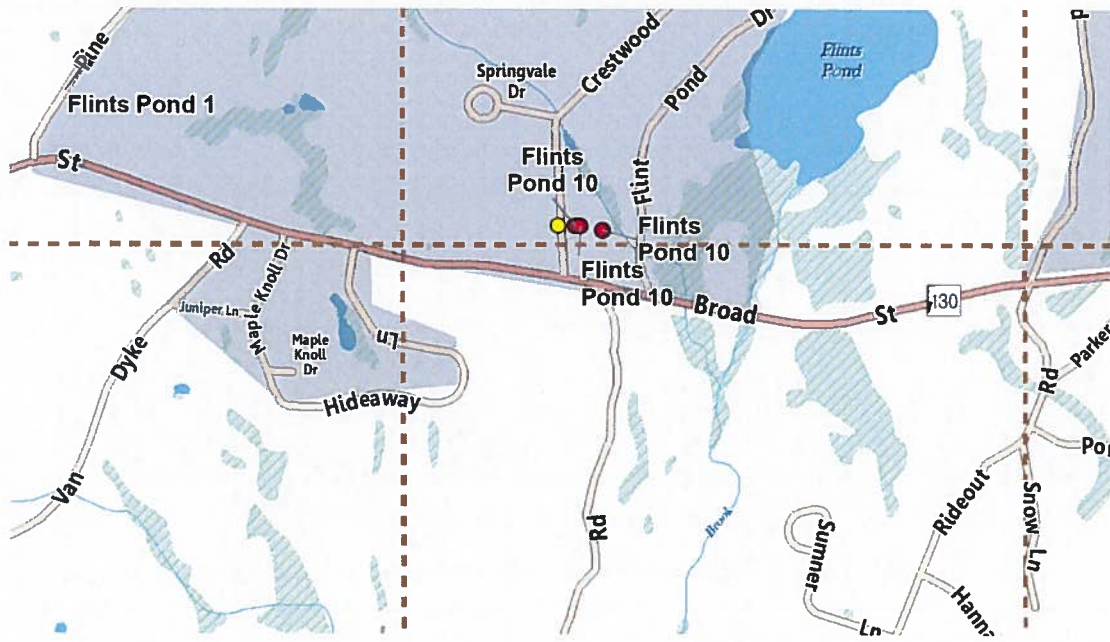
- (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law)...including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States.
- (ii) Designed or used for collecting or conveying stormwater;
- (iii) Which is not a combined sewer; and
- (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2."

Hollis has five outfalls that were identified as being subject to the MS4 permit. These five outfalls are included below so it is understood exactly what the scope of this discussion is. The map sections below are taken from the posted Hollis stormwater map available online.

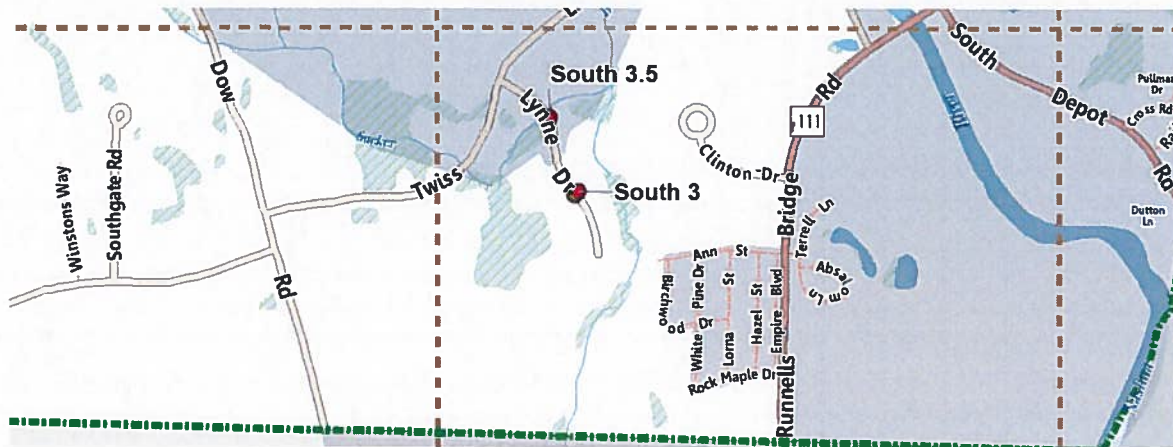
Below, the 3 red dots represent outfalls, specifically identified as Pennichuck 2,3 and 4



The map section below shows another permitted outflow at Flints Pond 10

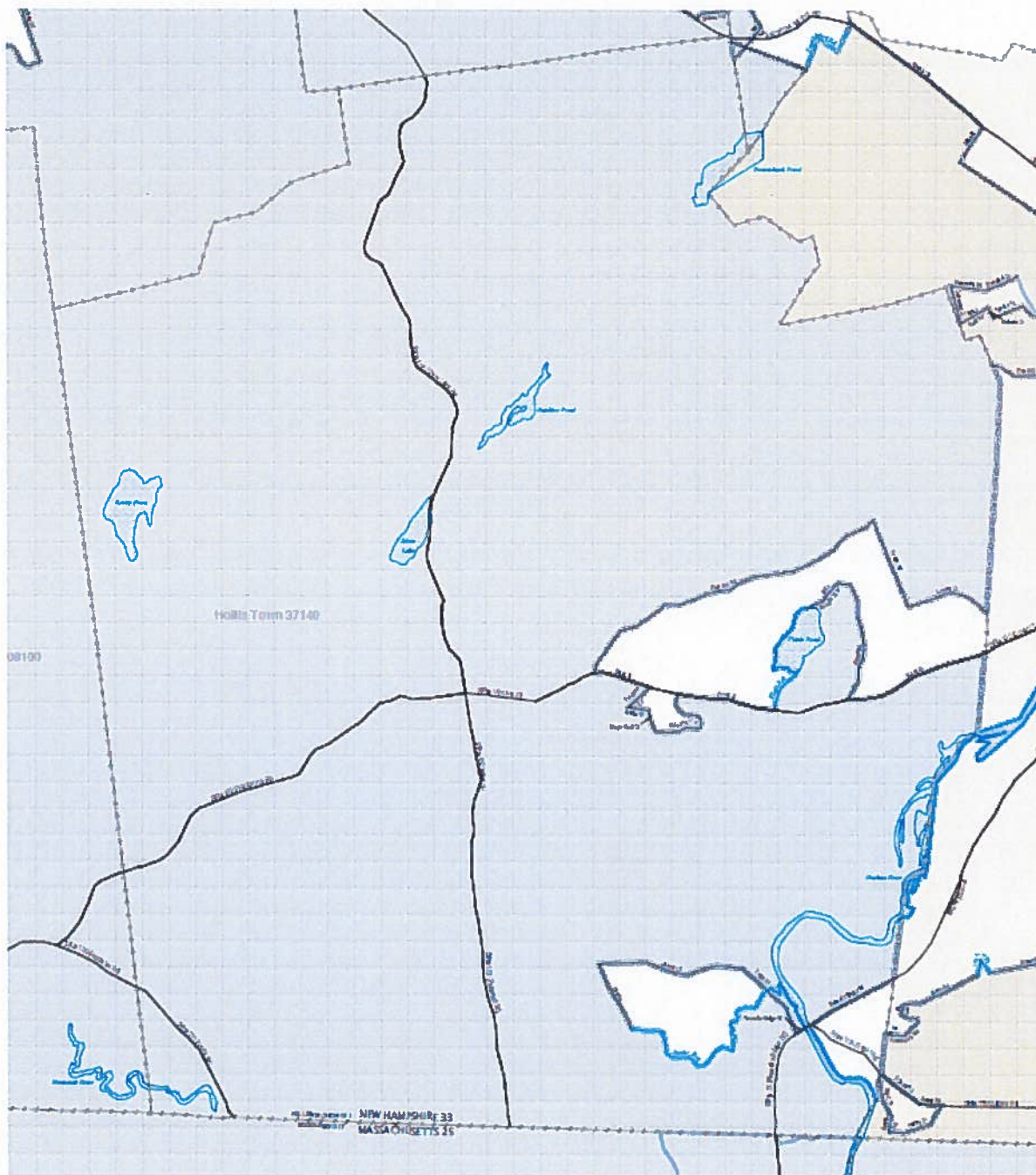


The fifth permitted outflow is shown as South 3.5 below

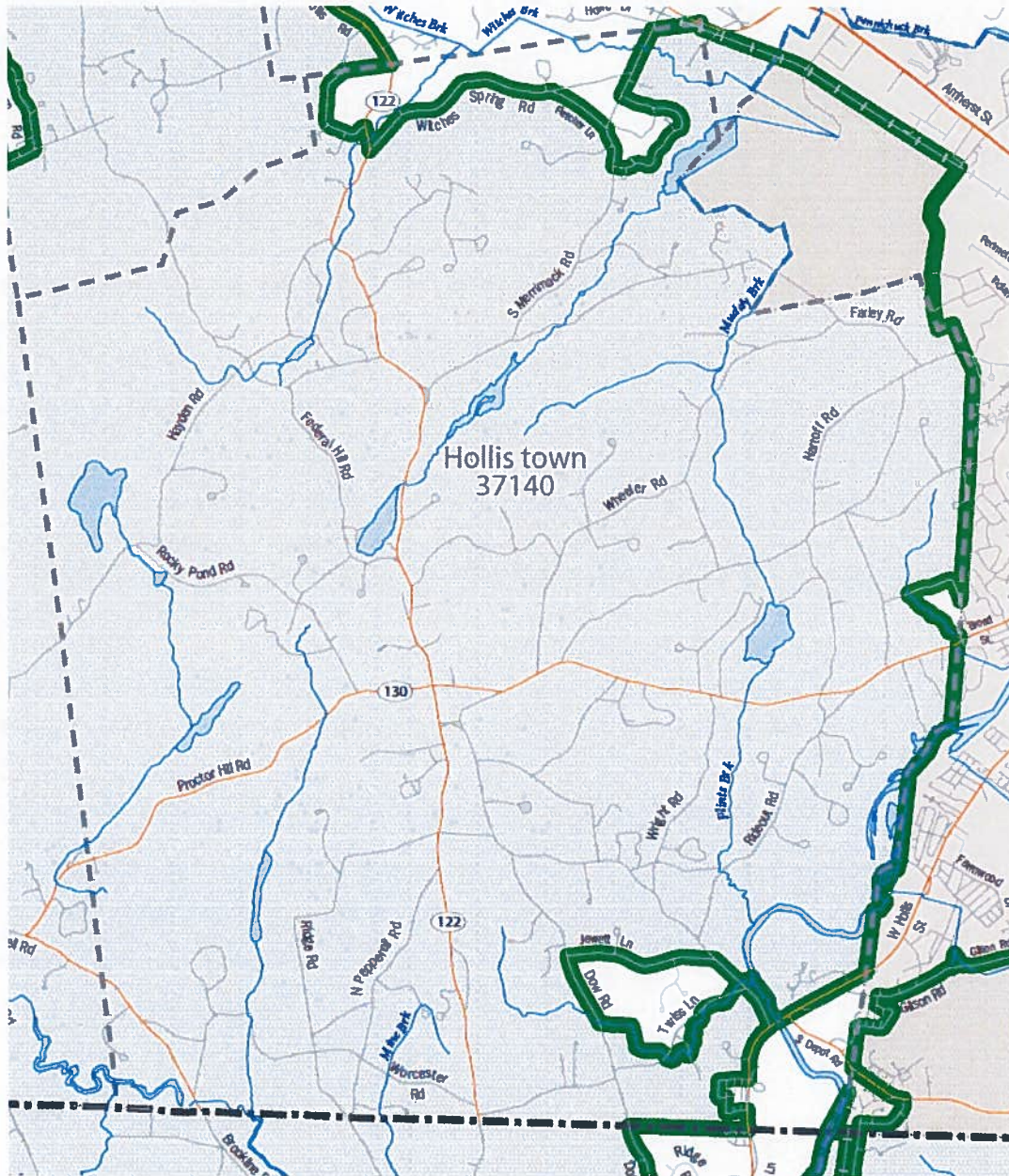


It is important to keep in mind that the permit is necessary only for storm water discharges to Waters Of The United States within the delineated urbanized area. The state permit requires Hollis to address only those discharges to Waters Of The United States within the urbanized areas identified by the census Bureau in the 2000 census and the 2010 census. Because the Census Bureau changed its criteria for identifying urban areas between 2000 and 2010, there is little agreement between the two federal maps. I.E areas which were classified as urban in 2000 were reclassified as rural in 2010. Regardless, the language in the permit requires Hollis to address the outflows in urbanized areas identified by the 2000 and 2010 census. This can be quite confusing, so I have included both Census Bureau maps below. The key information here is that the town only needs to address outfalls in the limited urban areas identified on these 2 maps. In general, the large majority of Hollis is classified as rural. In addition, the permit does not require us to address any areas identified in the 2020 census and it is likely that the 2020 census will not be adding much more area to the urbanized zone.

Per the United States Census Bureau, the urbanized area in Hollis as of 2000 is depicted in white and outlined in purple in the map below.



Per the United States Census Bureau, the urbanized area in Hollis as of 2010 is depicted in white and outlined in green in the map below



## Problems with implementing the MS4 Requirements

- The requirements imposed by the MS4 permit do not include funding to accomplish any of the expensive measures that are requested.
- The Notice of Intent was completed prior to the town's legislative body's approval and as such it is unreasonable to expect items written in it to be binding.
- The EPA Permit / regulation was released hastily in 2017 and it relies on a definition of Waters of the United States (WOTUS) which is currently being revised. The 2015 definition of WOTUS was repealed by the EPA in 2017. 27 states sued the EPA in 2017 and won their Supreme Court case against the expansive 2015 definition of WOTUS. Although New Hampshire is not one of those states. It is prudent for Hollis to wait for the revised definition of WOTUS before enacting ordinances based on EPA regulations which have already been struck down in 27 states and are presently being rewritten.
- From the language of the permit, only outfalls which are part of an MS4 are to be covered, but it seems that Hollis has incorrectly included outfalls from private property.
- It is not clear what size storm is to be addressed by the regulations. I.E compliance with a 50 year storm would be unreasonable since there would likely be a state of emergency declared at that time.

Below is an excerpt from [Coty Hopinks-Baul](#) & [Daniel Fanning](#) written on April 5, 2019 and published on the emerging energy insights webpage. It describes the upcoming changes to the WOTUS definition which are presently in the process of being released. To summarize, many waters that were previously considered WOTUS in 2015 will no longer be covered.

<https://www.emergingenergyinsights.com/2019/04/cwa-series-in-redefining-the-scope-of-the-clean-water-act-will-the-new-wotus-rule-truly-be-a-sea-change/>

### *The New Proposed WOTUS Definition*

*... the EPA and Corps, announced its new regulatory definition for WOTUS on December 11, 2018. Shortly after the government shutdown ended earlier this year, the proposed rule appeared in the February 14, 2019, Federal Register and EPA held a public hearing in Kansas City, Kansas, on February 27th and 28th. The comment period is currently open and ends April 15, 2019.*

*Much like the CWR (Clean Water Rule), the new rule is said to be intended to clarify the limits of the CWA (Clean Water Act's) authority. Unlike the CWR, the new rule streamlines rather than adds categories of waters. Also, whether waters are jurisdictional will now be based on the degree of their contribution to traditional navigable waters, rather than on arbitrary distances from jurisdictional waters without regard to their contribution (or any connection) to those waters. The elimination of the case-by-case*

*“significant nexus” determinations alone should go a long way towards reducing the significant ambiguity and uncertainty that the regulated community faced with the CWR. The rule codifies just six categories that are to be regulated under the CWA and specifically excludes from CWA jurisdiction water bodies that do not fall within one of those six categories, which is not to say that it wouldn’t be regulated under a different federal statute or a state law.*

*As a rough upshot, the most significant proposed changes to the 2015 rule include the following:*

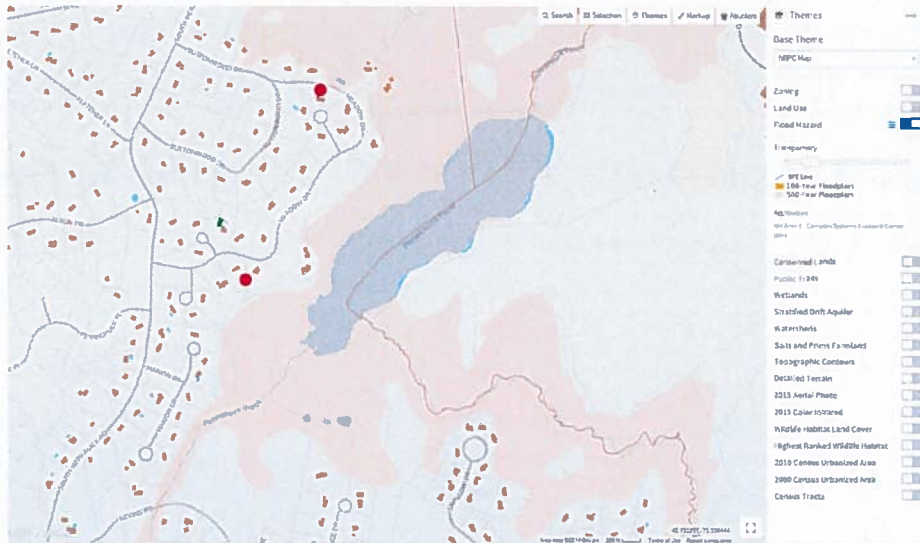
- Eliminating case-by-case “significant nexus” determinations, which are replaced with a more rigorous definitions section that includes significant terms like “perennial” and “intermittent” and provides temporal context for the evaluation of such flows;*
- Eliminating jurisdictional claims over (and, therefore, the need for NPDES and 404 permits for activities entailing discharges to) water bodies contributing only **ephemeral flows to traditional navigable waters**;*
- Retaining jurisdiction over impoundments of jurisdictional waters “unless jurisdiction has been affirmatively relinquished,” as noted in the preamble to the proposed rule (but not included in the proposed codifications); and*
- Limiting the definition of “adjacent wetlands” to those abutting or having a direct surface connection to other jurisdictional waters, requiring inundation or perennial or intermittent flow between the wetland and the jurisdictional water during a typical year.*

*This proposed rule has been met with mixed reactions. Some believe the rule provides a heightened level of clarity and certainty in determining whether a discharge requires a permit. Some also believe its reduction the CWA’s jurisdiction puts to the CWA’s authority back within the Commerce Clause, shifting some regulatory power back to the States. Others, however, believe this reduction in the CWA’s jurisdiction removes necessary protections for waters all around the US but particularly in arid and semi-arid regions of the West and Southwest where most streams are ephemeral.*



Considering the problematic nature of the mandate and that there are only 5 outfalls in town which were determined to discharge to the expanded definition of WOTUS, it seems prudent to revisit this determination. The new definition does not include the expansive 100 year flood plain as the 2015 rule did and ephemeral flows are now also specifically excluded. A cursory review indicates that the locations at Pennichuck 3 and 4 are now approx. a minimum of 700 feet from WOTUS based on the 2019 definition and Pennichuck 2 is not on a navigable flow. Similar relief may be available to Flint Pond 10 and South 3.5. The permit specifically addresses Municipal Separate Storm Sewer Systems. Discharges from private property into WOTUS are not within the scope of the permit requirements. Considering the problems caused by the EPA mandate

NRPC Map showing 100 year flood plain in dark orange below with red dots indicating approx. location of regulated outfalls. It can be seen that since the new definitions of WOTUS does not include the 100 year flood plain both of these outfalls do not release to WOTUS and thus do not need to be permitted.



Hollis should review each outflow carefully with a consideration of the new definitions, some outfalls could be removed from our permit limiting the cost and burden of legislation and enforcement that has been mandated. Please review this matter carefully as I believe there is a possibility of considerable cost savings to the town, in addition to the possibility of greater local control.

In addition to a review of the permit in light of the new definition of WOTUS, it should be the policy of the town to implement the requirements of the permit in a manner which restricts the impacts to only those areas that are addressed by the permit. Most of Hollis is considered rural as can be seen from the census maps. It is important that we as a town do not go beyond the federal mandate especially considering all the legal churn presently ongoing

Regards,  
Joseph Garruba