September 27, 2017

(submitted via regulations.gov)

Water Docket
Environmental Protection Agency
Office of Water 4504-T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Email: CWAwotus@epa.gov

RE: EPA-HQ-OW-2017-0203: Comments of Free Speech For People and Raritan Headwaters Association on Proposed Rescission of Definition of Waters of the United States

I. Introduction

The Trump Organization and President Trump would be direct beneficiaries of this proposal to rescind the definition of "waters of the United States," promulgated in 2015. The Trump Organization owns twelve Trump-branded golf courses across the country, from which President Trump earned roughly $272 million in income in 2016. If the definition of waters of the United States established by the 2015 rule were to go into effect, the Trump Organization would have to expend significant resources to protect water quality, prevent pollution, and adequately manage storm water runoff at each of its golf courses. In addition, if an agency issued a positive jurisdictional determination for waters on or near a Trump golf course, it could prevent the undertaking of new projects, development or construction at one or all of these properties if the resulting jurisdiction limited certain activities, placed conditions upon the proposed development, or required costly permitting or mitigation activities. Conversely, if the rule is rescinded, these Trump-owned properties will realize substantial cost savings and may be subject to preferential treatment under case-by-case decision-making standards. Because the

2015 rule has never been implemented, the EPA and Army Corps of Engineers should conduct an analysis of each of President Trump's properties under the 2015 rule to establish for the record the full scope of the benefits that the proposed rescission would be likely to produce at his properties.

In light of the direct benefits that this proposal would confer upon President Trump's business, the EPA and Army Corps of Engineers' proposed rule will, if promulgated as a final rule, violate the Domestic Emoluments Clause of the U.S. Constitution, which prohibits the federal government from conferring any benefits, financial or otherwise, upon the President other than his fixed presidential compensation. This constitutional violation is an independent reason, apart from the considerable environmental and other policy reasons to retain the 2015 rule, for the EPA and the U.S. Army Corps of Engineers to withdraw the proposal to rescind the 2015 rule. We therefore urge the EPA and the Army Corps of Engineers to withdraw this proposal, or, in the alternative, to ensure that it does not confer any financial benefit, profit, or other advantage upon President Trump or the Trump Organization.

II. Background

On June 29, 2015, after extensive public comment and participation, the EPA and the U.S. Army Corps of Engineers promulgated the "Clean Water Rule: Definition of 'Waters of the United States" (the "2015 rule"). The rule was intended to provide greater clarity about what waters fall under the jurisdiction of the EPA and the U.S. Army Corps of Engineers for purposes of applying provisions of the Clean Water Act aimed at protecting water quality, managing stormwater runoff, preventing pollution, and protecting wetlands. The 2015 rule affirmed the EPA and U.S. Army Corps of Engineers' jurisdiction over three traditional categories of jurisdictional waters, while also better delineating five categories of waters the jurisdiction over which had been subject to dispute. In addition, the rule categorically excluded from the EPA and the U.S. Army Corp of Engineers'

jurisdiction seven types of water features that had been the source of significant public comment.[1]

On February 28, 2017, President Donald Trump signed Executive Order 13778, which directed the EPA and the U.S. Army Corps of Engineers to review the 2015 rule and recommended publishing for notice and comment a proposed rule rescinding or revising that rule. On July 27, 2017, in response to President Trump's Order, the EPA issued a proposed rule to rescind the 2015 rule and recodify the regulations as they existed prior to the 2015 rule ("Proposed Rule"). Rescinding the 2015 rule would, among other things, reinstate a practice of determining jurisdiction for a broad set of waters on a case-by-case basis rather than according to bright-line rules, and could result in the exclusion of bodies of water affecting the drinking water of 117 million people from the Clean Water Act's requirements for water safety and protection.[2]

III. Identification of the Parties

Free Speech for People is a is a national non-partisan non-profit organization founded on the day of the U.S. Supreme Court's ruling in *Citizens United v. FEC* that works to defend our Constitution and reclaim our democracy. We work with a broad range of individuals, organizations, and communities to catalyze change, challenge big money in politics and make corporations responsible and accountable to the public. A key part of our mission is combating public corruption. The Raritan Headwaters Association is a non-profit, member-supported conservation association with a mission of "protecting water in our rivers, our streams and our homes." The Raritan Watershed Association works in the 470-square mile Raritan Rivers headwaters region.

IV. The Domestic Emoluments Clause: Purpose and Meaning

[1] 80 Fed. Reg. 37054 (2015).
[2] U.S. EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. (last updated on Oct. 29, 2013), available at http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm.

One of the catalysts for the founding of the United States was the colonists' experience with corruption and self-dealing under the rule of the British monarchy and the governors that represented it. Concerned about the potential for a powerful President who might similarly be swayed by gifts, financial inducements, or other benefits, the Framers included two provisions in the Constitution that prohibited the President from accepting such benefits from both foreign and domestic sources. One of those provisions, enshrined in Article II, Section I, Clause 7, is the Domestic Emoluments Clause, which provides that:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

As constitutional scholars and practitioners have explained, this provision grew out of an explicit concern that the president of a strong national government could be improperly influenced by Congress or the states through any number of means ranging from "bonuses, awards of pensions, grants of land, use of land and public labor for personal profit, sharing in taxes and fees, use of idle public funds as personal capital, tax exemptions, and 'customary gifts.'"[3] As a result, the Framers designed the Domestic Emoluments Clause to prohibit two distinct avenues for conferring additional benefits upon the president in an attempt to influence decision-making. The first portion of the Clause requires the President's compensation to be fixed and not subject to increases or decreases during his term as president. The second portion of the Clause addresses a much broader realm of corruption by prohibiting the President from accepting "any other Emolument."

[3] Brianne Gorod, et al., The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump, Constitutional Accountability Center 4 (July 2017) (citing, e.g. Alvin Rabushka, Taxation in Colonial America (2008)) https://www.theusconstitution.org/sites/default/files/briefs/20170726_White_Paper_Domestic_Emoluments_Clause.pdf; *See also*, The Federalist No. 73 (Clinton Rossiter ed., 1961); 1 The Records of the Federal Convention of 1787 (Max Farrand ed., 1911).

Historical research shows that this particular wording represents an attempt to rein in any actions that could confer a benefit upon the President:

> Consistent with the broad goals of this Clause, and its central role in preserving the integrity of the new federal government, the Framers used the expansive term "emolument" to describe the rewards forbidden to the President. That term was understood at the time to mean any benefit, advantage, or profit.[4]

The definitions and usage of the word "emolument" at the time of the drafting of the Constitution clearly demonstrate that the Framers would have understood it to encompass "profit," "advantage," or "benefit." English language dictionaries from 1604 to 1806 included one or more elements of the broader definition including "profit," "advantage," "gain," or "benefit."[5]

This broad definition is consistent with the Framers' ambitious goals for the Clause: to prevent all corruption and self-dealing by the nation's highest officer. Alexander Hamilton emphasized the importance of the Domestic Emoluments Clause in Federalist No. 73 this way:

> They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.

Hamilton's description emphasizes that emoluments extend to any kind of "pecuniary inducement," and state forerunners to the federal Domestic Emoluments Clause bolster this conclusion.[6] Until now, the Domestic Emoluments Clause has served as a bright line against corruption that Presidents assiduously avoided approaching. President Trump has barreled through it.

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[4] *Id*. at 6.

[5] Samuel Johnson, A Dictionary of the English Language (1st ed. 1755); Nathan Bailey, A Universal Etymological Dictionary (2d ed. 1724); Thomas Dyche & William Pardon, A New General English Dictionary (8th ed. 1754); John Ash, The New and Complete Dictionary of the English Language (1st ed. 1775); John Entick, The New Spelling Dictionary (1st ed. 1772).

[6] Gorod, Domestic Emoluments Clause. at 6-7.

V. Trump's Golf Courses and the Domestic Emoluments Clause

A. Trump's Interest in Trump Golf Courses

President Trump's May 2016 financial disclosure confirms that he continues to maintain an ownership interest in and receive income from his golf courses and their associated properties.[7] The financial disclosure included the following account of income from his United States Golf Courses:[8]

Property	**Income Amount**
Trump National Golf Course Jupiter	$17,903,803
Trump National Golf Course Bedminster	$20,572,150
Trump National Golf Course Charlotte	$14,125,381
Trump National Golf Course Hudson Valley	$5,574,955
Trump National Golf Course Philadelphia	$5,641,122
Trump National Golf Course-Doral	$131,892,107
Trump Ferry Point LLC	$7,930,134
Trump International Golf Club Florida	$17,510,455
Trump National Golf Course Colts Neck	$7,512,891
Trump National Golf Course Westchester	$10,313,031
Trump National Golf Course Washington, D.C.	$17,497,594
Trump National Golf Course L.A.	$15,635,196

[7] United States Office of Government Ethics, Executive Branch Personnel Financial Disclosure Form, OGE Form 278e, Submitted by Donald J. Trump (May 16, 2017).
[8] *Id*. Part 2, Filer's Employment Assets & Income, 16-18, 19, 21, 23.

According to the disclosure, DJT Holdings LLC remains the owner of 99%-100% of each of these properties.[9] President Trump has also continued to promote his golf course properties through his Twitter account and appearances at the golf courses.[10] In some cases, the properties have also promoted themselves as providing an opportunity to meet with or gain access to the President.[11]

B. Trump's Refusal to Separate From His Businesses

Because of the vast network of businesses, assets, marketing, and licensing agreements that make up the Trump Organization, ethics experts, including former legal advisers to both Republican and Democratic presidents,[12] urged President Trump to take steps to separate himself from his businesses to avoid violating both the Foreign and Domestic Emoluments Clauses. As early as November 30, 2016, the U.S. Office of Government Ethics announced that the "[o]nly way to resolve these conflicts of interest is to divest."[13] President Trump had ample opportunity to resolve these issues during the ten-week transition between his election and the Inauguration.[14] For example, he could have liquidated the business and invested

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[9] *Id*. Part 2, Appendix A.

[10] Amy Wang and Ana Swanson, "President Trump can't stop crashing parties at his golf clubs," Washington Post (Jun. 11, 2017) https://www.washingtonpost.com/news/politics/wp/2017/06/11/president-trump-cant-stop-crashing-parties-at-his-golf-clubs/; Philip Bump, "Trump had a terrible July, but at least he played a lot of golf," Washington Post https://www.washingtonpost.com/news/politics/wp/2017/07/31/trump-had-a-terrible-july-but-at-least-he-played-a-lot-of-golf/.

[11] Eric Lipton and Susanne Craig, "With Trump in White House, His Golf Properties Prosper," New York Times (Mar. 9, 2017) https://www.nytimes.com/2017/03/09/us/politics/trump-golf-courses.html?mcubz=3; Brad Heath et al., "Trump gets millions from golf members. CEOs and Lobbyists get access to president," USA Today (Sept. 6, 2017) https://www.usatoday.com/story/news/2017/09/06/trump-gets-millions-golf-members-ceos-and-lobbyists-get-access-president/632505001/.

[12] Richard W. Painter, Norman L. Eisen, Lawrence H. Tribe, Joshua Matz, "Emoluments: Trump's Coming Ethics Trouble," The Atlantic (January 18, 2017) https://www.theatlantic.com/politics/archive/2017/01/trumps-ethics-train-wreck/513446/; Norman L. Eisen and Richard W. Painter, Trump's Unprecedented War on Ethics, https://www.usatoday.com/story/opinion/2017/03/20/trump-unprecedented-war-on-ethics-eisen-painter-column/99388636/.

[13] Michael D. Shear & Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn't Committed To*, N.Y. Times, Nov. 30, 2016, http://nyti.ms/2gK988R.

[14] *See* Richard Painter & Norman Eisen, *Donald Trump will still be violating the Constitution as soon as he's sworn in*, Wash. Post, Dec. 13, 2016, http://wpo.st/9EZN2.

the proceeds in a diversified mutual fund or a true blind trust.[15] Instead, on January 11, 2017, the Trump Organization's tax law firm announced a plan to transfer *management* control of the Trump Organization to President Trump's sons and a senior executive, without removing President Trump's *ownership* stake.[16]

In addition, President Trump has transferred his ownership stakes in various Trump business entities to "The Donald J. Trump Revocable Trust." This trust, of which President Trump's son and the Trump Organization's chief financial officer are trustees, has as its purpose "to hold assets for the 'exclusive benefit' of the president," and uses President Trump's Social Security number as its taxpayer identification number.[17] Furthermore, in February 2017, the trust was amended so that President Trump ""shall distribute net income or principal to Donald J. Trump at his request," or whenever his son and a longtime employee "deem appropriate."[18] The terms of this revocable trust mean that President Trump can draw upon funds paid to any of the Trump Organization entities at any time.

This is not a "blind trust." President Trump knows which businesses his trust owns and how his actions as President may affect their income and value—including each of his golf courses and their associated properties. The trust is run not by an independent trustee, but by his own son and a longtime employee. And President Trump can revoke the trust at any time.[19] This arrangement does nothing to diminish President Trump's interest and ability to enrich himself through Executive Branch actions affecting his business entities, and continues to incentivize his shaping U.S. policy to preserve, promote and benefit his business assets, including his golf courses. Furthermore, it creates a clear avenue for other

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[15] *See* Norman Eisen, Richard W. Painter & Laurence H. Tribe, *5 Ways You'll Know if Trump Is Playing by the Rules*, Politico, Jan. 10, 2017, http://politi.co/2iCgLj2.
[16] *See Donald Trump's News Conference: Full Transcript and Video,* N.Y. Times, Jan. 11, 2017, http://nyti.ms/2kHSolf.
[17] Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. Times, Feb. 3, 2017, https://nyti.ms/2kytJlP.
[18] Drew Harwell, *Trump can quietly draw money from trust whenever he wants, new documents show*, Wash. Post, Apr. 3, 2017, http://wapo.st/2nQOjgK.
[19] *See* Craig & Lipton, *supra*, https://nyti.ms/2kytJlP.

federal agencies and branches of government, as well as the states, to confer benefits upon the President in violation of the Domestic Emoluments Clause.

VI. Rescinding the WOTUS Rule Confers Benefits on President Trump in Violation of the Domestic Emoluments Clause

A. The purpose of the 2015 rule and specific benefits of the proposal for Trump's Golf Courses

The 2015 rule defining "waters of the United States" was intended to remedy decades of uncertainty and legal disputes over when and where the protections of the Clean Water Act apply. The EPA and the U.S. Army Corps of Engineers initiated the rulemaking to reduce the costs of regulatory uncertainty by clearly defining "waters of the United States," while fulfilling the mandate of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 101(a). To that end, the 2015 rule, if allowed to go into effect, would implement "bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis." 80 Fed. Reg. 37053 (June 29, 2015).[20] The definition set forth by this rule ultimately determines whether a project and/or property is subject to sections 303, 305, 311, 401, 402, and 404 of the Clean Water Act.

The 2015 rule established six categories of waters that would be jurisdictional without additional case-by-case analysis. These include: all waters currently used, used in the past, or that may be susceptible to use in interstate or foreign commerce; all interstate waters, including wetlands; the territorial seas; all tributaries as defined by the rule; and all waters adjacent to a water identified in the preceding categories. The 2015 rule also included two categories of waters that would be subject to case-by-case determinations. These included Prairie potholes,

[20] The proposed rule would replace the 2015 rule with a "recodification" of the regulatory text prior to the 2015 rule and would be "informed by applicable guidance documents (e.g. the 2003 and 2008 guidance documents)." Proposed Rule, 11 (July 27, 2017); The 2003 guidance provides: "Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions." 68 Fed. Reg. 1991, 1997-98 (Jan. 15, 2003).

Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands if they were determined to have a significant nexus to waters covered by Section 230.3(o)(1)(i)-(iii). Such features would also be covered, without a case-by-case determination, if they fell within the definition of "adjacent waters." Finally, the 2015 rule included all waters located within the 100-year floodplain of a water covered by Section 230.3(o)(1)(i)-(iii) and all waters located within 4,000 feet of the high tide line or ordinary high water mark of waters covered by Section 230.3(o)(1)(i)-(v) if they are determined to have a "significant nexus" to a water identified in Section 230.3(o)(1)(i)-(iii). This shift from predominantly case-by-case decision-making to bright line rules would increase the number of positive jurisdictional determinations even though the actual scope of the rule would be narrower. As the agencies explained in the Economic Analysis:

> Compared to a baseline of existing regulations and historic practice, this rule results in a decrease in [Clean Water Act] jurisdiction because the scope of the regulatory jurisdiction in this rule is narrower than under the existing regulations. However, compared to recent practice, this rule is projected to result in a slight increase in [Clean Water Act] jurisdiction by providing clarity about which waters are covered by the Clean Water Act and resolving the uncertainty caused by the key Supreme Court cases that had led to caution in asserting jurisdiction.

One of the key motivations behind developing the 2015 rule was the well documented fact that the agency guidance implementing the line of Supreme Court cases defining waters of the United States had led to a restrictive approach by the Army Corps of Engineers in making jurisdictional determinations under Section 404 of the Clean Water Act.[21] Under that regime, over 100,000 case-specific jurisdictional determinations had been made between 2008 and 2015, and according to the Government Accountability Office and public comments, the Corps of

[21] U.S. Governmental Accountability Office, Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction (Sept. 2005); General Accounting Office, Waters & Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, 14, n.14 (Feb. 2004).

Engineers was not adequately documenting negative jurisdictional determinations and was not adequately protecting isolated waters.[22]

The 2015 rule was stayed by the Sixth Circuit pending appeal, so neither the EPA nor the Corps of Engineers have yet made any determinations under it. Nonetheless, as set forth below, it is clear that maintaining the guidance and rule that existed prior to promulgation of the 2015 rule would confer benefits, profits, and advantages on the President in violation of the Domestic Emoluments Clause.

B. The Proposed Rescission of the 2015 Rule Will Benefit President Trump

The golf course industry was one of the biggest opponents to the 2015 rule, and associations affiliated with the golf industry have spent, and continue to spend, tens of thousands of dollars lobbying against the 2015 rule and in favor of rescission.[23] According to the golf industry, the 2015 rule "would likely have a devastating economic impact on the golf course industry" because golf courses would be newly required to comply with certain Clean Water Act rules and restrictions.[24] Among the regulatory and economic burdens that the golf industry claimed it would face as a result of the 2015 rule were:

- The need to obtain federal permits for land management or use;
- Potential to halt or shut down operations if permits are not granted;
- Federal penalties for failure to comply with permits;
- Costly additions to the development and operational costs for designing and site assessment for new and existing courses;

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[22] *Id*.

[23] Ben Brody, "Trump's Golf Courses Would Benefit from His Water Rule Rollback," Bloomberg (March 1, 2017), https://www.bloomberg.com/news/articles/2017-03-01/trump-s-golf-courses-would-benefit-from-his-water-rule-rollback.

[24] Comments of the Golf Course Superintendents Association of America, Club Managers Association of America, National Club Association, American Society of Golf Course Architects, Golf Course Builders Association of America, National Golf Course Owners Association and Professional Golfers Association on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, 2-3 (November 14, 2014).

- Renovation and expansion processes that could require costly hydrologic evaluations, wetlands delineations, stream assessments, project design and 404 (dredge and fill) permitting;
- Design constraints and mitigation requirements that would increase costs;
- Routine golf maintenance activities (such as fertilizer and pesticide applications) could require National Pollutant Discharge Elimination System (NPDES) permits;
- Increased liability for managing property as a result of potential citizen suits under the Clean Water Act.[25]

The golf industry further believed that application of the 2015 rule would increase costs for every phase of owning and operating a golf course, including design, development, renovation, pesticide application and routine maintenance.[26] Taking these claims into account, there are three broad areas where rescission of the rule and reinstatement of the existing guidance is likely to confer benefits upon President Trump:

1. Jurisdictional Determinations for 404 Permits;
2. Application of other Clean Water Act Provisions; and
3. Enforcement Actions (either by agencies or citizens).

1. Jurisdictional Determinations and Section 404 Permits

Section 404 of the Clean Water Act regulates the discharge of dredged or fill materials into waters of the United States, including wetlands. Typically, before beginning a construction project in an area where there is a question as to whether a particular aquatic feature falls within the definition of waters of the United States, a project developer will apply to the Army Corps of Engineers for a jurisdictional determination.

[25] *Id*. 3-10.
[26] *Id*. 4, 8, 9.

According to the 2015 EPA Economic Analysis of the 2015 rule, its adoption would result in an estimated annual increase of between 2.84 and 4.65 percent in overall positive jurisdictional determinations across all categories of waters.[27] While a seemingly small change, the largest shifts would be seen in changes from negative to positive determinations in a category currently designated "other waters" by the Army Corps of Engineers. The agencies estimated that 34.5 percent of the "other waters" determinations would change from a negative to a positive jurisdictional determination under the 2015 rule.[28] In practice, this means that under the 2015 rule, developers would not only be more likely to apply for a jurisdictional determination if in doubt about whether a project triggered permitting requirements, but the Corps would be more likely to issue a positive jurisdictional determination for isolated waters. A positive jurisdictional determination could mean that the developer would choose not to go through with the project or that a permit would be necessary.

This change in jurisdictional determinations would have significant economic impacts for a golf course owner like President Trump. In the last ten years, President Trump's golf courses have engaged in a substantial number of construction projects from small projects such as the renovation of individual water features or greens to the construction of entirely new courses at existing clubs.[29] The Economic Analysis of the 2015 rule estimated that costs for a pre-construction notification for a "typical" construction project could range from $3,000-$10,000 and that application costs for a standard or individual permit could range from $10,000 to $24,000.[30] Estimates for Section 404 permit applications ranged from $34,000 to $62,000 plus $16,800 per acre of impact for individual permits while compensatory

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[27] U.S. Environmental Protection Agency and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule, ix (May 2015).
[28] *Id*. at vii.
[29] Renovation of Trump National Doral Blue Monster Course in 2014 and plans for upgrades to Red and Gold courses, http://www.golfchannel.com/news/travel-insider/new-and-improved-blue-monster-trump-doral-resort/; New course at Trump National Bedminster and rebuild of 18th hole at Trump National Los Angeles http://www.golf.com/courses-and-travel/trump-goes-public-los-angeles.

mitigation costs were estimated as high as $111,985 per acre of wetlands and as high as $1,000 per linear foot of stream mitigation.[31]

A review of the costs associated with wetland mitigation and stream mitigation in the states where President Trump owns courses presents the potential for even higher costs:

State	Increased jurisdiction wetlands /acres	Unit Cost Low/acre	Unit Cost High/acre	Increased jurisdiction streams/linear feet)	Unit Cost Low	Unit Cost High
CA	122.1	$18,500	$350,000	723	$185	$343
FL	93.5	$35,000	$217,800	47	$185	$343
NC	22.8	$25,874	$69,736	25	$289	$381
NJ	4.8	$82,489	$412,433	-	$185	$343
NY	145.3	$50,000	$94,000	249	$310	$420
VA	75.1	$16,000	$140,000	-	$300	$977

Adding to the complexity of the analysis, however, is the fact that "under the existing implementation of the scope of 'waters of the United States,' many of these entities may not believe their discharge affects a protected water and may not have applied for permit coverage."[32] As a result, in order to understand the scope of the benefits and advantages that would be conferred upon the President by rescinding the rule, the EPA and Army Corps of Engineers should conduct an analysis of each of President Trump's properties under the 2015 rule and determine the full scope of the benefits that the proposed rescission would be likely to produce.

Finally, with respect to jurisdictional determinations, the shift from the bright-line categories included in the 2015 rule back to the existing case-by-case analysis would lead to a situation where every case-by-case analysis conducted for a

[32] Economic Analysis of 2015 Rule, 22.

Trump property would be subject to scrutiny and concerns about impropriety. If the 2015 rule is applied, the EPA, the Corps of Engineers, and the state permitting authorities that implement the Clean Water Act would use a bright-line approach to determine applicability of particular sections of the Clean Water Act rather than continuing to make decisions about jurisdiction on a case-by-case basis. The reversion to a rule that relies on case-by-case decision-making is particularly problematic when the President of the United States will be directly affected by the outcomes of such an analysis. Federal agencies and employees conducting the analysis, as well as their state counterparts, would likely be influenced by knowing that any decision they make with respect to a Trump branded golf course could result in recriminations from the Executive Branch. Likewise, if they render a decision that benefits a Trump branded golf course, it could result in favored treatment ranging from increased resources to more access to the President.

The ambiguity and uncertainty that accompanied the application of the previous rule would make it extremely difficult for staff to withstand the temptation to reach a favorable conclusion for a Trump branded property. Such determinations have direct financial consequences as described by the golf industry in their opposition to the 2015 rule. If, for example, a federal or state agency determined that a particular feature on or near a Trump Golf course fell within the definition established by the 2015 rule, that jurisdictional determination would result in virtually every aspect of maintaining, operating, and developing Trump golf courses being subject to applicable provisions such as the National Pollutant Discharge Elimination System permits, section 404 dredge and fill permits, stormwater controls, and restrictions on application of pesticides and fertilizers. Conversely, if a federal or state agency issued a negative jurisdictional determination finding that a feature on or near a Trump golf course did not constitute "waters of the U.S." then it could save the Trump Organization thousands of dollars in costly hydrological studies and could confer even more financial benefits by preventing the need for permitting applications, permit compliance, and mitigation. In some instances, a determination that an area includes "waters of the U.S." could preclude additional

site assessments and evaluations prior to any new development entirely. Indeed, such a determination could itself be a violation of the Domestic Emoluments Clause.

As a result, rescinding the 2015 rule would confer direct and substantial financial benefits upon the President by subjecting the golf courses that he owns to a less exacting standard, and could result in preferential treatment for the President's properties, even with respect to other golf course owners or construction.

2. Application of other Clean Water Act Provisions

Although jurisdictional determinations and Section 404 permitting may have the broadest impacts upon President Trump's golf courses, the proposed rescission would also be likely to confer benefits to President Trump because it would make it less likely that his golf clubs would be subject to other provisions, such as Section 402's NPDES stormwater program and its Pesticide General Permitting program. The potential impacts to the President from the stormwater program could vary greatly among his properties as mitigation could range from simply implementing best management practices to obtaining permits for construction activities. For example, in 2015, the Trump Organization spent roughly $25 million re-developing the Lowe's Island Golf Course in Virginia and cut down 465 trees along one acre of the Potomac River as part of the development without any apparent regard for potential stormwater runoff impacts and without any permitting determinations.[33] If the Trump Organization applied for a jurisdictional determination to conduct this type of construction under the 2015 rule, it would have been much more likely to receive a positive determination that resulted in the need for construction permitting or a NPDES permit for stormwater discharges. The President's Bedminster course is scheduled to host the 2022 PGA championship making it likely that construction and renovations will be undertaken there as well.[34]

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[33] Jonathan O'Connell, "Trump tees up $25 million in upgrades at Loudoun golf club," Washington Post (Jun. 23, 2015) https://www.washingtonpost.com/news/digger/wp/2015/06/23/trump-tees-up-25-million-in-upgrades-at-loudoun-golf-club/?tid=a_inl.

[34] PGA of America, "Trump National Golf Club – Bedminster, N.J. to Host 2022 PGA Championship," PRNewswire (May 1, 2014) http://www.prnewswire.com/news-releases/trump-

Although the Economic Analysis for the 2015 rule did not estimate costs for individual permits under Section 402, it did conclude that nationwide costs to new permit-holders for stormwater permitting under the 2015 rule could range from $29.2 to $60.2 million annually.[35] Additional nationwide costs for permitting under the Pesticide General Permitting program were estimated at $3.3 to $5.9 million.[36] The EPA and Army Corps of Engineers should also conduct an assessment to determine the potential economic benefits that rescinding the 2015 rule could have for President Trump under these programs.

3. Enforcement by Agencies and Citizen Suits

Another key area in which the proposed rescission will confer an advantage upon President Trump as the owner of a golf course is enforcement. Increased certainty about the types of aquatic features that fall within the definition of "waters of the United States" would not only make it easier for an agency to bring an enforcement action against an entity that proceeds with a project without obtaining necessary permits or waivers, but it would also allow residents and organizations who are impacted by the activities to file suit against Trump-owned properties under the citizen suit provision of Section 505 of the Clean Water Act.[37] The potential for more rigorous enforcement by agencies and citizens would open the possibility for civil and criminal penalties as well as the potential for an award of attorneys' fees in citizen suits.

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national-golf-club---bedminster-nj-to-host-2022-pga-championship--trump-national-golf-club---washington-dc-to-host-2017-senior-pga-championship-presented-by-kitchenaid-257518221.html.

[35] Economic Analysis for 2015 Rule, 25.

[36] *Id*. at 31.

[37] The Waters Advocacy Coalition, which included several golf industry associations, raised this concern about increased liability for enforcement actions by agencies and citizen suits in its comments on the 2015 rule. *See* Comments of the Waters Advocacy Coalition on the EPA and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States Under the Clean Water Act EPA-HQ-OW-2011-0880, 22, 47, 51, 66 (Nov. 2014) http://www.nam.org/Issues/Energy-and-Environment/Water-Regulations/Waters-Advocacy-Coalition-Comments-on-Proposed-WOTUS-Rule.pdf.

VII. Conclusion

Rescinding the 2015 Rule will confer direct financial benefits, profits, and advantages upon President Trump in direct violation of the Domestic Emoluments Clause and thus will violate 5 U.S.C. § 706(2). At a minimum, the EPA and Army Corps of Engineers need to provide an analysis of how the rescission of the 2015 rule would impact the Trump golf courses to determine the full scope of the benefits and advantages that would be conferred upon them. Such an analysis is necessary to understand the extent to which this proposed rulemaking will violate the Domestic Emoluments Clause. Once that analysis has been performed, the record may show that, in addition to the significant environmental and economic harms that this proposal would cause, the proposed rule would violate the Domestic Emoluments Clause. Therefore, the EPA and the Army Corps of Engineers should withdraw the proposed rule. In the event that EPA and the Army Corps of Engineers refuse to withdraw the proposed rule, in the alternative, they could:

- specify that the 2015 rule continues to apply to Trump properties for the remainder of his natural life; or
- specify that the 2015 rule continues to apply to Trump properties while he remains in office; or
- specify that an independent commission would be established to oversee application of the rules to Trump properties to ensure that EPA and the Army Corps of Engineers recuse themselves from decisions related to Trump properties. Such independent commissions would need to be composed of independent, reputable scientists, community-based environmental and recreational organizations, national environmental organizations, community-based social justice organizations, an industry representative, and state and local representatives.

We appreciate the opportunity to comment on this proposal and urge the agencies to ensure that they do not violate the Domestic Emoluments Clause.

Respectfully submitted,

On behalf of Free Speech For People and
Raritan Headwaters Association

by

Shanna M. Cleveland
Senior Counsel
Free Speech For People
1340 Centre Street
#209
Newton, MA 02459