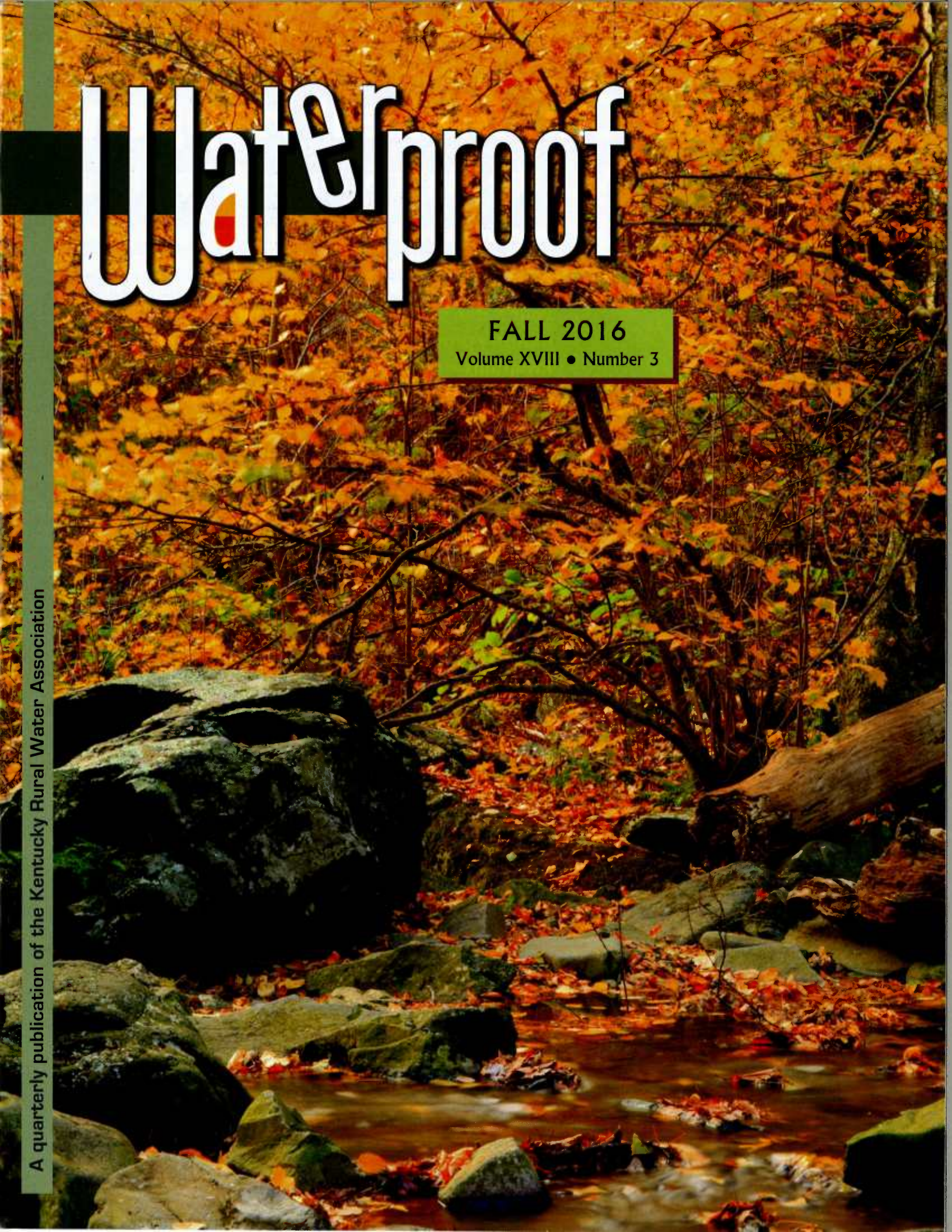


Waterproof

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SEND ALL INQUIRIES, LETTERS, AND SUBMISSIONS TO THE ADDRESS ABOVE. PRINTED IN THE UNITED STATES OF AMERICA. THIS MAGAZINE IS DISTRIBUTED TO REPRESENTATIVES OF KENTUCKY'S WATER AND WASTEWATER UTILITIES, THEIR EMPLOYEES, ASSOCIATE MEMBERS, LEGISLATORS, WATER-RELATED AGENCIES, AND OTHER FRIENDS AND SUPPORTERS. *WATERPROOF* IS DESIGNED AND PRODUCED FOR KRWA BY MAUREEN MAHANEY, PRINT DESIGN CONCEPTS, PHONE: 270.781.4649

TOTAL CIRCULATION IS APPROXIMATELY 2500.

EPA'S MUDDY

“WATERS OF THE U.S.” RULE

Max Bridges, Wyatt, Tarrant & Combs

On June 29, 2015, the EPA and the US Army Corps of Engineers published their final “Clean Water Rule,” which defines the waters of the United States (WOTUS) that are subject to federal jurisdiction under the Clean Water Act. The rule became effective on August 28, 2015, but its implementation has been stayed by a federal appeals court. Nonetheless, if the Clean Water Rule is ultimately found to be lawful by the courts, it could be the most consequential regulation ever created under the Clean Water Act and will likely increase the permitting obligations of landowners, businesses, and utilities alike.

History of WOTUS & Current Landscape

In 1972, Congress created the Clean Water Act (the “Act”), which prohibits unpermitted discharges into “waters of the United States, including the territorial seas.” 33 USC 1362(7). But there was a problem; Congress never defined the term “waters of the United States,” and ever since there has been much controversy and litigation on the waters subject to federal jurisdiction. The Act’s reach is “notoriously unclear” and the result is that it’s very difficult to determine if a particular water is a WOTUS. For example, if a utility is in the planning stages of a new project and needs to determine if a Clean Water Act permit is required, it must

analyze: three confusing decisions from the United States Supreme Court, various federal guidance documents, and several federal regulations. On top of this, the US Army Corps of Engineers has the authority to assert jurisdiction on a case-by-case basis. In sum, there is much confusion and no bright-line rule.

The Clean Water Rule

In an effort to provide greater clarity regarding which waters are subject to federal jurisdiction, the EPA and the US Army Corps of Engineers published the “Clean Water Rule” on June 29, 2015. The new rule sets up a three-tiered system for determining whether a particular water is a WOTUS: certain waters are per se jurisdictional, certain waters will be evaluated on a case-by-case basis, and some waters are categorically non-jurisdictional. See 33 CFR 328.3. But there has been significant backlash to the new rule, especially among farmers and small business owners. Furthermore, the EPA and US Army Corps of Engineers have conceded that their rule will increase federal control over traditional state waters by at least 2.8 to 4.7%.

The most controversial aspects of the rule include new definitions for “tributaries” and “adjacent” waters. The notable feature of the tributary definition is that it does not

require that there be a certain volume or frequency of water flow, but rather relies only on the presence of a bed, bank, and ordinary high water mark. So long as those three factors are present, even the driest tributary can be regulated under this rule. Utilities should also take special note that “ditches” are defined as tributaries and the federal agencies say that “in many instances [ditches] can meet the definition of tributary.” The Clean Water Rule also provides a new definition of “adjacent” waters that leaves considerable room for interpretation and discretion in its application to the federal agencies.

Numerous states and interest groups challenged the Clean Water Rule and on October 9, 2015 the Sixth Circuit Court of Appeals stayed the rule’s implementation. The lawsuit is ongoing, and it will likely take many years for the courts to determine if the Clean Water Rule is ultimately valid. But, if found to be lawful, the rule will likely increase the permitting obligations of regulated parties.

Kentucky Rural Water Association member utilities should pay close attention to the litigation and be ready for significant changes to the current regime if the Clean Water Rule takes effect.