



November 19, 2025

Legal Risk Analysis for IHMM Certificants Under the EPA Proposed 2025 WOTUS Rule

A. Overview

IHMM certificants—including CHMMs, CHMPs, AHMMs—are frequently involved in environmental due diligence, site assessments, remediation planning, permitting, spill response, wetland delineations, and compliance counseling. EPA’s proposed 2025 WOTUS Rule [https://ihmm.org/wp-content/uploads/2025/11/EPA-updated_definition_wotus_nprm.pdf] significantly alters the jurisdictional landscape under the Clean Water Act (CWA). These changes create new compliance risks, operational uncertainties, and potential liabilities for certificants conducting work in areas involving wetlands or hydrologically connected waters.

B. Key Legal Risks

1. Increased Exposure to Civil and Criminal Liability

Because the proposed definition narrows federal jurisdiction, the regulated community may **incorrectly assume** that certain wetlands or features no longer fall under federal control.

IHMM certificants who rely on incomplete, misunderstood, or inconsistent state guidance risk:

- **Unauthorized discharges** into features that EPA later asserts are jurisdictional
- **False certifications** in CWA permit applications
- **Professional negligence claims** if delineations are later invalidated
- **Potential criminal exposure** where discharges are deemed “knowing” or “willful” under §§ 309(c)(2)–(3)

2. Divergence Between Federal and State Programs

The proposal will result in a **patchwork of state protections**, some more expansive than federal jurisdiction and others far narrower. For certificants:

- Cross-state projects will require constant recalibration of regulatory obligations
- Misalignment of state and federal definitions will complicate NEPA reviews, 404 permitting, stormwater plans, and spill response obligations
- Multi-jurisdictional operations (rail, pipeline, logistics, industrial facilities) face heightened compliance risk

3. Increased Litigation Uncertainty

Courts will inevitably be asked to interpret the meaning of “continuous surface connection,” “wet season,” “abut,” and other terms. For professionals providing compliance opinions:

- Legal standards may shift mid-project
- Clients may challenge certifications retroactively
- Environmental consultants may be pulled into litigation as fact witnesses or experts

4. Risk to Property Transactions and Due Diligence

Reduced federal protection increases the probability that:

- Developers may rely on aggressive readings of the rule
- Gains in developable acreage may later be reversed by revisions or litigation
- Phase I/II environmental due diligence may face challenges for failing to anticipate jurisdictional risk

IHMM certificants performing due diligence or feasibility analysis may face expanded liability for inaccurate jurisdictional conclusions.

5. Increased Demand for Expertise + Increased Liability

Ironically, narrower jurisdiction increases the complexity of determining what remains protected. As a result:

- IHMM certificants’ expertise becomes more essential

- But their exposure increases due to higher stakes and interpretive uncertainty

II. Point-by-Point Redline Comparison: Proposed 2025 WOTUS Rule vs. *Sackett v. EPA*

Below is a legal redline-style comparison showing **where the proposal aligns with Sackett, where it exceeds it, and where it may fall short.**

1. Definition of “Waters of the United States”

Sackett Holding

- Only wetlands with a **continuous surface connection** to traditional navigable waters (TNWs) are jurisdictional.
- Wetlands must be “**indistinguishable**” from the adjacent water.
- The decision rejects “significant nexus” as a basis for jurisdiction.

2025 Proposed Rule

- Adopts a **two-part test** requiring that wetlands **(1) abut** a jurisdictional water and **(2) have surface water during the wet season.**

Redline Analysis

- **Alignment:** Eliminates significant nexus; requires physical connection.
- **Deviation:**
 - Sackett did not impose a **seasonality requirement**; the Court focused on *physical indistinguishability*, not hydrological timing.
 - By creating a “wet season” requirement, EPA arguably adopts a **more restrictive** standard than Sackett demanded.
- **Result:** The proposal arguably goes **beyond** Sackett in limiting jurisdiction.

2. Abutment Requirement

Sackett Holding

- Wetlands must share a “**continuous surface connection**” making them “as a practical matter indistinguishable.”
- Sackett did **not** require a wetland to physically “abut” a jurisdictional water; adjacency may be sufficient if indistinguishability exists.

2025 Proposed Rule

- Requires wetlands to **abut** a jurisdictional water.

Redline Analysis

- **More restrictive than Sackett.**
- Sackett did not require “abutment”—only indistinguishability.
- Wetlands separated by natural berms, vegetation, or subtle elevation may still be indistinguishable but would be excluded by EPA’s rule.

3. Surface Water “Wet Season” Requirement

Sackett Holding

- Uses **no seasonal criteria**.
- Focuses solely on continuous surface connection at the time of jurisdictional evaluation.

2025 Proposed Rule

- Requires wetlands to have **surface water during the wet season**.

Redline Analysis

- **Not required by Sackett** and may conflict with it.
- Seasonal ecosystems (e.g., prairie potholes, vernal pools) could lose jurisdiction even if they form part of a hydrologically indistinguishable system.

4. Treatment of Intermittent or Ephemeral Waters

Sackett Holding

- Leaves open (but does not endorse) jurisdiction over waters that have continuous surface connections, even if intermittent.
- Does not address ephemeral channels directly.

2025 Proposed Rule

- Provides **no federal protection** for wetlands connected through intermittent or ephemeral flows unless they also satisfy the abutment and wet-season criteria.

Redline Analysis

- **Narrower than Sackett**, which did not prohibit intermittent connections.
- Risks future litigation because some intermittent systems may still qualify under Sackett’s “indistinguishable” standard.

5. Structural Result of the Rule

Sackett Holding

- Intends to clarify but not eliminate large categories of wetlands.
- Leaves room for EPA to exercise reasonable judgment consistent with the Clean Water Act's text and purpose.

2025 Proposed Rule

- Could remove protections from **up to 55 million acres** of wetlands.

Redline Analysis

- The magnitude of deregulatory impact is **far beyond** what Sackett explicitly required.
- This raises potential Administrative Procedure Act (APA) vulnerability:
 - *Arbitrary and capricious* for failing to consider downstream impacts
 - Failure to evaluate consequences on water quality, flood control, habitat, and interstate commerce
 - Failure to assess impacts on federal-state coordination under § 101 of the CWA

IHMM CERTIFICANT RISK-MATRIX TOOL

Assessing Compliance and Liability Risks Under EPA's Proposed 2025 WOTUS Rule

I. PURPOSE OF THIS TOOL

This matrix enables IHMM certificants to systematically evaluate **regulatory jurisdiction, permitting obligations, and professional liability risks** under the proposed definition of “Waters of the United States.” The tool is designed for use during:

- Site assessments
- Wetland delineations
- Permitting evaluations (CWA §§ 402, 404)
- Remediation planning
- Spill response
- Property transactions
- Industrial expansion projects

It provides a structured, legally grounded method to flag high-risk scenarios early.

II. RISK-MATRIX OVERVIEW

Risk Categories

Risk is assessed across **four domains**:

1. **Jurisdictional Uncertainty** – likelihood that a wetland or water feature is jurisdictional despite ambiguous indicators.
2. **Regulatory Compliance Risk** – likelihood of an unauthorized discharge, failed permit requirement, or misclassification.
3. **Professional Liability Exposure** – likelihood that the certificant is blamed for an incorrect assessment.
4. **Project Impact Severity** – magnitude of potential cost, delay, or enforcement consequences.

Each domain is scored **Low (1), Medium (2), High (3), Very High (4)**.

III. RISK-MATRIX TABLE

A. Site Conditions Matrix

Site Condition	Jurisdictional Uncertainty	Compliance Risk	Professional Liability	Project Impact Severity	Overall Risk
Wetland abuts a jurisdictional water and has visible surface water year-round	1	1	1	2	Low
Wetland abuts a jurisdictional water but has seasonal surface water only	2	2	2	3	Moderate
Wetland does not abut a jurisdictional water but shows intermittent or ephemeral connection	3	3	3	3	High
Wetland separated by a berm, road, levee, or natural feature but hydrologically connected	4	3	4	4	Very High
Prairie potholes, vernal pools, or isolated depressions with ecological wetland indicators	4	4	4	4	Critical
Artificial ponds, stormwater basins, or constructed wetlands	2	2	3	2	Moderate
Ditches or drainage features with unclear origin or flow regime	3	3	4	2	High

Features regulated by state law only after loss of federal jurisdiction	4	4	4	3	Very High
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B. Activity-Based Risk Matrix

Project Activity	Jurisdictional Risk	Federal/State Compliance Risk	Certificant Liability Risk	Notes
Phase I ESA	2	1	2	Flag potential wetlands early; disclose uncertainty.
Phase II ESA	3	3	3	Sampling in near-jurisdictional areas requires caution.
Wetland delineation	4	4	4	Highest liability under new rule; retain documentation.
Stormwater (NPDES) permitting	3	3	2	State-federal gaps can mislead clients.
Spill response under CWA § 311	2	3	2	Misclassification of receiving waters increases penalties.
Remediation planning	3	4	4	Incorrect routing of dredged/excavated materials is a major risk.
Industrial facility expansion	3	4	4	Misstated wetland impacts can derail the project.

Pipeline, rail, or utility corridor development	4	4	4	Multi-state projects most vulnerable to state-federal inconsistencies.
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C. Risk Triggers Checklist

Certificants should immediately elevate a project to **High** or **Very High** risk if any of the following apply:

1. Hydrology & Connectivity

- Presence of surface water but only in wet season
- Intermittent or ephemeral connections
- Hydric soils adjacent to jurisdictional waters
- Wetlands separated by artificial structures

2. Regulatory Indicators

- State program weaker than federal CWA
- State definitions broader than federal (increasing dual-regulation risk)
- Project includes potential dredge/fill activities
- Project timeline overlaps an agency rulemaking or litigation cycle

3. Client Behavior & Documentation

- Client pressures for aggressive jurisdictional interpretations
- Lack of prior delineations or outdated delineations (>5 years)
- Multi-state operations with inconsistent state protections
- Developer interest in expanding buildable acreage through narrow interpretations

4. Environmental Sensitivity

- Sensitive ecological regions (prairie potholes, vernal pools, coastal areas)
- Floodplains or stormwater-dependent hydrology
- Areas with prior violations or ongoing enforcement actions

IV. RECOMMENDED ACTIONS BY RISK LEVEL

Risk Level	Required Actions
Low	Document rationale; proceed with standard SOPs.
Moderate	Consult state regulators; perform supplemental hydrology review; enhance documentation.
High	Seek legal review; obtain third-party delineation; advise client of risks in writing.

**Very High /
Critical**

Halt expansion activities; secure formal jurisdictional determination (AJD/PJD); document all communications; require client sign-off acknowledging uncertainty.

V. Documentation Requirements

IHMM certificants should maintain:

- Hydrology data logs
- GPS-located boundary maps
- Soil profiles with photos
- Flow-path diagrams
- Written communications with regulators
- Internal memoranda explaining jurisdictional rationale
- Client advisories showing disclosure of uncertainty

This documentation is essential for defending professional decisions in future regulatory disputes or litigation.

Draft Standard Operating Procedure (SOP)

Assessment of Jurisdictional and Compliance Risks Under the Proposed 2025 WOTUS Rule

1. Purpose

This SOP establishes the procedures IHMM certificants could consider following to evaluate, document, and mitigate regulatory, jurisdictional, and professional liability risks associated with wetlands and water features potentially regulated under the proposed 2025 Waters of the United States (WOTUS) Rule.

2. Scope

This SOP applies to all IHMM certificants conducting environmental due diligence, wetland delineations, permitting reviews, remediation planning, spill response, industrial expansions, or any activity involving water features that may fall under federal or state Clean Water Act (CWA) jurisdiction.

3. Definitions

- Jurisdictional Water: A water body that meets federal CWA criteria.
- Wetland: An area with hydrophytic vegetation, hydric soils, and wetland hydrology.
- Continuous Surface Connection: A physical, unbroken surface-water link between a wetland and a jurisdictional water.
- Abutment: A wetland directly touching a jurisdictional water without barriers.

4. Responsibilities

IHMM certificants are responsible for conducting accurate assessments, maintaining documentation, advising clients of regulatory uncertainties, and escalating high-risk projects for legal or regulatory review.

5. Procedure

5.1 Preliminary Site Screening

Certificants shall gather available data (topographic maps, soil surveys, NWI maps) and perform a desktop assessment to determine potential wetland or water features. Document initial findings in the project file.

5.2 Field Assessment

Conduct field verification using hydrology indicators, soil sampling, vegetation surveys, and flow-path observations. Photograph all areas where jurisdiction may be ambiguous.

5.3 Apply Risk Matrix Tool

Use the IHMM WOTUS Risk Matrix to assign risk scores in four categories: Jurisdictional Uncertainty, Regulatory Compliance Risk, Professional Liability Exposure, and Project Impact Severity.

5.4 Risk-Level Actions

- Low Risk: Document rationale; proceed with standard SOP.
- Moderate Risk: Consult state regulators; enhance documentation; verify seasonal hydrology.
- High Risk: Obtain legal review; pursue independent delineation; issue written client advisory.
- Very High Risk: Pause work; request formal jurisdictional determination; require client acknowledgment of risks.

5.5 Documentation Standards

Certificants shall maintain GPS boundary maps, hydrology logs, soil profiles, flow-path diagrams, communications with regulators, and internal memoranda explaining jurisdictional determinations. All documentation must be retained for a minimum of seven years.

6. Escalation Protocol

For High or Very High risk projects, certificants must notify project leadership and, when applicable, advise clients to seek regulatory or legal review. Escalation shall be documented in the project record.

7. Quality Assurance and Review

This SOP shall be reviewed annually or upon issuance of revised federal or state guidance on WOTUS or related regulatory programs.