

# The Information Quality Act: The Little Statute That Could (Or Couldn't?) Applying the Safe Drinking Water Act Amendments of 1996 to the Federal Communications Commission

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I. INTRODUCTION

This is the era of regulation by information.<sup>1</sup> More than at any other time in American history, U.S. lawmakers rely upon information in the formation of state policy.<sup>2</sup> With this in mind, Congress has passed several laws designed to ensure the quality of government-disseminated information.<sup>3</sup> However, Congress had no such design when it passed the

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1. Paul Noe et al., *Learning to Live with the Data Quality Act*, 33 ENVTL. L. REP. 10224, 10224 (2003), available at [http://www.progressiveregulation.org/articles/ABA\\_Session.pdf](http://www.progressiveregulation.org/articles/ABA_Session.pdf) (testimony of panel members on the Data Quality Act). See also Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL’Y REV. 339, 341 (2004) (stating that “[t]he dissemination of information is now part and parcel of the regulatory process.”); Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resources Regulation*, 26 PUB. LAND & RESOURCES L. REV. 1, 2 (2005) (“environmentalism is primarily science-based . . . Science has been seen both as the justification for environmental law and as the means for fairly administering it.”).

2. Noe et al., *supra* note 1.

3. See, e.g., Paperwork Reduction Act, 44 U.S.C. § 3501 (1995). See also Susan M.

Information Quality Act (“IQA”)—also referred to as the Data Quality Act.<sup>4</sup> Slipped into the Treasury and General Government Appropriations Act for Fiscal Year 2001<sup>5</sup> as an appropriations rider, the IQA was subject to no legislative hearings, no committee review, and no congressional debate.<sup>6</sup>

At first blush, the IQA appears to be benign—a good government statute.<sup>7</sup> Despite its seemingly good intentions,<sup>8</sup> the IQA has been met with fierce public resistance.<sup>9</sup> Written by industry lobbyist Jim Tozzi, who now heads the Center for Regulatory Effectiveness (“CRE”), the IQA comes at the heels of several unsuccessful attempts by Tozzi to get Congress to raise the evidentiary requirement of regulation.<sup>10</sup> Not discouraged, Tozzi worked with Jo Ann Emerson (R-Mo.)<sup>11</sup> who snuck the IQA—two sentences long—into the 712-page Treasury and General Government Appropriations Act for Fiscal Year 2001.<sup>12</sup>

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Bisong, *Federal Agencies Subject to Data Quality Act*, FINDLAW: FOR CORPORATE COUNSEL (2003), [http://www.thecre.com/quality/2006/20060215a\\_quality.html](http://www.thecre.com/quality/2006/20060215a_quality.html); NATIONAL ACADEMY OF SCIENCES, ENSURING THE QUALITY OF DATA DISSEMINATED BY THE FEDERAL GOVERNMENT (2002), available at [http://www7.nationalacademies.org/stl/4-22-02\\_Transcript.doc](http://www7.nationalacademies.org/stl/4-22-02_Transcript.doc); Chris Mooney, *Paralysis by Analysis: Jim Tozzi’s Regulation to End All Regulation*, THE WASH. MONTHLY, May 2004, at 23, available at <http://www.washingtonmonthly.com/features/2004/0405.mooney.html>; The Center for Regulatory Effectiveness, Data Quality: OMB to Begin Implementing New Data Quality Law, [http://www.thecre.com/quality/OMB\\_Implements\\_New\\_DataQualityLaw.html](http://www.thecre.com/quality/OMB_Implements_New_DataQualityLaw.html) (last visited Nov. 20, 2006) (citing Data Quality report language from the 1999 Omnibus Appropriations Act).

4. The Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (appendix C of statute, codifying H.R. 5658). See also Shapiro, *supra* note 1, at 346.

5. Pub. L. No. 106-554.

6. Shapiro, *supra* note 1, at 346.

7. Noe et al., *supra* note 1, at 10227, 10232. See also The Center for Regulatory Effectiveness, President Signs Federal Data Quality Legislation (ACT) (Public Law 106-554 Section 515), <http://www.thecre.com/quality/PL06-554Sec515.html> (last visited Nov. 20, 2006).

8. *Improving Information Quality in the Federal Government: Hearing Before the Subcommittee on Regulatory Reform, H. Comm. on Government Reform* 109th Cong. 1 (2005), (statement of William L. Kovacs, Vice President U.S. Chamber of Commerce), available at <http://reform.house.gov/UploadedFiles/7-20-2005%20Kovacs%20Testimony.pdf> [hereinafter Kovacs Testimony].

9. Noe et al., *supra* note 1, at 10231–33.

10. Rick Weiss, ‘Data Quality’ Law is Nemesis of Regulation, WASH. POST, Aug. 16, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A3733-2004Aug15.html>.

11. U.S. Representative Jo Ann Emerson, Proudly Serving Missouri’s 8th District, <http://www.house.gov/emerson/> (last visited Nov. 21, 2006).

12. Margaret Pak, *An IQ Test for Federal Agencies? Judicial Review of the Information Quality Act Under the APA*, 80 WASH. L. REV. 731, n. 30 (2005) (citing Rick Weiss, *Data Quality Law is Nemesis of Regulation*, THE WASH. POST, Aug. 16, 2004, at A1).

Despite its size, the IQA “packs quite a wallop.”<sup>13</sup> The IQA’s mandate is four pronged: (1) Public Law 106-554 § 515(a) entrusts the Office of Management and Budget (“OMB”) with providing “policy and procedural” guidance to federal agencies to ensure the “quality, objectivity, utility and integrity” (“quality”) of federally disseminated information; (2) § 515(b)(2)(A) compels each individual agency to formulate their own guidelines in an effort to achieve the same objective; (3) § 515(b)(2)(B) requires each agency, in formulating those guidelines, to establish an appeals process whereby third parties may challenge the quality of disseminated information; and (4) § 515(b)(2)(C) demands that each agency periodically update the OMB as to the number of complaints received and the agency’s response—quite the feat for the two-sentence long appropriations rider.

What the IQA does not do, however, has fueled the debate between public interest groups and the private sector. The IQA seeks to “maximize the quality, objectivity, utility, and integrity of information”<sup>14</sup> disseminated by the federal government<sup>15</sup>—yet provides no explanation of those terms.<sup>16</sup> Buried within 2001’s Appropriations Bill, the IQA has no legislative history. On the method of interpretation, Congress is effectively silent. Therefore, as a matter of administrative law,<sup>17</sup> the IQA vests the OMB with immense discretion.

The OMB exercised that discretion in 2002 when it finalized its Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies (“Guidelines”).<sup>18</sup> In a controversial move, the OMB incorporated the EPA’s Safe Drinking Water Act Amendments of 1996 (“SDWAA” or “the 1996 Amendments”)<sup>19</sup> as its general scientific standard for risk assessment. Since their inception by the OMB in 2002 the Guidelines, including the SDWAA, have received hostile public reception.<sup>20</sup>

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13. Noe et al., *supra* note 1, at 10226.

14. For brevity these adjectives will be limited to “Quality” in this Note.

15. The Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763A-153–154 (2000) (appendix C of statute, codifying H.R. 5658).

16. Noe et al., *supra* note 1, at 10228.

17. See *generally* *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1983).

18. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) [hereinafter Guidelines].

19. *Id.* at 8457–58, (citing 42 U.S.C. §§ 300(g)-1(b)(3)(A)&(B) (1996)).

20. See Guidelines, *supra* note 18, at 8457–58; MARY TIEMANN, SAFE DRINKING WATER ACT AMENDMENTS OF 1996: OVERVIEW OF P.L. 104-182 (Feb. 8, 1999), available at <http://ncseonline.org/nle/crsreports/water/h2o-17.cfm>; Jocelyn Kaiser, *Economics: Wielding the Data-Quality Cudgel*, 299 SCIENCE 1837 (2003) [hereinafter *Economics*], stating:

This Note will argue that, as written, the OMB Guidelines under the IQA require the FCC to adopt or adapt the SDWAA when it engages in the analysis of risks to human health, safety, and the environment. Part II will provide a brief summary of the history, substance, and criticisms of the IQA and the SDWAA. Part III will contend that the FCC engages in and disseminates information related to risk analysis for the purposes of coverage under the SDWAA. Part IV will argue that social risk analysis—*e.g.*, agency evaluations of the hazards of exposure to certain content on viewers—also falls under the purview of the broad standard articulated by the OMB. Part V will evaluate what the SDWAA mean for the FCC. This Note will end with the assertion that, for the purposes of the OMB Guidelines, the FCC is subject to the SDWAA, and will conclude with suggestions on how to appropriately incorporate the SDWAA in a way that will mitigate the negative effects while remaining true to the goals of the IQA, the White House Office of Management and Budget, and the FCC.

## II. THE INFORMATION QUALITY ACT

In 2002, the OMB promulgated its Guidelines as per the IQA.<sup>21</sup> Already displeased with the IQA's stealth beginnings, vague directive, and costly appeals mechanism,<sup>22</sup> the OMB fueled anti-IQA fire when it borrowed the 1996 Amendments from the Safe Drinking Water Act ("SDWA").<sup>23</sup> This section will survey the SDWAA, beginning with a brief history of the SDWA, a summary of the 1996 Amendments under the OMB Guidelines, and concluding with a review of the criticisms against the use

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'I am completely freaked out about the data-quality act,' says Wendy Wagner, an environmental law expert at the University of Texas, Austin. 'The potential [for harm] is tremendous.' . . . Ellen Paul of the Ornithological Council in Washington D.C. worries that the law will trigger complaints that 'will burden staff and discourage scientists from working for the government.' And the law 'will be exploited to slow regulations,' asserts Virginia Sharpe of the Center for Science in the Public Interest in Washington D.C. It could even choke discussion of preliminary findings, so that 'none of us will really ever know what the agency has excluded,' says Wagner.;

Weiss, *supra* note 10; *Daily News Archive: Data Quality Act Hamstrings Pesticide Regulation*, NAT'L COALITION AGAINST THE MISUSE OF PESTICIDES, Aug. 18, 2004, [http://www.beyondpesticides.org/news/daily\\_news\\_archive/2004/08\\_18\\_04.htm](http://www.beyondpesticides.org/news/daily_news_archive/2004/08_18_04.htm); Chris Mooney, *Interrogations: Thanks to a Little-Known Piece of Legislation, Scientists at the EPA and Other Agencies Find Their Work Questioned Not Only by Industry, but by Their Own Government*, THE BOSTON GLOBE, Aug. 28, 2005, available at <http://www.boston.com/news/globe/ideas/articles/2005/08/28/interrogations/?page=full>.

21. Guidelines, *supra* note 18.

22. See *supra* note 20 and accompanying text.

23. Compare Guidelines, *supra* note 18, at 8457–58, with CURTIS W. COPELAND & MICHAEL SIMPSON, THE INFORMATION QUALITY ACT: OMB'S GUIDANCE AND INITIAL IMPLEMENTATION, (Sept. 17, 2004), [www.ombwatch.org/info/dataquality/RL32532\\_CRS\\_DQA.pdf](http://www.ombwatch.org/info/dataquality/RL32532_CRS_DQA.pdf). See also Shapiro, *supra* note 1, at 354.

of the SDWAA in this context.

### *A. Risk Analysis Under the Safe Drinking Water Act*

Congress passed the SDWA in 1974, authorizing the EPA to set national health-based standards for drinking water based upon the best available science. In 1996, the SDWA was amended to confirm the EPA's commitment to water contamination prevention in an effort to increase public participation in SDWA programs by granting better access to information used by the EPA, among other things.<sup>24</sup>

### *B. Office of Management and Budget's Safe Drinking Water Act Amendments of 1996*

Under the Guidelines, all agencies must *adopt* or *adapt* the SDWAA in their use of information related to the analysis of health, safety, or the environment.<sup>25</sup> This standard is two-pronged. First, agencies must (1) make use of "the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and [(2)] data collected by accepted methods or best available methods . . . ."<sup>26</sup> Second, agencies must:

[I]n a document made available to the public [in support of a regulation [to specify, to the extent practicable—(i) each population addressed by any estimate [of applicable risk effects]; (ii) the expected risk or central estimate of risk for the specific populations [affected]; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each significant uncertainty identified in the process of the assessment of [risk] effects and the studies that would assist in resolving the uncertainty; and (v) peer-reviewed studies known to the [agency] that support, are directly relevant to, or fail to support any estimate of [risk] effects and the methodology used to reconcile inconsistencies in the scientific data.]<sup>27</sup>

Under the Guidelines, agency presentation of information to the public must be "comprehensive, informative and understandable."<sup>28</sup>

24. U.S. Environmental Protection Agency, The Safe Drinking Water Act Amendments of 1996: Strengthening Protection for American's Drinking Water, <http://www.epa.gov/safe-water/sdwa/theme.html#2> (last visited Nov. 24, 2006).

25. Guidelines, *supra* note 18, at 8457–58 ("With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to [SDWAA]."); Shapiro, *supra* note 1, at 354–55 (citing Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763A-125, 2763A-154 § V(3)(b)(ii)(B) (2001)).

26. Guidelines, *supra* note 18, at 8457.

27. Guidelines, *supra* note 18, at 8457–58.

28. Guidelines, *supra* note 18, at 8457.

### *C. The Safe Drinking Water Act Amendments of 1996: A Review of Criticisms*

The SDWAA were undoubtedly promulgated with environmental risk in mind. However, the OMB posits that, in passing the 1996 Amendments, Congress “adopted a basic standard of quality for the use of science in agency decision-making.”<sup>29</sup> The OMB formalized that position in the Guidelines, establishing the SDWAA as the standard for risk analysis.<sup>30</sup>

Opponents of the Guidelines contest the OMB’s adoption of the SDWAA principles for risk analysis in general, for reasons not the least of which are, that a review of the relevant legislative history will reveal no such adoption by Congress.<sup>31</sup> Disputants’ concerns are twofold: first, implementation of the SDWAA will require the expense of limited federal resources; and second, the added administrative burden will clog the wheels of the regulatory process.<sup>32</sup>

First, the use of rigorous evidentiary requirements, such as in the SDWAA, seems at odds with the goals of risk analysis—namely, avoidance and/or mitigation of risk. The very purpose of risk analysis—to evaluate the likelihood of some uncertain harm—suggests, at least in some cases, a precautionary approach. In some cases, this precautionary approach is legally compelled.<sup>33</sup> In these instances, added constraints that impede or stop the process altogether, such as the SDWAA would be both counterintuitive and counterproductive.

As a result, opponents argue that the IQA’s rigorous scientific requirements (SDWAA standard included) will stall the regulatory process.<sup>34</sup> “Every time you create a new set of check boxes before the agency can do something, you increase the risk of the agency not doing it.”<sup>35</sup> Certainly, the extra regulatory hurdle that is the OMB’s SDWAA standard for risk analysis will serve to stall the process in some form.

### III. HEALTH, SAFETY, AND ENVIRONMENTAL INFORMATION UNDER THE FCC GUIDELINES

The FCC published its draft Guidelines on May 1, 2002.<sup>36</sup> Following

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29. Shapiro, *supra* note 1, at 355 (quoting the Guidelines).

30. Guidelines, *supra* note 18, at 8457.

31. See Shapiro, *supra* note 1, at 355.

32. See *supra* note 21 and accompanying text.

33. See Carol M. Rose, *Environmental Law Grows Up (More Or Less), and What Science Can Do To Help*, 9 LEWIS & CLARK L. REV. 273, 291 (2005).

34. Shapiro, *supra* note 1, at 365.

35. Noe et al., *supra* note 1, at 10234.

36. FCC, FCC Draft Information Quality Guidelines, May 1–June 28, 2002, [http://www.theclerk.com/pdf/20020527\\_fcc-guidelines.pdf](http://www.theclerk.com/pdf/20020527_fcc-guidelines.pdf) [hereinafter Draft FCC Guidelines].

revision, the final Guidelines were promulgated on October 8 of that year.<sup>37</sup> In Part I of its Guidelines, the FCC describes the purpose and scope of its duties under the IQA<sup>38</sup> and to the OMB as per the OMB Guidelines.<sup>39</sup> In Part II of the FCC Guidelines, the Commission clarifies key terms articulated in the IQA and developed by the OMB. Specifically, the FCC commits to the OMB's definitions of quality, utility, and integrity,<sup>40</sup> and clarifies the OMB's definitions of objectivity,<sup>41</sup> transparency,<sup>42</sup> and reproducibility.<sup>43</sup> In Parts III–VI, the FCC describes what it will do to ensure that information satisfies the IQA as refined by the OMB, including the formation of a third-party complaint and appeals mechanism.

*A. The FCC Has Neither Adopted Nor Adapted the Safe Drinking Water Act Standard*

In its Guidelines, the OMB articulates its general requirements for information. In addition, the OMB acknowledges that, in some cases, information must receive a heightened level of scrutiny and meet a higher standard of quality.<sup>44</sup> Specifically, the OMB sets out an entirely different and more demanding course of information review for agency analysis of risks to human health, safety, and the environment.<sup>45</sup> In these instances, agencies must not only meet the general standards of quality, objectivity, utility, and integrity, but they must “adopt or adapt” *specific* quality principles pursuant to the Safe Drinking Water Act (SDWA) Amendments of 1996 . . . .<sup>46</sup>

In compliance with the OMB Guidelines, federal agencies drafted and finalized their own guidelines, applying the SDWA where risk analysis was

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37. Implementation of Guidelines for Ensuring and Maximizing the Quality, *Information Quality Guidelines*, FCC 02-277 (Oct. 8, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-277A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-277A1.pdf) [hereinafter *FCC Guidelines*].

38. *Id.* at Appendix A, I para. 1.

39. *Id.* at Appendix A, I para. 2.

40. *Compare* Guidelines, *supra* note 18, with *FCC Guidelines*, *supra* note 37, at paras. 9, 12, 15.

41. *Compare* Guidelines, *supra* note 18, with *FCC Guidelines*, *supra* note 37, at para. 11.

42. *Compare* Guidelines, *supra* note 18, with *FCC Guidelines*, *supra* note 37, at para. 14.

43. *Compare* Guidelines, *supra* note 18, with *FCC Guidelines*, *supra* note 37, at para. 13.

44. Guidelines, *supra* note 18, at 8458.

45. Guidelines, *supra* note 18, at 8458. See also Urs Gasser, *Information Quality and the Law, or, How to Catch a Difficult Horse*, BERKMAN CENTER FOR INTERNET & SOCIETY AT HARV. LAW SCHOOL, Nov. 2003, at 18, <http://cyber.law.harvard.edu/home/uploads/291/2003-08.pdf>.

46. Gasser, *supra* note 45, at 18 (emphasis added); Guidelines, *supra* note 18, at 8458; Safe Drinking Water Act Amendments of 1996, 42 U.S.C. § 300(g)-1(b)(3)(A)&(B) (1996).



conducted.<sup>47</sup> In § 6.4 of the EPA's Guidelines, for example, the EPA commits to an adaptation of the SDWAA where it disseminates information regarding health, safety, or environmental risks.<sup>48</sup> It proceeds to dedicate six pages to clarifying those adaptations—articulating its modified SDWAA standard, justifying additions and modifications of SDWAA language,<sup>49</sup> and detailing how that standard will function within EPA.<sup>50</sup>

The FCC Guidelines *generally* set out the basic policy for information quality,<sup>51</sup> though they neither adopt nor adapt the SDWA *in particular* for those instances where it engages in risk analysis. This may be due, at least in part, to the fact that the FCC Guidelines do not acknowledge that the Commission engages in any analysis of risks to human health, safety, or the environment.<sup>52</sup>

*B. The FCC Engages in Analysis of Risks to Human Health, Safety, and the Environment; Therefore, the FCC Should Adopt or Adapt the Safe Drinking Water Act Standards of 1996*

Not all agencies are equal before the SDWAA. Where an agency fails to regulate risks to human health, safety, or the environment, the SDWAA is irrelevant. The FCC, in the performance of many of its major federal duties—processing broadcast license requests, reviewing complaints, and participating in hearings<sup>53</sup>—does not appear to engage in the type of risk analysis that would trigger the SDWAA under the IQA. Yet, for example, where the Commission has *developed and disseminated information for its*

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47. See, e.g., National Oceanic and Atmospheric Administration, Information Quality Guidelines, [http://www.cio.noaa.gov/itmanagement/IQ\\_Guidelines\\_110606.htm](http://www.cio.noaa.gov/itmanagement/IQ_Guidelines_110606.htm) (last visited Nov. 23, 2006) [hereinafter NOAA Guidelines]; U.S. Fish & Wildlife Service, Information Quality Guidelines, at 10, <http://www.fws.gov/informationquality/topics/FWS%20Information%20Quality%20Guidelines.pdf> (last visited Nov. 23, 2006); U.S. Dept. of Health and Human Services, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated to the Public, <http://aspe.hhs.gov/infoquality/Guidelines/part1.shtml#d4f> (last visited Nov. 23, 2006); Department of Energy, Final Report Implementing Office of Management and Budget Information Dissemination Quality Guidelines, at 3, <http://cio.doe.gov/informationquality/finalinfoqualityguidelines.pdf> (last visited Nov. 23, 2006).

48. U.S. Environmental Protection Agency, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency 21–22, <http://www.epa.gov/quality/informationguidelines/iqg-faqs.html> (last visited Nov. 26, 2006) [hereinafter EPA Guidelines].

49. *Id.* at 23.

50. *Id.* at 21–27.

51. See FCC Guidelines, *supra* note 37, at paras. 5–9.

52. See generally FCC Guidelines, *supra* note 37.

53. FCC.gov, About the FCC, <http://www.fcc.gov/aboutus.html> (last visited Nov. 26, 2006).

*environmental regulations about risks to public health, safety, and the environment,*<sup>54</sup> and where it has then conditioned the issuance of licenses upon compliance with those regulations, the FCC falls within the purview of the SDWAA.

### *C. Regulation of Environmental Risk: FCC Environmental Regulations*

In 1969, Congress passed the National Environmental Protection Act (“NEPA”) in an effort to establish a “framework for environmental protection.”<sup>55</sup> Towards this end, NEPA requires all federal agencies to: (a) make use of both natural and social sciences in decisions that may affect the environment; (b) establish methods that will take into account all aspects of the environment, as required by Title II of NEPA; and (c) enclose an environmental assessment report which evaluates the environmental effects—available alternatives, long-term and short-term environmental impact, and the use of environmental resources—prior to taking any federal action that may affect the environment in a significant way.<sup>56</sup>

In September 1974, the FCC promulgated environmental rules requiring it to evaluate if and to what extent its actions impact the environment.<sup>57</sup> In large part, the FCC’s compliance with NEPA consists of requiring licensees to complete an environmental assessment (“EA”) survey as a condition of license renewal.<sup>58</sup> Prior to issuing or renewing a license, the FCC reviews the EA to ensure that the licensee comports with environmental and other regulations.<sup>59</sup> Licenses are conditioned upon an

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54. See, e.g., Effects of Comm. Towers on Migratory Birds, *Notice of Inquiry*, 18 F.C.C.R. 16938 (2003); Effects of Communications Towers on Migratory Birds, 68 Fed. Reg. 53,696 (Sept. 12, 2003).

55. U.S. Department of the Interior: Bureau of Reclamation, National Environmental Policy Act of 1969 (NEPA) 1, <http://www.usbr.gov/gp/eca/slideshow.pdf> (last visited Nov. 26, 2006).

56. National Environmental Policy Act, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1970) [hereinafter *NEPA*].

57. See Actions that May Have a Significant Environmental Effect, for Which Environmental Assessments (EAs) Must be Prepared, 47 C.F.R. § 1.1307 (2005). See also U.S. GEN. ACCOUNTING OFFICE, TELECOMMUNICATIONS: STATUS OF RESEARCH ON THE SAFETY OF CELLULAR PHONES 23 (1994), <http://www.gao.gov/archive/1995/rc95032.pdf> [hereinafter GAO STATUS].

58. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, QUESTIONS AND ANSWERS ABOUT BIOLOGICAL EFFECTS AND POTENTIAL HAZARDS OF RADIOFREQUENCY ELECTROMAGNETIC FIELDS 16, (1999), [http://www.fcc.gov/Bureaus/Engineering\\_Technology/Documents/bulletins/oet56/oet56e4.pdf](http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet56/oet56e4.pdf); FCC, Compliance with Commission’s Rules Implementing the National Environmental Policy Act of 1969, <http://wireless.fcc.gov/siting/npaguid.html> (last visited Nov. 26, 2006) [hereinafter Compliance with NEPA].

59. Compliance with NEPA, *supra* note 58.

FCC determination that the licensee's activities will comport with the Commission's environmental standards.<sup>60</sup>

In June 1979, the FCC published a *Notice of Inquiry* requesting comments on its duty to evaluate the environmental effects of radiofrequency ("RF") emission under NEPA.<sup>61</sup> In 1982, the Commission proposed an amendment to its environmental regulations that would establish an emissions standard and require all licensees whose devices exceeded that standard to complete an EA prior to licensing. In 1985, the FCC incorporated the emissions standard used by the American National Standards Institute ("ANSI").

To date, the FCC is active in the investigation of the biological effects of RF exposure. Under FCC Guidelines, licensing is contingent upon compliance with the Commission's environmental regulations, including radiofrequency exposure limits. In support of those regulations, the FCC regularly publishes recent scientific studies and other information regarding the hazards of RF exposure.<sup>62</sup>

#### *D. Regulation of Risks to Public Health & Safety: Radiofrequency Exposure Regulations*

The FCC's regulation of RF exposure also requires the analysis of risks to human health and safety. Some FCC reports link RF exposure to cancer,<sup>63</sup> cataracts, temporary sterility,<sup>64</sup> and effects on the immune and neurological systems.<sup>65</sup> In 1993, the Commission proposed a revision of the ANSI standards it adopted in 1985.<sup>66</sup> In 1996, following three years of public commentary, the FCC issued a *Report and Order* establishing radiofrequency exposure limits.<sup>67</sup>

Also in 1996, the FCC amended its environmental regulations to include the recommendations of the National Council on Radiation Protection and Measurements ("NCRP")<sup>68</sup> on the method by which to

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60. Compliance with NEPA, *supra* note 58.

61. GAO STATUS, *supra* note 57, at 35.

62. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58; FCC, Radio Frequency Safety: Office of Engineering and Technology, <http://www.fcc.gov/oet/rfsafety/> (last visited Nov. 26, 2006).

63. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58, at 8.

64. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58, at 7.

65. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58, at 8.

66. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58, at 11.

67. Exposure to Radiofrequency Electromagnetic Fields, 68 Fed. Reg. 52,879, 52,880 (Sept. 8, 2003) (to be codified at 47 C.F.R. pt. 1).

68. The National Council on Radiation Protection and Measurements ("NCRP") is a company with whom Congress has contracted to provide recommendations on radiation exposure. FCC, Human Exposure to Radio Frequency Fields: Guidelines for Cellular & PCS Sites, <http://www.fcc.gov/cgb/consumerfacts/rfexposure.html> (last visited Nov. 26, 2006).

measure human exposure to radiofrequency emissions from cellular radio and Personal Communications Services (“PCS”) cell sites.<sup>69</sup> In so doing, the FCC established maximum permissible exposure limits contingent upon location. Occupational exposures to RF are held to one standard, whereas radiofrequency emissions to the general populace are limited to 580 microwatts per square centimeter.<sup>70</sup>

While human health and safety protections may be incidental to NEPA’s mandate that federal agencies ensure the environment upon which the public depends, the SDWAA provide additional, if not more targeted, protections to further the purposes of the IQA. Where the FCC disseminates information regarding its environmental regulations, particularly as it relates to radiofrequency, the Commission is bound by the SDWAA.

#### IV: SOCIAL RISK ANALYSIS UNDER THE OMB GUIDELINES: APPLICATION OF THE SAFE DRINKING WATER ACT AMENDMENTS OF 1996 TO SOCIAL SCIENCE

The OMB provides limited guidance as to what constitutes “sound science” for the purposes of the IQA. Indeed, the Guidelines themselves provide no descriptive qualification. As written, the OMB’s broad mandate encompasses a wide range of information, from a variety of disciplines in both the natural and the social sciences, which is used by the government in the evaluation of risks to human health, safety, and the environment.

##### *A. Regulatory Authority*

In 1934, Congress passed the Communications Act, thereby establishing the FCC. The Communications Act charges the FCC with regulatory responsibility over communications by wire or radio, both interstate and abroad, *in the public interest*.<sup>71</sup> In compliance with this statutory duty, the FCC is empowered to regulate broadcast programming targeting children.<sup>72</sup>

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69. *Id.*

70. *Id.*

71. *See generally*, Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.). *See also* Policies and Rules Concerning Children’s TV Programming, *Report and Order*, FCC 96-335, para. 23 (Aug. 8, 1996), available at [http://www.fcc.gov/Bureaus/Mass\\_Media/Orders/1996/fcc96335.pdf](http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96335.pdf) [hereinafter *Children’s TV Order*] (citing Senate Report).

72. FRED H. CATE, *THE INTERNET AND THE FIRST AMENDMENT: SCHOOLS AND SEXUALLY EXPLICIT EXPRESSION* 46 (1998). *See also Children’s TV Order*, *supra* note 71, at para. 23 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1943) (“As part of their public interest obligation, broadcasters can and indeed must be required to render public service to children.”)).

The Children's Television Act of 1990 ("CTA") was passed in an effort to serve the educational needs of child viewers.<sup>73</sup> In conjunction with the licensing process, the CTA requires the FCC evaluate how and to what degree the licensee has made an effort to ensure the programming needs of children.<sup>74</sup>

Congress supplemented the Communications Act with the Telecommunications Act of 1996 ("1996 Act"). As per § 551 of the 1996 Act, the FCC must establish guidelines for the identification of sexual, violent, or indecent material on television.<sup>75</sup> Based in part on studies drawing a connection between viewing content and violent behavior,<sup>76</sup> the FCC required all televisions with screens larger than thirteen inches to be equipped with the V-Chip.<sup>77</sup> The V-Chip is a technology that, among other things, may be used by parents to block certain television programs.<sup>78</sup>

The health and welfare of children in the television era continues to be on the forefront of the social, political, and legal debate.<sup>79</sup> The FCC has been and currently is active in regulatory activity that aims to ensure the developmental needs of child viewers.<sup>80</sup> On March 24, 2006, for example, the FCC issued its *Second Notice of Proposed Rulemaking on Children's Television Obligations of Digital Television Broadcasters* ("SNPRM").<sup>81</sup> According to the Commission, the purpose of the SNPRM is to evaluate the duty of television licensees to make specific types of programming available to ensure the educational needs of child viewers, as well as to "protect children from excessive and inappropriate commercial messages."<sup>82</sup> The FCC's efforts come at the heels of scientific research showing that young children cannot distinguish commercial advertising content from truth, and therefore, are "uniquely" vulnerable to advertising messages.<sup>83</sup>

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73. *Children's TV Order*, *supra* note 71, at para. 1.

74. *Children's TV Order*, *supra* note 71, at para. 1.

75. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56 (codified at 47 U.S.C. § 303 (2000)).

76. See Reed Hunt, *The Moment of Truth*, 8 MEDIA STUD. J. 7 (Fall 1994); Telecommunications Act, § 551(a)(1)–(9).

77. V-Chip: Viewing Television Responsibly, [www.fcc.gov/vchip/](http://www.fcc.gov/vchip/).

78. *Id.*

79. Children's TV Obligations of Digital TV Brdcsts., *Second Further Notice of Proposed RM*, FCC 06-33, (Mar. 24, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-33A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-33A1.pdf) [hereinafter *Second Notice of Proposed RM*].

80. See *Children's TV Order*, *supra* note 71, at para. 16; Children's TV Programming and Advertising Practices, *Report and Order*, 96 F.C.C.2d 634 (1984), *aff'd* by Action for Children's TV v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

81. See generally *Second Notice of Proposed RM*, *supra* note 79.

82. *Second Notice of Proposed RM*, *supra* note 79, at para. 1.

83. *Second Notice of Proposed RM*, *supra* note 79, at 14 (Statement of Commissioner

### B. Social Science as Risk Analysis Under the OMB Guidelines

Under OMB Guidelines, the FCC analyzes the risk of viewer exposure and regulates accordingly. Risk is a factor involving an unknown probability of harm,<sup>84</sup> and risk analysis is the process by which analysts evaluate that probability. Put simply, the process involves (1) an identification of the risk, (2) a description and calculation of the risk, and (3) a determination of the meaning of the risk.<sup>85</sup> The SNPRM follows an analogous pattern: it identifies the exposure of young children to advertising content as a potential harm (risk),<sup>86</sup> publishes research by the Parents Television Council,<sup>87</sup> Nielsen Media Research Reports, the Kaiser Family Foundation, and the American Psychological Association<sup>88</sup> in support of this identification, and seeks comments on its determination of that risk as manifested through the Commission's proposed rulemaking.<sup>89</sup>

#### 1. Psychological Harms to Human Health and Safety

According to former FCC Commissioner Gloria Tristani: “[E]ntertainment violence has a toxic effect.”<sup>90</sup> In addition to concerns regarding the cognitive health of children, the Commission also evaluates and publishes information supporting regulation in an effort to preserve the psychological health and safety of young viewers. In her 1999 address to Congress, Tristani addressed the risks of violence on television: “The research shows that heroes and good guys who act violently actually pose *more* of a risk than villains because viewers are more likely to emulate and learn from characters who are perceived as attractive.”<sup>91</sup> In a subsequent 2000 statement, Tristani employed “over 1000 studies,” by the American Medical Association, American Psychological Association, American

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Deborah Taylor Tate).

84. VINCENT T. COVELLO & MILEY W. MERKHOFFER, RISK ASSESSMENT METHODS: APPROACHES FOR ASSESSING HEALTH AND ENVIRONMENTAL RISKS 2 (1993).

85. *Id.* at 4–5.

86. *Second Notice of Proposed RM, supra* note 79, at 14 (Statement of Commissioner Deborah Taylor Tate).

87. *Second Notice of Proposed RM, supra* note 79, at 12 (Statement of Commissioner Michael J. Copps).

88. *Second Notice of Proposed RM, supra* note 79, at 14 (Statement of Commissioner Deborah Taylor Tate).

89. *Second Notice of Proposed RM, supra* note 79, at 13 (Statement of Commissioner Jonathan S. Adelstein).

90. Statement of FCC Comm’r Gloria Tristani on the Impact of Entm’t Violence on Children (July 26, 2000), <http://www.fcc.gov/Speeches/Tristani/Statements/2000/stgt040.html> [hereinafter Tristani July 26, 2000].

91. Gloria Tristani, FCC Comm’r, Wrestling for Our Children’s Future, Remarks Before the Congress on Television Violence of Puerto Rico (Oct. 12, 1999), *available at* <http://www.fcc.gov/Speeches/Tristani/spgt916.doc> [hereinafter Tristani Oct. 12, 1999].

Academy of Pediatrics, and the American Association of Children and Adolescent Psychology, to name a few, to reach her conclusion that there is a causal relationship between violent programming content and aggressive behavior in viewers.<sup>92</sup> The truth of these studies notwithstanding, research proffered by the FCC that evaluates and affirmatively ties toxic content to violent human behavior constitutes risk analysis to human health and safety,<sup>93</sup> and in so doing falls within the purview of OMB's 1996 Amendments.

## 2. Physical Harms to Human Health and Safety

Though the OMB Guidelines make no distinction between the two, studies evidencing a positive correlation between programming content and viewer health are not limited to psychological health. There is a fair amount of research linking certain programming content to physical health hazards, such as childhood obesity.<sup>94</sup> Indeed, science shows a positive relationship between unhealthy eating preferences prompted by commercial advertising and weight problems. Obesity itself is a major health problem—consequences to individual health range from the cosmetic to death, and the United States Department of Agriculture (“USDA”) estimates societal costs (e.g., health care fees) approaching seventy billion per annum.<sup>95</sup> Information published by the FCC in compliance with its duties under the Children's Television Act, or other statutes, for the purposes of mitigating risks to children's health—*psychological or physical*—falls under the Guidelines' human health and safety section.

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92. Tristani July 26, 2000, *supra* note 90.

93. See, e.g., FCC, Fact Sheet, [http://www.fcc.gov/Bureaus/Mass\\_Media/Factsheets/factvchp.txt](http://www.fcc.gov/Bureaus/Mass_Media/Factsheets/factvchp.txt) (last visited Nov. 26, 2006).

94. William Ramsey, Note, *Rethinking Advertising Aimed at Children*, 58 FED. COMM. L.J. 361, 368 (2006) (citing DALE KUNKEL ET AL., AM. PSYCH ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN: SECTION: PSYCHOLOGICAL ISSUES IN THE INCREASING COMMERCIALIZATION OF CHILDHOOD 2–3 (2004), available at <http://www.apa.org/releases/childrenads.pdf>; W. Dietz, *You Are What you Eat—What You Eat Is What You Are*, 11 J. ADOLESCENT HEALTH CARE 76 (1990); K.B. Horgan, et al., *Television Food Advertising: Targeting Children in a Toxic Environment*, in THE HANDBOOK OF CHILDREN AND MEDIA 447–62 (2001); R.P. Toriano & K.M. Flegal, *Overweight Children and Adolescents: Description, Epidemiology and Demographics*, PEDIATRICS, 101, 497 (1998)).

95. See Dan Glickman, Agriculture Secretary, Remarks at the USDA Symposium on Childhood Obesity: Causes and Prevention (Oct. 27, 1998), available at <http://www.usda.gov/news/releases/1998/10/0445>.

## V. SAFE DRINKING WATER ACT AMENDMENTS OF 1996: THE RISK OF RISK ANALYSIS UNDER THE INFORMATION QUALITY ACT

### *A. Incorporation of the SDWAA by the FCC is Consistent with the Information Quality Act*

Application of the SDWAA standard for risk analysis by the FCC in evaluating hazards to public health, safety and environment comports with the object and purpose of the IQA, and indeed furthers it. The IQA seeks a heightened standard of information quality where agencies use certain information.<sup>96</sup> FCC efforts to ensure that regulation is based upon the best available data and communicated clearly are consistent with the purposes of the IQA.

Incorporation of the SDWAA standard promotes the objectives of the FCC's own IQA Guidelines ("FCC Guidelines"). In the FCC Guidelines, the Commission has undertaken to "ensur[e] that all data it disseminates reflect a level of quality commensurate with the nature of the information."<sup>97</sup> Where health, safety, and environmental risks are involved, the OMB has deemed that the commensurate level is that articulated by Congress in the SDWAA.

From a practical viewpoint, the SDWAA's mandate is the last in a series of government attempts to make the rulemaking process more transparent.<sup>98</sup> In 1973, the U.S. Court of Appeals for the District of Columbia Circuit in *Portland Cement Ass'n v. Ruckelshaus* held that, prior to regulation, agencies must publish a notice of proposed rulemaking that identifies (1) the scientific data, and (2) the processes used to acquire it.<sup>99</sup> Twelve years later in *Quincy Cable TV, Inc. v. FCC*, that same court specifically commanded the FCC to regulate on the basis of "supportable facts and knowledge."<sup>100</sup> Use of the SDWAA, which prescribe the use of a

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96. See Noe et al., *supra* note 1 at 10224.

97. *FCC Guidelines*, *supra* note 37, at para. 5.

98. Noe et al., *supra* note 1.

99. Noe et al., *supra* note 1, at 10229. See also *Lloyd Nolan Hosp. & Clinic v. Heckler*, 762 F.2d 1561 (11 Cir. 1985).

100. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985) (stating:

the Commission itself now applies a far more rigorous standard of proof before crediting the broadcast industry's inevitable refrain that regulation is essential to protect it from the deleterious effects of new video technologies. As a matter of explicit agency policy, the Commission will consider such regulation only if presented with 'hard evidence' that the new technology 'will have a critically adverse effect on existing broadcast service. Speculative allegations concerning possible reductions in service from other sources simply will not do.)

(citations omitted).



particular method and quality of analysis, furthers the goals of rulemaking transparency already in place.

*B. The Safe Drinking Water Act—Good Government Under the Information Quality Act*

Application of the SDWAA where the FCC engages in risk analysis is a reasonable request. To be flexible, under the Guidelines, agencies have the option of adopting *or* adapting the standard. This mandate is more accommodating than it may appear—OMB provides little guidance as to what does (or does not) constitute a lawful adaptation. In the same way that IQA's lack of direction provides OMB much discretion, so too does the Guidelines' failure to define the boundaries of what constitutes "adaptation" allow for much agency discretion. Thus, the Guidelines' standard is not yet cause for alarm.

Similarly, the sound science standard itself affords agencies even more regulatory legroom. While ambiguous mandates may at first pose some interpretative challenges, they also afford federal agencies some latitude in implementation. The best available science rule is flexible and agency interpretation of the standard is varied. For example, the EPA uses the best available science *at the time the study is done*.<sup>101</sup>

Concerns regarding the procedural effects of the implementation of the SDWAA, at least insofar as its application under the IQA, are largely speculative. Thus far, many of the fears spurred by the IQA have failed to materialize: (1) the IQA provides no judicial private right of action; and (2) there has been no "deluge of IQA petitions" serving to clog "the wheels of the federal bureaucracy"<sup>102</sup>—at least insofar as the FCC is concerned. In the IQA's five years, there has been only one complaint filed, and it was summarily rejected. These predictions of havoc wreaked by the IQA have not been and are not yet a cause for concern.<sup>103</sup>

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101. EPA Guidelines, *supra* note 48, at 23.

102. Fred Anderson, an expert on the Information Quality Act, discounts these concerns, saying:

[F]ear exists that the statute is going to unleash a deluge of petitions that will clog the wheels of the federal bureaucracy. I'm not so sure. I would agree, had I not lived through a number of other episodes in the history of administrative law where dire predictions of deluges were made and not realized, as recently, for example, as the Shelby Act. . . . You could count on one or two hands the Shelby petitions that have been filed for all the federal agencies.

Noe et al., *supra* note 1, at 10227. The number of challenges filed with the FCC can be counted on one finger—and it was dismissed. *Docket of Data Quality Petitions*, OMB WATCH (Nov. 11, 2005), <http://www.ombwatch.org/article/articleview/2668/1/231> (last visited Nov. 26, 2006) [hereinafter *Docket*].

103. John D. Graham, Adm'r, Office of Info. and Reg. Affairs Executive Office of the President, Information Quality Act: An Update on the First Year (Oct. 8, 2003),

However, the IQA comes in the wake of “insufficient protections for those who might be adversely affected when agencies produce information on the web and in reports.”<sup>104</sup> In fact, it has been argued that agencies do not always provide the best evaluations of risk.<sup>105</sup> The SDWA itself was passed in response to the continued sluggishness of a federal agency—the EPA.<sup>106</sup>

For the FCC, the 1996 Amendments would serve as an added agency discipline. Incorporation of the SDWAA continues the process of regulatory improvement by requiring agencies to make use of the best available, peer-reviewed science in their decision-making processes. For government agencies, “scientific peer-review generally enhances both the scientific competence and the credibility of agency decision making.”<sup>107</sup> Use of the 1996 Amendments by the Commission would also contribute to the transparency of agency rulemaking—adding to the goals of the SDWAA.<sup>108</sup> Despite major regulatory efforts to protect child viewers from particular programming content, there are few instances where the Commission explains the processes by which it has made its decisions. For example, a review of research cited in the FCC’s *Second Notice of Proposed Rulemaking on Children’s Television Obligations of Digital Television Broadcasters* will reveal conclusions—but very little as to how those conclusions were reached.<sup>109</sup>

On the whole, the 1996 Amendments’ heightened scientific standard may have the general effect of persuading agencies to refrain from exhausting those resources in efforts to regulate risks that are scientifically unsupported.<sup>110</sup> Thus, the FCC resources would remain available to be devoted to efforts to prevent risks that *are* scientifically supported.

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<http://www.whitehouse.gov/OMB/inforeg/speeches/031008graham.html> (noting that the administrative processes have not been slowed, there has been no chilling of the regulation process, and the appeals mechanism has not only been used by industry).

104. Noe et al., *supra* note 1, at 10229.

105. John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL F. 13, 41–43, 48 (1997).

106. Lynn R. Goldman, M.D., *Risk Symposium: Environmental Risk Assessment and National Policy: Keeping the Process Fair, Effective and Affordable*, 63 U. CIN. L. REV. 1533, 1535 (1995).

107. Graham, *supra* note 105, at 43 (citing SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* (1990)); JOHN D. GRAHAM, *HARNESSING SCIENCE FOR ENVIRONMENTAL REGULATION* (1991).

108. Guidelines, *supra* note 18, at 8455 (“reproducibility”).

109. See generally *Second Notice of Proposed RM*, *supra* note 79.

110. *Second Notice of Proposed RM*, *supra* note 79, at 14.

### *C. To Adapt or Adopt?: That is the Question*

Given the flexibility afforded by the OMB, even the EPA has opted to *adapt* the SDWAA. In addition to existing agency-wide and program-specific information quality policies already in place:<sup>111</sup> the Quality System,<sup>112</sup> peer review policy,<sup>113</sup> communications product review process,<sup>114</sup> web guide,<sup>115</sup> and integrated error correction process,<sup>116</sup> the EPA Guidelines incorporate one added requirement, underpinning its commitment to the objectivity of information it disseminates—an adaptation of the SDWAA principles where the agency engages in risk analysis.<sup>117</sup>

In the EPA Guidelines, the Agency interprets the SDWAA's best available science mandate as then best available *at the time the study is done*.<sup>118</sup> Also, the EPA prefaces its approach to risk assessment by adding that the SDWAA principles must be “consistent with agency statutes and existing legislative regulations.”<sup>119</sup> In addition, the EPA further qualifies its approach by committing to use the principles “to the extent practical.”<sup>120</sup> For the EPA, this addendum provides for flexibility with existing and future agency policies.<sup>121</sup>

The OMB Guidelines temper its 1996 Amendments standard in a way that will ensure continued agency efficiency. Indeed, the Guidelines demand that some of its scientific hurdles, namely peer review and reproducibility, be interpreted by agencies in a way that will “assure[] the timely flow of vital information from agencies to medical providers, patients, health agencies, and the public.”<sup>122</sup> The Guidelines provide no clarification of the phrase “vital information,” suggesting agency discretion in interpretation.

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111. EPA Guidelines, *supra* note 48, at 13.

112. EPA Guidelines, *supra* note 48, at 10 (“The EPA Agency-wide Quality System helps ensure that EPA organizations maximize the quality of environmental information . . . . A graded approach is used to establish quality criteria that are appropriate for the intended use of the information and the resources available.”).

113. EPA Guidelines, *supra* note 48, at 11.

114. EPA Guidelines, *supra* note 48, at 19.

115. EPA Guidelines, *supra* note 48, at 19.

116. EPA Guidelines, *supra* note 48, at 12.

117. EPA Guidelines, *supra* note 48, at 22.

118. EPA Guidelines, *supra* note 48, at 23.

119. EPA Guidelines, *supra* note 48, at 23.

120. EPA Guidelines, *supra* note 48, at 24.

121. EPA Guidelines, *supra* note 48, at 24–25.

122. Guidelines, *supra* note 18, at 8458.

Furthermore, the OMB allows for the SDWAA to be disregarded altogether in “urgent situations (e.g., imminent threats to public health or homeland security) in accordance with the latitude specified in agency-specific guidelines.”<sup>123</sup> In this way, the standard can be tailored by individual agencies who are not only free to determine what constitutes an urgent situation, but may also define the scope within which they may make that determination. The National Oceanic and Atmospheric Administration, for example, adopts a qualified version of the 1996 Amendments, excluding risk assessments that must be made in the event of an environmental emergency, such as a hurricane.<sup>124</sup>

In light of the freedom afforded by the Guidelines, the FCC should adapt, not adopt the standard. As demonstrated *supra*, critics of the SDWAA argue that the amendments’ high scientific threshold may interfere with other agency mandates.<sup>125</sup> A customized adaptation by the FCC may mitigate these conflicts while remaining true to the purposes of the OMB’s SDWAA mandate—sound science.

#### *D. Adaptation of the Safe Drinking Water Act: Something to Consider*

While the principles of the SDWAA are not at odds with the FCC Guidelines, they may conflict with other agency mandates. The SDWAA is a high scientific threshold, which may seem out of place in risk regulation. Risk entails an uncertain probability of some adverse effect. Resource-prohibitive requirements that frustrate the regulatory process may work against statutory demands to take a precautionary approach. Competition with other statutory duties is already evident. For example, in some cases the EPA, whose primary function is protecting the public from health and environmental hazards, is legally compelled to take a precautionary approach to regulation, including regulation in the face of limited, or altogether absent, scientific information.<sup>126</sup>

The FCC is not excused from the conflict. By statute, it is required to regulate in the public interest. Studies evidencing a positive correlation between RF exposure and cancer, or advertising content and obesity, may call for the FCC to fulfill that statutory duty. Indeed, current research on the link between RF exposure and cancer or “‘non-thermal’ biological effects” is “inconclusive”;<sup>127</sup> yet, certainly it is preferable to err on the side

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123. Guidelines, *supra* note 18, at 8458.

124. NOAA Guidelines, *supra* note 47.

125. Rose, *supra* note 33, at 291 (“Policymakers may have to act before the scientific community comes to a definitive conclusion.”).

126. *See id.* at 290–291.

127. ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, *supra* note 58, at 8.

of safety. In the same vein, the adverse impact of television programming content is fiercely debated. However, studies do show that content may have adverse effects on vocabulary, literacy, even eating habits and overall health. High scientific thresholds are an increased burden upon the regulatory process—the result being an impediment to agencies that threatens the flow of the regulatory process.<sup>128</sup> To mollify these effects, the FCC should take full advantage of the leeway provided by the Guidelines with an adaptation of the SDWAA that defines what, if anything, constitutes “vital health information,” an “urgent situation,” and the latitude for determinations therein.

## VII. CONCLUSION

With no legislative history to the contrary, there is little outside of the Guidelines’ text that provides for interpretive assistance. The Guidelines themselves are clear—Agencies *shall* either adopt or adapt the SDWAA. Where the FCC disseminates information regarding risks to public health, safety, and the environment—as is the case with the Commission’s environmental regulations, regulations of radiofrequency exposure, and regulations of advertising content—the FCC is subject to the SDWAA.

Criticisms of the SDWAA notwithstanding, the Guidelines allow for some individual agency discretion. Indeed, the OMB requires (1) *either* adoption or adaptation; (2) in such a way that will not disrupt the flow of vital health information; and (3) which affords for the principles to be disregarded altogether, while entrusting agencies with the discretion to define the latitude with which the agency may make such a determination.

The FCC can and should adapt the SDWAA in a way that will satisfy its statutory mandates and reinforce its own principles. Strategic development of an adaptation by the FCC would not only comply with the Guidelines as written, but would also serve a more practical and desirable goal—ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the FCC.

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128. Shapiro, *supra* note 1, at 365.

