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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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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

Kellen Ressmeyer*

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I. INTRODUCTION

This is the era of regulation by information. More than at any other time in American history, U.S. lawmakers rely upon information in the formation of state policy. With this in mind, Congress has passed several laws designed to ensure the quality of government-disseminated


2. Noe et al., supra note 1.
information. However, Congress had no such design when it passed the Information Quality Act ("IQA")—also referred to as the Data Quality Act. Slipped into the Treasury and General Government Appropriations Act for Fiscal Year 2001 as an appropriations rider, the IQA was subject to no legislative hearings, no committee review, and no congressional debate.

At first blush, the IQA appears to be benign—a good government statute. Despite its seemingly good intentions, the IQA has been met with fierce public resistance. 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. Not discouraged, Tozzi worked with Jo Ann Emerson (R-Mo.) who snuck the IQA—two sentences long—into the 712-page Treasury and General Government Appropriations Act for Fiscal Year 2001.

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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).


Despite its size, the IQA "packs quite a wallop."\(^{13}\) 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"\(^{14}\) disseminated by the federal government—yet provides no explanation of those terms.\(^{15}\) 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,\(^{16}\) 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").\(^{18}\) In a controversial move, the OMB incorporated the EPA’s Safe Drinking Water Act Amendments of 1996 ("SDWAA" or "the 1996 Amendments")\(^{19}\) 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.\(^{20}\)

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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.


\(^{16}\) Noe et al., supra note 1, at 10228.


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

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.21 Already displeased with the IQA's stealth beginnings, vague directive, and costly appeals mechanism,22 the OMB fueled anti-IQA fire when it borrowed the 1996 Amendments from the Safe Drinking Water Act ("SDWA").23 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
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.\textsuperscript{24}

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.\textsuperscript{25} 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 . . . ”.\textsuperscript{26}
Second, agencies must:

\begin{itemize}
  \item [(I)] In 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.\textsuperscript{27}
\end{itemize}

Under the Guidelines, agency presentation of information to the public
must be “comprehensive, informative and understandable.”\textsuperscript{28}

\begin{enumerate}
  \item \textsuperscript{24} U.S. Environmental Protection Agency, The Safe Drinking Water Act Amendments
  water/sdwa/theme.html#2 (last visited Nov. 24, 2006).
  \item \textsuperscript{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
  \item \textsuperscript{26} Guidelines, supra note 18, at 8457.
  \item \textsuperscript{27} Guidelines, supra note 18, at 8457–58.
  \item \textsuperscript{28} Guidelines, supra note 18, at 8457.
\end{enumerate}

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.” The OMB formalized that position in the Guidelines, establishing the SDWAA as the standard for risk analysis.

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. 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.

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. 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. “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.” 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. Following

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.
34. Shapiro, supra note 1, at 365.
35. Noe et al., supra note 1, at 10234.
In Part I of its Guidelines, the FCC describes the purpose and scope of its duties under the IQA and to the OMB as per the OMB Guidelines. 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, and clarifies the OMB's definitions of objectivity, transparency, and reproducibility. 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. 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. 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.

In compliance with the OMB Guidelines, federal agencies drafted and finalized their own guidelines, applying the SDWA where risk analysis was
conducted. 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. It proceeds to dedicate six pages to clarifying those adaptations—articulating its modified SDWAA standard, justifying additions and modifications of SDWAA language, and detailing how that standard will function within EPA.

The FCC Guidelines generally set out the basic policy for information quality, 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.

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—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


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.

environmental regulations about risks to public health, safety, and the environment, 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." 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.

In September 1974, the FCC promulgated environmental rules requiring it to evaluate if and to what extent its actions impact the environment. 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. Prior to issuing or renewing a license, the FCC reviews the EA to ensure that the licensee comports with environmental and other regulations. Licenses are conditioned upon an
FCC determination that the licensee’s activities will comport with the Commission’s environmental standards.\textsuperscript{60}

In June 1979, the FCC published a \textit{Notice of Inquiry} requesting comments on its duty to evaluate the environmental effects of radiofrequency ("RF") emission under NEPA.\textsuperscript{61} 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.\textsuperscript{62}

\textbf{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,\textsuperscript{63} cataracts, temporary sterility,\textsuperscript{64} and effects on the immune and neurological systems.\textsuperscript{65} In 1993, the Commission proposed a revision of the ANSI standards it adopted in 1985.\textsuperscript{66} In 1996, following three years of public commentary, the FCC issued a \textit{Report and Order} establishing radiofrequency exposure limits.\textsuperscript{67}

Also in 1996, the FCC amended its environmental regulations to include the recommendations of the National Council on Radiation Protection and Measurements ("NCRP")\textsuperscript{68} on the method by which to

\textsuperscript{60} Compliance with NEPA, \textit{supra} note 58.
\textsuperscript{61} GAO \textit{STATUS}, \textit{supra} note 57, at 35.
\textsuperscript{63} ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, \textit{supra} note 58, at 8.
\textsuperscript{64} ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, \textit{supra} note 58, at 7.
\textsuperscript{65} ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, \textit{supra} note 58, at 8.
\textsuperscript{66} ROBERT F. CLEVELAND, JR. & JERRY L. ULCEK, \textit{supra} note 58, at 11.
\textsuperscript{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. 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.

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*. In compliance with this statutory duty, the FCC is empowered to regulate broadcast programming targeting children.
The Children’s Television Act of 1990 (“CTA”) was passed in an effort to serve the educational needs of child viewers. 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.

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. Based in part on studies drawing a connection between viewing content and violent behavior, the FCC required all televisions with screens larger than thirteen inches to be equipped with the V-Chip. The V-Chip is a technology that, among other things, may be used by parents to block certain television programs.

The health and welfare of children in the television era continues to be on the forefront of the social, political, and legal debate. The FCC has been and currently is active in regulatory activity that aims to ensure the developmental needs of child viewers. 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”). 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.” 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.

73. Children’s TV Order, supra note 71, at para. 1.
74. Children’s TV Order, supra note 71, at para. 1.
76. See Reed Hunt, The Moment of Truth, 8 MEDIA STUD. J. 7 (Fall 1994); Telecommunications Act, § 551(a)(1)–(9).
78. Id.
81. See generally Second Notice of Proposed RM, supra note 79.
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, 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. The SNPRM follows an analogous pattern: it identifies the exposure of young children to advertising content as a potential harm (risk), publishes research by the Parents Television Council, Nielsen Media Research Reports, the Kaiser Family Foundation, and the American Psychological Association in support of this identification, and seeks comments on its determination of that risk as manifested through the Commission’s proposed rulemaking.

1. Psychological Harms to Human Health and Safety

According to former FCC Commissioner Gloria Tristani: “[E]ntertainment violence has a toxic effect.” 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.” In a subsequent 2000 statement, Tristani employed “over 1000 studies,” by the American Medical Association, American Psychological Association, American

Deborah Taylor Tate).

85. Id. at 4–5.
86. Second Notice of Proposed RM, supra note 79, at 14 (Statement of Commissioner Deborah Taylor Tate).
88. Second Notice of Proposed RM, supra note 79, at 14 (Statement of Commissioner Deborah Taylor Tate).
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. 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, 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. 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.

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.

92. Tristani July 26, 2000, supra note 90.
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. 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." 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. 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. 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." Use of the SDWAA, which prescribe the use of a

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.101

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”102—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.103

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].

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."\(^{104}\) In fact, it has been argued that agencies do not always provide the best evaluations of risk.\(^{105}\) The SDWA itself was passed in response to the continued sluggishness of a federal agency—the EPA.\(^{106}\)

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."\(^{107}\) Use of the 1996 Amendments by the Commission would also contribute to the transparency of agency rulemaking—adding to the goals of the SDWAA.\(^{108}\) 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.\(^{109}\)

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.\(^{110}\) Thus, the FCC resources would remain available to be devoted to efforts to prevent risks that are scientifically supported.

\textbf{C. To Adapt or Adopt?: That is the Question}

Given the flexibility afforded by the OMB, even the EPA has opted to

\(^{104}\) Noe et al., \textit{supra} note 1, at 10229.


\(^{108}\) Guidelines, \textit{supra} note 18, at 8455 ("reproducibility").

\(^{109}\) \textit{Second Notice of Proposed RM, supra} note 79.

\(^{110}\) \textit{Second Notice of Proposed RM, supra} note 79, at 14.
adapt the SDWAA. In addition to existing agency-wide and program-specific information quality policies already in place:111 the Quality System,112 peer review policy,113 communications product review process,114 web guide,115 and integrated error correction process,116 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.117

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.118 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.”119 In addition, the EPA further qualifies its approach by committing to use the principles “to the extent practical.”120 For the EPA, this addendum provides for flexibility with existing and future agency policies.121

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.”122 The Guidelines provide no clarification of the phrase “vital information,” suggesting agency discretion in interpretation.

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.”123 In this way, the standard can be tailored by

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

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. 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.

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”, yet, certainly it is preferable to err on the side 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

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.
threatens the flow of the regulatory process.\textsuperscript{128} 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.

\section*{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 \textit{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) \textit{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.

\footnote{128. Shapiro, \textit{supra} note 1, at 365.}