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I. INTRODUCTION

In the arena of environmental disputes where multiple interests and stakeholders, including the public, are involved, issues of fairness among the parties inevitably arise. Public disputes themselves are already difficult because of the multiple parties and interests involved, the complexity of the environmental issues, and the long-term consequences that the decisions may have.[1] In addition to these areas of difficulty, fairness regarding public participation must also be addressed, since the public is most directly affected by these decisions.[2]

While most people seem concerned with having an adequate voice in the decision-making process of environmental issues in their locality, the actual extent of public involvement and influence depends on fairness in the process. Various problems with procedural fairness exist in this context.[3]

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1. Lawrence Susskind, *Multi-Party Public Policy Mediation: A Separate Breed*, 4 NO. 1 DISP. RESOL. MAG. 4 (1997).

2. *See generally* LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC 17 (Basic Books 1996). Susskind & Field note that, "When people feel they have not been treated fairly, or with respect, their anger multiplies. If they have been manipulated, trivialized, ignored or, worse still, lied to, the initial source of their anger may be less important than their sense of unfairness." *Id.*

3. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 21 (1987). Susskind & Cruikshank contend that,

> One obvious way to evaluate the fairness of a settlement is to judge the fairness of the process by which the resolution was reached .... What counts most in evaluating the fairness of a negotiated outcome are the perceptions of the participants. The key question is, "Were the people who managed the process responsive to the concerns of those affected by the final decision?" A dispute resolution process open to continuous modification by the disputants is, we would argue, the approach most likely to be perceived as fair.

Id.

The public may clash with the other stakeholders, including the government, because they have little or no technical knowledge or expertise to understand the complexities of the environmental issues.[4] Also, when interest groups said to represent the public are brought into the resolution process, these groups may, over time, grow to represent only the narrow interests of their particular group and may not truly be a representative sample of the affected public.[5] In effect, the interest group becomes elitist, separated from its constituencies, and the actual public affected by the decisions becomes unrepresented.[6]

Furthermore, the government or administrative agency is often seen as the big power player, who dictates its interests and resolutions.[7] In the past, input of the public during decision-making was not as important as merely informing the public of the steps the agency planned to take on a particular issue.[8] However, these aspects of procedural unfairness leave the public feeling resentful and angry in not having adequate representation or a voice in the decision-making process of environmental disputes.

Efforts have been made to address this unfairness. The recent trend seeks to involve the public in the decision-making process early, rather than after the fact of the conflict.[9] Most broadly, the modern approach to public disputes is through the idea of "consensus building."[10] Consensus building involves direct communication and interaction among specially chosen representatives of all stakeholders of the issue, who collaborate for "all-

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4. Peter T. Allen, *Public Participation in Resolving Environmental Disputes and the Problem of Representativeness*, 9 RISK 297, 303-04 (1998).

5. *Id.* at 304-05.

6. *Id.* at 305.

7. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 906-07 (1998).

8. *Id.* Past procedures involving the public in decisionmaking

> reflect[] a "paternalistic" model of public participation, in which the government experts are expected to make decisions based on their objective vision of the public interest. While the opportunity to comment late in the decisionmaking process is open to all, dialogic or back-and-forth input from outsiders, to the extent that it occurs, comes primarily from the equally expert persons who are regular participants in the regulatory process.

Id. Susskind & Cruikshank also note that, "[W]e need to improve the ways in which we use [our representative democracy] to resolve public disputes . . . . We need to find ways of dealing with differences that will restore public confidence in government, and improve relationships among the various segments of . . . society." SUSSKIND & CRUIKSHANK, *supra* note 3, at 10.

9. *See* Applegate, *supra* note 7, at 951. Applegate is quick to note, however, the various methods used to involve the public in decisionmaking regarding environmental disputes do not supersede each other. *Id.* "They are in fact simultaneously available and amount to a menu of public participation procedures from which agency decisionmakers can choose." *Id.*

10. SUSSKIND & CRUIKSHANK, *supra* note 3, at 11.

gain" and improved relationships.[11] Intermediaries may be used to assist the negotiation. This contrasts with the conventional approach of distributive bargaining, where the outcome is usually viewed as zero-sum or win-lose, and where communication is often through lawyers in a more formalized process and not all interests may be heard.[12] As a result, neither procedural nor outcome fairness is addressed.

In practice, a form of consensus building is seen through the development of citizens advisory boards in addressing environmental disputes. In response to the limitations and unfairness presented by other forms of public participation in administrative decision-making, such as the review-and-comment method or the regulatory negotiation approach, citizens advisory boards were developed to complement these existing techniques.[13] A citizens advisory group is composed of citizens who are interested in addressing environmental disputes or in some way affected by the agency (whose actions are at issue) sponsoring the group.[14] The citizens are involved in the decision-making early on so that the process is collaborative, deliberative, and not final, which leaves the outcome to be determined.[15]

This paper will assess whether or not consensus building and citizens advisory boards adequately address the issues of procedural fairness regarding public participation in environmental disputes. Part II describes the preceding methods leading up to the development of consensus building and citizens advisory boards in dealing with public involvement. In particular, it discusses the review-and-comment and regulatory negotiation models to environmental public disputes. Part III describes the consensus building process, particularly the use of citizens advisory boards, and evaluates the effectiveness of consensus building and citizens advisory boards in addressing fairness of public participation. In addition, it discusses the use of site-specific advisory boards, which are characteristic of citizens advisory boards. Part IV raises limitations that hinder complete fairness in consensual approaches to environmental public disputes. Finally, Part V

11. *Id.* at 78. "[S]pecially chosen representatives of all 'stakeholding' groups . . . seek 'all-gain' rather than 'win-lose' solutions or watered-down political compromise; and, often, the assistance of a neutral facilitator or mediator." *Id.* at 11.

12. *Id.*

13. Applegate, *supra* note 7, at 906-07.

14. *Id.* at 921.

15. *Id.*

concludes the paper with possible solutions to deal with challenges to complete fairness in the environmental decision-making process.

II. VARIOUS APPROACHES TO PUBLIC INVOLVEMENT IN ENVIRONMENTAL DISPUTES

Over the years, numerous methods have been developed in addressing public participation in environmental public disputes, such as toxic waste clean-up efforts or the siting of radioactive waste dumps.[16] These disputes are usually complicated by the involvement of multiple parties, including governmental agencies, environmental interest groups, business interests, and public agencies, to name a few.[17] Consequently, with so many stakeholders involved, issues arise regarding the adequacy of procedural fairness to public participation.[18] Unfairness can occur when public interest groups are no longer accountable to the constituencies they ostensibly represent.[19] Unfairness can also occur if the voice of a group representing public interest is stifled by the representation of those more powerful, such as governmental agencies or business interests.[20] In addition, "administrative resolution of public disputes tends to favor those with the resources to lobby and play other behind-the-scenes political games."[21] As a result, unfairness in the process likely engenders unfairness in the outcome.

Before the rise of citizens advisory boards, efforts were made to provide meaningful public participation in the administrative decision-making process through the review-and-comment procedure and regulatory negotiation.[22] Writer John S. Applegate provides an overview of the previous efforts made to foster public participation in environmental decision-making:

> The traditional model of agency action adopted . . . the basic technique of giving the public an opportunity to review and comment on agency-generated proposals before they were finally adopted. As attention moved to participation by public interest groups (as surrogates for the general public), procedures came into use that were designed to increase those groups' influence on agency decisions. The enhanced form of review-and-comment . . . is cumbersome, however, and in response to growing interest in alternative

16. *Id.* at 903-06. *See also* Allen, *supra* note 4, at 300-02.

17. Susskind, *supra* note 1, at 4.

18. Allen, *supra* note 4, at 303-05; Applegate, *supra* note 7, at 943-44. *See generally* Elke Schneider, Bettina Oppermann & Ortwin Renn, *Implementing Structured Participation for Regional Level Waste Management Planning*, 9 RISK 379 (1998).

19. Allen, *supra* note 4, at 304.

20. Allen, *supra* note 4, at 305-06.

21. SUSSKIND & CRUIKSHANK, *supra* note 3, at 10.

22. Applegate, *supra* note 7, at 905.

> dispute resolution, regulatory negotiation grew to avoid the increasingly adversarial and technocratic nature of an elaborate . . . review-and-comment process.

Regulatory negotiation also has serious drawbacks, however, most notably its narrow representation and its tendency to adopt dickered compromises.[23]

A. Review-and-Comment Model

In "review-and-comment," the method most commonly used in administrative decision-making, the agency first "develops a proposal internally to gain an understanding of the issues and then settles on a basic approach."[24] The proposal is then communicated to the general public and comments from all are solicited.[25] Afterwards, the agency may or may not take the comments into consideration in revising the proposal.[26] Review-and-comment models are limited in their efforts to solicit public participation because they "provide an opportunity for public reaction to agency proposals, but they do not draw the public into the decisionmaking process at a point at which they can be influential."[27] The review-and-comment paradigm is characteristic of the so-called "decide, announce, and defend" model, in which "the agency makes its decision internally, announces it to the public only nominally as a proposal, and then defends its proposal against criticism rather than seriously reexamining it in light of comments."[28] Thus, the process is unfair in further alienating the public.

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) demonstrates the limitations of review-and-comment procedures.[29] Through the original 1980 version of CERCLA, Congress' decision to "focus clean-up decisions on technical issues and limit delay in implementation by limiting participation," in effect, "mandated the decide-announce-defend version of the review-and-

23. *Id.*

24. *Id.* at 907.

25. *Id.*

26. *Id.*

27. *Id.* at 913.

28. *Id.* at 908-09. The phrase, "decide, announce, and defend," "has become a descriptive cliché for describing a public participation process that is not intended to take the public's views into account." *Id.* at 908 n.22 (citing MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK 132 (1994)).

29. *Id.* at 911.

comment model by placing public participation in a narrow time frame after the remedial decision was made."[30] Although subsequent government policy directives increased opportunities for public participation, CERCLA remedy selection primarily remains a review-and-comment process because of its limitations on broad public participation until after decisions between the agency and responsible parties have already been made.[31] The agency does not invite the public to participate in the decision-making process, but instead promulgates a "take it or leave it" stance.[32] As a result, review-and-comment has been characterized as effective in improving "public awareness but not public participation."[33]

B. Regulatory Negotiation

Responding to the limitations of review-and-comment, regulatory negotiation was developed as another alternative to involve the public in administrative decision-making.[34] Also known as "negotiated rulemaking," regulatory negotiation is more cooperative than review-and-comment, in that it allows for discussion between the negotiating parties to jointly identify all the issues.[35] Furthermore, regulatory negotiation leads to more informed decisions since the parties with the information are at the negotiating table.[36] Stakeholders are brought together to discuss the development of a

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30. *Id.*

31. *Id.* at 912-13.

32. *Id.* at 913. By giving the public an opportunity to comment only after decisions have been reached, the public is prone to react with "aggressive position-taking" and "hard-line rejectionist positions as a way to 'modify' the predetermined result." *Id.*

33. *Id.*

34. *See generally* Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) for an instructive background to regulatory negotiation.

35. *See generally* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

> Negotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA) with a negotiation process that takes place before an agency issues a proposed regulation. The agency establishes a committee comprised of representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff. The committee meets publicly to negotiate a proposed rule. If the committee reaches consensus, the agency typically adopts the consensus rule as its proposed rule and then proceeds according to the notice-and-comment procedures specified in the APA.

Id. at 1256-57.

36. Applegate, *supra* note 7, at 915.

regulation.[37] The results of a complete negotiated rule-making process are formally enacted as a regulation by an agency.[38]

However, just like review-and-comment models, this forum has its drawbacks.[39] Most significantly, the regulatory negotiation favors the well-organized interests and excludes those people who are unorganized, because of the ease at which organized interests are identifiable.[40] Thus, the outcome does not always take into account the public good because these groups are often not representative or accountable to the general public.[41]

The regulatory negotiation of woodstoves, occurring in the mid-1980s, illustrates the shortcomings of this method.[42] After public officials discovered that woodstoves caused an increase in hazardous air pollutants in the 1980s, the Environmental Protection Agency (EPA) formed an advisory committee to negotiate its "proposed new source performance standards for woodstoves."[43] The committee included representatives from sixteen organizations that had been active in the state regulation of woodstoves and had a "stake in the outcome of the proposed rule."[44] In theory, the

37. SUSSKIND & FIELD, *supra* note 2, at 143-44.

38. *Id.* "[M]ore than a dozen federal agencies in the United States and Canada have used negotiated rule-making procedures successfully." *Id.* In addition to the EPA's development of woodstove emissions rules in the 1980s, other examples of successful regulatory negotiations include "Agriculture Canada's development of regulations for anti-sap-stain chemicals used in controlling mold" on fresh lumber in 1990 and the U.S. Coast Guard's "development of tank-vessel oil-spill response plans" in 1992 in compliance with the Oil Pollution Act of 1990 passed in response to the *Exxon Valdez* accident. *Id.*

39. *See generally* Coglianese, *supra* note 35, at 1335-36. Regulatory negotiation was developed to supplement review-and-comment procedures in order to facilitate agreement reached among stakeholding parties. However, regulatory negotiation "has not lived up to its promising potential to save regulatory time or prevent litigation." *Id.*

40. Applegate, *supra* note 7, at 919.

41. *Id.*

42. *See* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1988).

43. *Id.* at 60.

44. *Id.* at 61. Some of the interested parties and their respective purposes in the regulatory negotiation included: 1) the Wood Heating Alliance and the manufacturers it represented sought a national emissions limit on woodstoves to "forestall the burgeoning movement by states and localities to create their own limitations" through the negotiation; 2) states with their own woodstove regulations hoped that the negotiation of the federal rule would bring about a substantive regulation under federal law that would reduce their internal funding difficulties by "allow[ing] federal funding of local enforcement, federal enforcement, or federally mandated local enforcement;" 3) states considering woodstove regulations expected the regulatory negotiation to "enable them to achieve substantive regulation they sought without the financial or political cost within their state of developing the regulation;" 4) National Resources Defense Counsel (NRDC) were interested in a

regulatory negotiation that ensued was meant to represent the interests of consumers through the Consumer Federation of America (CFA) in addition to the interests of other organizations.[45] However, in reality, even the CFA admitted that "consumers are hardly a homogenous entity."[46]

> The CFA may have represented the interests associated with the mentality of a Consumers Reports reader, but it did not appear to lobby on behalf of poor, rural folk for whom the rule will provide little benefit and perhaps significant burden. Moreover, the fact that these people do not comment on the proposed rule or challenge a final rule in court hardly establishes that the rule is fair and wise as to them.[47]

Consequently, even in its efforts to bring every interest to the negotiating table, regulatory negotiation still lacked in its ability to account for interests that were less organized or not as easily identifiable, such as consumers.[48] Some literature related to alternatives to litigation faults regulatory negotiation for its tendency

> to focus on the interests of the specific parties to the dispute without regard to broader values .... Regulatory negotiation, by reducing disputes over what is in the public interest to disputes between various private interests, and by substituting private agreement for public determinations made according to legal norms, transforms administrative rulemaking into an area of private law.[49]

Thus, "regulatory negotiation ... fundamentally alters the dynamics of traditional administrative rulemaking from a search for the public interest, however imperfect that search may be, to a search for a consensus among private parties representing particular interests."[50]

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regulation that would reduce the emission of a pollutant it believed to be harmful; 5) EPA knew that "any new source performance standard rule to which the various states and NRDC would agree would eliminate the resource intensive litigation to which EPA would otherwise be subjected and would eliminate the demand;" and 6) Consumer Federation of America (CFA) sought to further its "'consumer' goals by using the regulation to promote advertising and labeling requirements that would facilitate comparison shopping and consumer awareness." *Id.* at 61-62.

45. *Id.* at 95.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 95-96.
50. *Id.* at 97.

III. CONSENSUS BUILDING, CITIZENS ADVISORY BOARDS, AND ITS EFFECTIVENESS IN ENVIRONMENTAL PUBLIC DECISION-MAKING

Consensus building is one method of addressing the unfairness present in previous models to resolve public disputes.[51] It brings the public into the decision-making process early on and establishes a dialogue among a greater sample of representatives of various sectors of the public with the assistance of an intermediary.[52] Consensus building "requires informal, face-to-face interaction among specially chosen representatives of all 'stakeholding' groups; a voluntary effort to seek 'all-gain' rather than 'win-lose' solutions or watered-down political compromise; and, often, the assistance of a neutral facilitator or mediator."[53] While consensus building can occur without the assistance of a mediator, most public disputes benefit from a mediator because they are usually highly complex; affected groups are hard to identify and difficult to represent; emotional, psychological, and financial stakes run high; and power imbalances may prevent direct dealings among disputants.[54]

Citizens advisory boards, a form of consensus building, later developed in response to the issue of unfairness of public involvement in both review-and-comment and regulatory negotiation.[55] Citizens advisory boards "represent a useful new alternative to the one-way . . . communication of the review-and-comment models and to the narrow representation of regulatory negotiation[,]. . . result[ing] in better administrative decisions that enjoy widespread public support."[56] In accordance with the consensus building model, citizens advisory boards seek to bring in public participation early to the administrative decision-making process.[57] A citizens advisory board is composed of citizens interested in environmental disputes or affected by an agency (whose actions are at issue) sponsoring the board.[58] The goal of a citizens advisory board is to create an open, yet structured, forum for lay and technical people to cooperate in direct communication, candidly discussing and collaborating to reach decisions which have not yet been determined by

51. SUSSKIND & CRUIKSHANK, *supra* note 3, at 80-81.
52. Applegate, *supra* note 7, at 921.
53. SUSSKIND & CRUIKSHANK, *supra* note 3, at 11.
54. *Id.* at 136. *See also* Susskind, *supra* note 1, at 4-5.
55. Applegate, *supra* note 7, at 905.
56. *Id.* at 957.
57. *Id.* at 921.
58. *Id.*

the sponsoring agency.[59] Since the function of the advisory board is to render advice and recommendations, it is important that they represent a broad spectrum of public concerns and interests.[60] The citizens advisory board is created through an independent convener, hired by the agency.[61] The convener selects members to the board with the aim of including a broad base of interests, identifies a neutral chairperson who acts as the mediator in providing direction and leadership, and drafts a written statement outlining the basic mission and procedures.[62] A citizens advisory board that effectively addresses fairness requires the implementation of commitment to one another in cooperation and honesty, commitment to the process, adequate leadership provided by the chair, and transparency to the general public.[63]

From the review-and-comment models to citizens advisory boards, agencies are making a concerted effort to provide for public participation in the administrative decision-making process of environmental disputes.[64] The various approaches demonstrate that fairness in the process is integral to adequate public involvement and influence, dependent upon the representation of a broad range of interests and the point in the process at which the public becomes involved.

A. Effectiveness of Consensus Building and Citizens Advisory Boards in Addressing Fairness

Fairness in mediation processes is an issue that will always exist, regardless of the various attempts to deal with it. Undoubtedly, consensus building and citizens advisory boards actively respond to the needs of fairness with public participation, in ways that review-and-comment or regulatory negotiation lack.[65] Susskind & Cruikshank note that,

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59. *Id.* at 923.

60. *Id.* at 936.

61. *Id.* at 931, 935-36.

62. *Id.* at 935-36.

63. *Id.* at 937-45.

64. *See generally* SUSSKIND & CRUIKSHANK, *supra* note 3, at 247. Susskind & Cruikshank believe that "[c]onsensual approaches to the resolution of public disputes will increasingly offer an opportunity to demonstrate that democratic institutions can work effectively." *Id.*

65. *See generally id.* at 76-77. According to Susskind & Cruikshank, it is necessary for a consensus-building approach that "produce[s] fairer, more efficient, wiser, and more stable resolution" in public disputes to be ad hoc, informal, consensual, face-to-face, supplementary to existing structures, and restricted to distributional issues. *Id.* at 77, 79.

> [*A*]*d hoc* . . . mean[s] there should be room in each situation for the participants to design the dispute resolution process they prefer. [*I*]*nformal* . . . mean[s] the parties should deal with each other (and not through hired advocates) in a nonbureaucratized fashion. A

> Public disputes can be resolved more effectively (that is, better outcomes are more likely) if the parties voluntarily negotiate an agreement that serves their interests . . . . Consensual solutions are better—and will be accepted—only if all the stakeholding parties are confident they will get more from a negotiated agreement than they would from a unilateral action, or from conventional means for resolving distributional disputes.[66]

Nevertheless, as will be discussed later, unfairness is inevitable.

In contrast to review-and-comment and regulatory negotiation, the consensus building method addresses fairness by bringing the public into the decision-making process early and working to obtain broader public representativeness.[67] For instance, before negotiation begins, the mediator convenes separately with potential stakeholders to discuss their interests and works with the present parties to identify missing groups or strategies for representing those not in attendance.[68] Also, the mediator helps to equalize the playing field among the different interests involved by allowing voices to be heard which may otherwise have been suppressed without an intermediary. The mediator provides a safe atmosphere for brainstorming of potential options to occur during the negotiation and caucuses with the parties privately as necessary.

In addition, fairness in mediation is improved through the proper use of the media to ensure that the public is aware and can be involved in what representatives in the mediation are discussing.[69] "It is often necessary to organize public educational processes and work closely with the press in an

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> *consensual* approach is achieved when everyone agrees to live with a particular formulation of a problem and its solution because everyone knows the settlement is the best available under the circumstances, and because it attend to each party's most important concerns. *Face-to-face* implies that the disputing parties should sit around a table and work together until they produce an agreement—or decide to give up. A *supplementary* approach suggests that if agreement is not reached, the parties will fall back upon conventional dispute resolution processes. And finally, . . . such an approach is *not* appropriate when the dispute is primarily about the definition of constitutional rights or legality.

Id. at 77.

66. *Id.* at 80-81. An effective resolution of public disputes depends on whether the diverse interests are met and satisfied. Stakeholding parties using a consensus-building strategy for a public dispute will have greater satisfaction in the outcomes when their short-term and long-term interests are met. Thus, the first priority for any group in a public dispute is to clarify its interests, both in knowing what its members want and in estimating what its members would receive by conventional means without consensus. *Id.* at 80.

67. *See* Applegate, *supra* note 7, at 921.

68. *See* Susskind, *supra* note 1, at 5.

69. SUSSKIND & FIELD, *supra* note 2, at 214. *See also* LAWRENCE SUSSKIND, PAUL F. LEVY & JENNIFER THOMAS-LARMER, NEGOTIATING ENVIRONMENTAL AGREEMENTS 9 (2000).

effort to be sure that all the stakeholders know what their representatives are doing. Public dispute mediation can only be effective if the stakeholder representatives stay in close touch with their constituents."[70] A mediator can be vital to the process by being the neutral voice to the media, informing them of substantive progress, and educating them on the consensus-building process in general.

While the mediator brings an element of fairness, the stakeholders retain the ability to monitor the fairness of the mediator herself.[71] For consensus building to be fair to the various parties, neutrality and competence of the mediator are significant.[72] All sides want to make sure the mediator will be impartial and unbiased. The mediator's background and affiliation are taken into account to ensure neutrality.[73] However, neutrality is best addressed by the fact that the role of the mediator is largely in the hands of the parties, who have the control to discharge the mediator if one party feels he or she is biased or otherwise unsatisfactory.[74] Competence of the mediator also helps control fairness. By demonstrating credibility, a mediator with substantive expertise is viewed as more competent. With environmental disputes in particular, stakeholders will more readily trust a mediator who is knowledgeable and familiar with scientific and technical issues specific to the dispute.[75]

Furthermore, a mediator's particular mediation style may affect fairness in both the process and outcome of an environmental dispute. Whether a mediator is facilitative or evaluative in his style and whether he focuses more narrowly on the legal issues or more broadly on underlying interests, influences the direction the mediation will take.[76] By nature, a facilitative mediator focuses more on making sure the process is fair and monitoring the dialogue. However, because a facilitative mediator will not interject with his ideas, he might hinder substantive fairness by failing to offer his viewpoint on alternative solutions that the parties may not see. On the other hand, an extremely evaluative mediator may be unfair in being too aggressive in offering their opinions on the best outcome or steering the negotiation

70. Susskind, *supra* note 1, at 6-7. *See also* SUSSKIND & FIELD, *supra* note 2, at 198-221.

71. SUSSKIND, LEVY & THOMAS-LARMER, *supra* note 69, at 250-51. Susskind asserts that "'veto power' is key. Any party to a dispute can disqualify a proposed helper who seems biased." *Id.* at 251.

72. *Id.*

73. SUSSKIND & CRUIKSHANK, *supra* note 3, at 139.

74. *Id.*

75. Susskind, *supra* note 1, at 5.

76. *See generally* Jeffrey Krivis & Barbara McAdoo, *Know Thyself: A Test that Classifies Style to Improve Mediators' Performance*, ALTERNATIVES, Dec. 1997 at 1 (describing the four mediator styles (Evaluative Narrow, Evaluative Broad, Facilitative Narrow, and Facilitative Broad) theorized by Professor Leonard L. Riskin of the University of Missouri-Columbia School of Law).

toward solutions that had proven successful in the past.[77] Consequently, taking into account the issues of fairness, the most effective mediator is probably one whose style is flexible in gauging the particular needs of the stakeholders involved.

Citizens advisory boards, a specific type of consensus building, address the shortcomings in fairness of review-and-comment and regulatory negotiation processes. Unlike review-and-comment, citizens advisory boards are forums for public involvement in affecting the decision-making process early. Also, in contrast to regulatory negotiation, citizens advisory board members are "not characterized by representation of an organized group, but by the more generalized idea of an identifiable interest that contributes to achieving a broad range of potentially affected interests."[78] Citizens advisory boards improve fairness by allowing for early public involvement in influencing the decisions, and including a broader spectrum of people than would be represented in a regulatory negotiation.

i. Site-Specific Advisory Boards

Characteristic of citizens advisory boards are site-specific advisory boards (SSABs), usually sponsored by the government under agencies such as the Department of Energy (DOE) or the EPA.[79] SSABs assist in making sure that the processes of risk assessment, public participation, risk management, and decision-making proceed effectively, with the consensus and mutual understanding of the parties involved.[80] "Public workshops, public comment periods, public hearings, and specifically designed opinion

77. SUSSKIND & CRUIKSHANK, *supra* note 3, at 163.

78. Applegate, *supra* note 7, at 922. *See also* Allen, *supra* note 4, at 303.

79. Applegate, *supra* note 7, at 926-27. Incidentally, EPA established site-specific advisory boards, after its initial attempts at "public participation in the environmental remediation . . . echo[ed] the limitations of the review-and-comment paradigm" through late public involvement in decision making. *Id.* at 928. "The public was involved only as an afterthought, once the 'deal had been cut' between agency and regulators." *Id.*

80. NATIONAL RESEARCH COUNCIL, BUILDING CONSENSUS THROUGH RISK ASSESSMENT AND MANAGEMENT OF THE DEPARTMENT OF ENERGY'S ENVIRONMENTAL REMEDIATION PROGRAM 33 (1994), http://books.nap.edu/books/NI000191/html/33.html#pagetop (last visited Jan 31, 2006). Risk assessment first begins with a work plan, which identifies the contaminants, pathways of exposure, and points of concern to the stakeholders. *Id.* at 34. In addition, the work plan specifies the procedures to assess exposures and risks, identifies the research necessary to fill in gaps in data and methods, and projects a preliminary timetable for remediation activities. *Id.*

polls to elicit public concerns" may also accompany SSABs to encourage dialogue among the parties and ascertain the public's interests.[81] SSABs are

> independent public bodies established to provide policy and technical advice to the regulated and regulating agencies with respect to fundamental clean-up decisions[,] . . . [comprised of] both readily identifiable affected parties, and also unorganized "individual residents that live in the communities or regions in which [the] site is located."[82]

With the main goal of reaching consensus, governmental decision-makers are also active on SSABs, as nonvoting members, to fairly provide for diversity of perspectives to be heard.[83] SSABs place heavy emphasis on the involvement of the public, knowing that,

> [b]road stakeholder participation can improve the quality of assessments by increasing the comprehensiveness of data; ensuring that all site-relevant pathways, end points, and land uses are taken into account and are based on an accurate understanding of habits, values, and preferences of affected people; and contributing to the discussion of appropriate and acceptable uses for risk assessment in the process of risk management.[84]

The benefit of public participation in SSABs is that it lends credibility to the risk assessment "institution" used by the DOE.[85] As a result, small community groups and unorganized interests perceive the SSABs as fair, neutral, and reliable.[86] Moreover, it is possible for the DOE to improve the effectiveness of public participation even further if it provides the most-affected communities with grants to supply technical assistance in understanding and responding to scientific studies or other complex issues.[87] Thus, consensus building through SSABs demonstrates fairness by making a deliberate effort to bring in public participation early, obtaining the values and interests of the public, and ensuring that their voices are heard.[88]

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81. *Id.* at 33.

82. Applegate, *supra* note 7, at 928.

83. Applegate, *supra* note 7, at 929.

84. NATIONAL RESEARCH COUNCIL, *supra* note 80, at 36.

85. *Id.* at 37-38. The term "institution" here does not refer to any particular agency, organization or company, but is used in a much broader sense to refer to the entire system for undertaking and explaining risk assessments, which may include many different organizations collaborating together. *Id.*

86. *Id.* at 40.

87. *Id.* at 35-36. National Research Council states, "Stakeholders must be provided with accessible, understandable, clear information. Information must be tailored to the needs of individual stakeholder groups and distributed far enough in advance of decision points or interaction points for them to study and understand it. All stakeholders should have access to the same information." *Id.* at 36.

88. *See generally id.* at 35-37.

In 1993, a site-specific advisory board was established in Fernald, Ohio to address the clean-up and future use of an extremely hazardous radioactive waste site in close proximity to neighboring properties.[89] This board contained many elements addressing fairness that the citizens advisory board model emphasizes. For instance, an independent convener chose the members of the Fernald advisory board (formally called the Fernald Citizens Task Force), and recommended a neutral chair to mediate the meetings and draft a charter identifying the specific issues and mission of the Task Force.[90] In attempts to provide for a broad base of public participation, the board members chosen were "socially, economically, and educationally diverse," and included local residents, businesspeople, representatives of local and national environmental groups, health professionals, and engineers.[91] Through early public involvement in the agency decision-making process, the Task Force sought consensus and dialogue on all issues, paying attention to fundamental interests such as protection of human health, while at the same time, recognizing technological and financial constraints.[92] The Task Force demonstrates that citizens advisory boards are advantageous because, even if consensus is not reached on all issues, a good working relationship has been established. The board has achieved the long-term benefits of trust among the public and accountability of the agency that will be essential for any future relations.

IV. LIMITATIONS OF CITIZENS ADVISORY BOARDS TO ESTABLISH COMPLETE FAIRNESS IN ENVIRONMENTAL PUBLIC DISPUTES

Although citizens advisory boards may demonstrate some success in addressing fairness of public participation in environmental disputes, unfairness in the process is inevitable and will always be present. Different models of involving the public in the decision-making process show that unfairness subsists regardless of the various attempts to remedy it. Even though citizens advisory boards may address unfairness where other procedures like review-and-comment and regulatory negotiation could not, limitations still exist.[93]

89. Applegate, *supra* note 7, at 930.

90. *Id.*

91. *Id.* at 928-31.

92. *Id.* at 931.

93. In addition to limitations in unfairness to the consensus-building model of citizens advisory boards, Susskind & Cruikshank acknowledge that there are other drawbacks to the use of

For instance, one study showed that the public's purported inability to understand complex data and their lack of experience hindered them from providing any useful input into the process.[94] The difficulties of understanding highly complex and technical information will still place members of the public on the advisory board at a slight disadvantage in not having the complete picture in making informed decisions, even if the citizens advisory boards attempt to assist the most-affected communities with grants to provide for technical assistance in understanding scientific data.[95]

In addition, "there is no necessary assurance that the [outside] public will accept an 'advisory group' to speak on its behalf[,] . . . [as] advisory groups may become elitist, or otherwise lose touch with constituencies. . . ."[96] Generally, the public as a whole is fickle, yet apathetic; it does not initially care to become involved in a public dispute discussion until their so-called representatives on the board are perceived as unrepresentative.

Assembling a fully representative cross-section of the community on the board is another difficult challenge that will always impede the road to complete fairness in public involvement. One study demonstrated that, even despite best efforts to obtain a representative sample, "the panel selected was better educated and had a higher average income than that of the general population."[97] Other impediments include:

> [The] difficulties in identifying members, exclusion of potential members by others, and the appearance late in the process of new potential members. In addition, there is the

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consensus-building models, such as time, which may have an indirect effect on fairness in the process. SUSSKIND & CRUIKSHANK, *supra* note 3, at 243. On average, a negotiation can vary between several months and a year or more. *See id.* "Both powerful and less powerful parties are often tempted to use other avenues that seem to offer a quick solution. The prospect of a speedy court ruling, for instance, is often difficult to resist." *Id.* However, Susskind & Cruikshank also note that often times speedy outcomes are a false hope because if the dispute is not resolved in a manner that meets "the satisfaction of all the parties, they merely shift [the dispute] to another arena." *Id.* Indeed, if the existing apparatus of "public agencies, courts, and legislative bodies were able to act promptly, without the risk of subsequent challenge or reconsideration, consensus building would be much less attractive." *Id.* Consensus building is attractive for the very reason that more effective and stable outcomes are necessary in public disputes. *See id.* Even if more time must be taken to contact and brief all potential stakeholders, choose a spokesperson for each group, select appropriate and qualified intermediaries, set ground rules, establish an agenda, allow time for extensive fact-finding before problem solving can begin, "these are good investments . . . . [I]t is often necessary to 'go slow to go fast.'" *Id.* at 243-44.

94. Allen, *supra* note 4, at 303-04 (referencing "an earlier study conducted in the U.K. of the potential incorporation of public values into siting decision for hazardous plant").

95. *See generally* NATIONAL RESEARCH COUNCIL, *supra* note 80, at 35-36.

96. Allen, *supra* note 4, at 304.

97. *Id.* at 305.

> overall problem of changing levels of interest of stakeholders as the process unfolds over a number of years. Thus, inclusion of stakeholders results in a process that is unlikely to be as straightforward and efficient as some might desire; however, this inclusion is essential for the overall credibility of the process.[98]

"Splinter groups" emerging within a consensual approach to dispute resolution in the public sector is another valid threat to the process.[99] Splinter groups are factions that form during a consensus-building process or even after an agreement has been ratified.[100] They raise new interests and concerns sufficiently different from the other groups at the table to necessitate their division to form a new group.[101] Splinter groups can severely limit the effectiveness and applicability of consensual approaches to dispute resolution and any outcomes reached if a runaway faction is able to undermine the entire process at its conclusion.[102] Furthermore, it may be more difficult for splinter groups to voice their needs and concerns because they have emerged during the middle of discussions or even after an agreement has already been reached among existing stakeholders.[103] At first glance, splinter groups actually address fairness in involving a wider sector of the public and are seemingly beneficial in representing new interests. However, upon closer analysis, it is difficult for splinter groups to gain political credibility and money to assert their interests and contact all potential stakeholders mid-stream.[104] Thus, splinter groups may do more harm than good in the fairness of a consensus building approach.[105]

Also, fairness raises the question of whether hard-to-represent interests, such as future generations, should garner representation on the advisory board through proxies.[106] If future generations will be affected by the

98. NATIONAL RESEARCH COUNCIL, *supra* note 80, at 33-34.

99. SUSSKIND & CRUIKSHANK, *supra* note 3, at 244.

100. *Id.*

101. *See id.*

102. *See id.*

103. *Id.*

104. *Id.*

105. *See id.* While Susskind & Cruikshank concede that there is no way to completely eliminate the threat of splinter groups, the authors do offer solutions to reduce their likelihood of forming and soften the impact if they emerge. *Id.* For instance, the participants may reassemble to renegotiate and consider concerns that were not addressed earlier. *Id.* Or, if the negotiators cannot be reassembled, the agreement may still withstand challenges of the splinter groups because the final agreement was consensual by everyone else at least until the splinter group emerged. *Id.*

106. Lawrence Susskind, *Building Consensus*, *in* BEYOND BACKYARD ENVIRONMENTALISM 87 (2000) (responding to debate presented by Charles Sabel, Archon Fung, & Bradley Karkkainen).

decisions and recommendations made by the advisory board, then fairness theoretically requires that these hard-to-represent interests have a voice through proxies.

Thus, although deliberate efforts have been made to make public involvement as fair as possible, issues of fairness will always be present. Challenges arise in ensuring that every voice and interest in the community is adequately represented. As such, environmental agencies can only do their best to address as many interests as candidly as they can; and most importantly, they should make every effort to sustain the trust of the public in their tasks at hand.

V. CONCLUSION

Unlike the conventional legal system with rules of conduct and procedure to ensure fair representation, the challenges to fairness in alternative dispute resolution processes are still being worked through. Even so, environmental agencies have made headway in the arena of public participation in complex environmental dispute resolution. Review-and-comment and regulatory negotiation procedures made attempts at addressing fairness.[107] However, where these procedures lacked in fairness, the introduction of citizens advisory boards, a form of consensus building, improved procedures by allowing for a broader base of public representativeness early in the decision-making process.[108] More specifically, site-specific advisory boards bring consensus and mutual understanding effectively to risk assessment, public involvement, risk management, and decision-making in environmental public disputes.[109]

Yet, challenges to fairness still exist in consensus building, and, in all actuality, will always exist. Too many other variable constraints impede complete fairness in consensus building methods, such as the ability to understand complex or technical issues, the permanent apathy of the public overall, the difficulty in identifying all potential stakeholders, and how to deal with splinter groups and hard-to-represent interests.[110] While these hindrances to fairness will never completely disappear, some limitations can be dealt with in creative ways. The federal government could provide grants to hold workshops for interested members of the public to understand complex scientific and technical data, in order to improve the effectiveness

107. *See supra* notes 24-50 and accompanying text.
108. *See supra* notes 51-78 and accompanying text.
109. *See supra* notes 79-92 and accompanying text.
110. *See supra* notes 93-106 and accompanying text.

of public participation.[111] Also, a renegotiation provision could be included in a negotiated agreement to deal with splinter groups or hard-to-represent interests that later emerge.[112] In this way, the agreement preserves the possibility to reassemble all the participants to consider these new concerns not addressed earlier.[113]

Even though citizens advisory boards have certain advantages in addressing the fairness in public participation better than the review-and-comment method or regulatory negotiation, it is important to note that citizens advisory boards using consensus building do not strive to replace the other environmental dispute resolution models.[114] On the contrary, "they are in fact simultaneously available and amount to a menu of public participation procedures from which agency decisionmakers can choose."[115]

Nevertheless, if nothing else, environmental agencies build better relations and rapport with the community and public-at-large through their attempts at fairness with citizens advisory boards. If the issues of fairness can never be fully resolved, then at the very least, consensus building brings mutual understanding among the government, agencies, environmental interest groups, businesses, and the local community.[116]

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111. NATIONAL RESEARCH COUNCIL, *supra* note 80, at 35-36.

112. SUSSKIND & CRUIKSHANK, *supra* note 3, at 244.

113. *Id.*

114. Applegate, *supra* note 7, at 951.

115. *Id.* Applegate further specifies,

> The review-and-comment models are undoubtedly the most universally useful ones, as they can be adapted to informal adjudicatory or licensing decisions, as well as to general and specific rulemakings. Citizens advisory boards, in contrast, are most obviously suited to decisions that have a relatively narrow and well-understood impact, typically (though not necessarily) geographically defined.

Id. While citizens advisory boards are unable to confront the needs of every decision, they "can result in better administrative decisions that enjoy widespread public support" with careful organization and structuring. *Id.* at 957.

116. In fact, Susskind & Cruikshank believe that the consensus-building technique holds great promise as a hallmark of an effective representative democracy. SUSSKIND & CRUIKSHANK, *supra* note 3, at 246-47. They believe that consensus building is not merely a "fad" because it does depend on governmental intervention but can be proposed by any party with "[n]o abdication of private responsibility." *Id.* at 246. "As a result, we are confident that consensual approaches to dispute resolution will thrive. As they do, it will be easier to avoid or break whatever impasses emerge." *Id.* at 247.