

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**Searching for a Sense of Control: The
Challenge Presented by Community Conflicts
Over Concentrated Animal Feeding Operations**

by

Nancy A. Welsh and Barbara Gray

Originally published in PENN STATE ENVIRONMENTAL LAW REVIEW
10 PENN ST. ENVTL. L. REV. 295 (2002)

www.NationalAgLawCenter.org

Searching for a Sense of Control: The Challenge Presented By Community Conflicts Over Concentrated Animal Feeding Operations

Nancy A. Welsh* and Barbara Gray**

I. Introduction

The growth in the number of concentrated animal feeding operations (“CAFOs”), particularly those involved in swine production, has brought with it increased community concern and outright conflict in many communities across the United States.¹ Most commentators have focused upon anticipated outcomes to explain the contentiousness of CAFO-related disputes.² Meanwhile, even though the social dynamics that contribute to the development and escalation of conflicts over

* Associate Professor of Law and Associate Director of the Center for Dispute Resolution, The Dickinson School of Law, The Pennsylvania State University; B.A. *magna cum laude*, Allegheny College, 1979; J.D., Harvard Law School, 1982.

** Professor of Organizational Behavior and Director, Center for Research in Conflict and Negotiation, Smeal College of Business, The Pennsylvania State University; B.S. *magna cum laude*, University of Dayton, 1968; Ph.D., Organizational Behavior, Case Western Reserve University, 1979.

1. See B. J. Hubbell and R. Welsh, *An Examination of Trends in Geographic Concentration in U.S. Hog Production*, 30 JOURNAL OF AGRICULTURAL AND APPLIED ECONOMICS 285-99 (1998).

2. Particularly, commentators have focused on concerns regarding economic viability, environmental contamination, and over-regulation. See e.g., D. L. Bartlett & J. B. Steel, *The Empire of Pigs*, TIME, Nov. 30, 1998, at 52-64; A. Thurow, *An Industrializing Animal Agriculture: Challenges and Opportunities Associated with Clustering*, in PRIVATIZATION OF TECHNOLOGY AND INFORMATION TRANSFER IN THE U.S. AGRICULTURE: RESEARCH AND POLICY IMPLICATIONS (S. Wolf ed., 1997); J. E. Ikerd, LARGE SCALE, CORPORATE HOG OPERATIONS: WHY RURAL COMMUNITIES ARE CONCERNED AND WHAT THEY SHOULD DO (Sustainable Agriculture Systems Program, Univ. of Mo., Working Paper, 1998); U.S. GOVERNMENT ACCOUNTING OFFICE, GAO/RCED-95-200BR, ANIMAL AGRICULTURE: INFORMATION OF WASTE MANAGEMENT AND WATER QUALITY ISSUES (Briefing report to the Committee on Agric., Nutrition, & Forestry, U.S. Senate, June 1995).

CAFOs parallel those exhibited in other kinds of community conflicts,³ little research has systematically examined the social dynamics associated with CAFO conflicts. One exception to this deficiency is recent work conducted by a team of researchers that examined CAFO-related disputes in Pennsylvania in order to make recommendations for alternative models for the resolution of such disputes.⁴ The researchers found that Pennsylvania stakeholders' perceived loss of direct and indirect control in the decision-making processes governing CAFOs was at the root of these conflicts.⁵ This Article highlights stakeholders' concerns about the procedural fairness of the governmental decision-making surrounding CAFOs, including the negotiation, passage, and implementation of the Pennsylvania Nutrient Management Act ("Act 6"); decisions regarding CAFOs' requests for permits; and townships' adoption of CAFO-related ordinances. The Article argues that these perceptions of procedural unfairness are among the primary factors contributing to Pennsylvania stakeholders' perception of loss of control. Alternative mechanisms for the resolution of CAFO-related disputes, therefore, must respond quite explicitly to the need for procedural justice.

In Part I, based on interviews with stakeholders in Pennsylvania, this Article will describe the model of how conflicts over CAFOs arise and will provide an overview of the stakeholders' perceptions regarding uncertainty, risk, unfairness, threats to identity, and mistrust, and it will demonstrate the effect of these cognitive and affective responses upon perceptions of control. In Part II, the Article will explore the procedural justice implications of the central issues of fairness, identity maintenance, and trust, as well as stakeholders' preferences for more productive resolution of CAFO-related conflicts. Finally, in Part III, the Article will propose five community participation and dispute resolution processes that have the potential to increase the reality and perception of procedural justice for all members of the communities affected by decision-making regarding CAFOs. The analysis in this Article is intended to help policy makers, regulators, and the disputants themselves

3. See, e.g., W. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* 30-32 & 72-88 (1975); Edgar Schein, *Intergroup Problems in Organizations*, in *ORGANIZATIONAL PSYCHOLOGY* 96-99 (David Kolb et al. eds., 2d ed 1970); M. SHERIF & C. SHERIF, *GROUPS IN HARMONY AND TENSION* 105-8 (1966).

4. CHARLES ABDALLA, JOHN BECKER, CELIA COOK-HUFFMAN, BARBARA GRAY & NANCY WELSH, *ALTERNATIVE CONFLICT RESOLUTION STRATEGIES FOR ADDRESSING COMMUNITY CONFLICTS OVER INTENSIVE LIVESTOCK OPERATIONS: FINAL REPORT FOR PENNSYLVANIA DEPARTMENT OF AGRICULTURE CONTRACT # ME 448432* [hereinafter ABDALLA ET AL., PENNSYLVANIA REPORT]. See also, Charles Abdalla, John Becker, Ralph Hanke, Celia Cook-Huffman, Barbara Gray, and Nancy Welsh, *Community Conflicts Over Intensive Livestock Operations: How and Why Do Such Conflicts Escalate?*, 7 *DRAKE J. OF AGRICULTURAL LAW* (forthcoming) (2002).

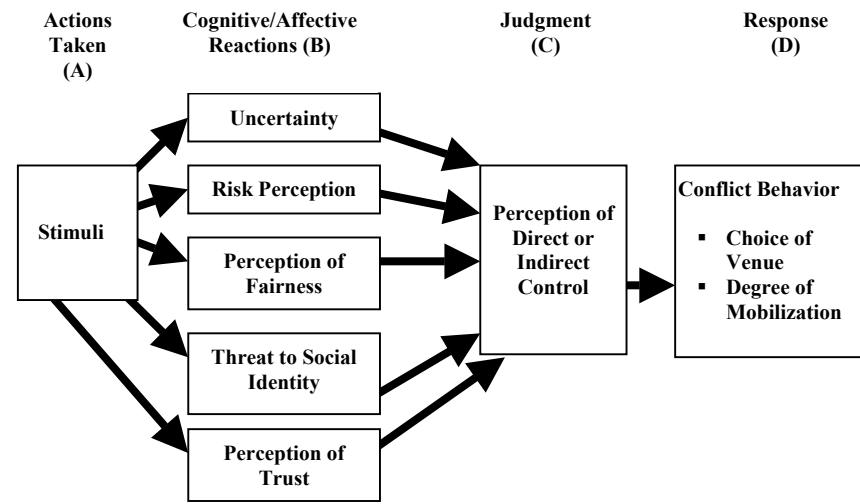
5. *Id.*

to anticipate the social dynamics of these conflicts and to make informed choices about how to address them constructively.

II. Community Conflicts over CAFOs

In 1999-2000, Abdalla et al.⁶ conducted in-depth interviews with Pennsylvania stakeholders who have been involved in CAFO-related disputes, including local farmers, community activists, environmentalists, representatives of agribusiness, and local, state, and federal officials.⁷ Based on these interviews, Abdalla et al. proposed a model of how conflicts over CAFOs arise.⁸ This Article begins with a brief overview of this model before looking more closely at the procedural justice issues embedded within it. Abdalla et al.'s model of community conflicts over CAFOs focuses on the inter-relationships between: 1) the stimuli that motivate people to become involved in the conflict, 2) their cognitive and affective reactions to the conflict (perceptions, feelings, interpretations, attributions, etc.), 3) their subsequent perceptions regarding their direct or indirect control in the situation, and 4) the actions they take based upon their interpretations and perceptions. Figure 1 shows the four main steps in the model.⁹

Figure 1. The Four Main Steps Leading to How Conflicts Over CAFOs Arise



6. See *supra* note 4.

7. We conducted interviews with 28 stakeholders, including local farmers; environmentalists; representatives of agribusiness; Farm Bureau representatives; local, state, and federal officials; and concerned citizens, determined through a snowball sampling procedure. See *id.*

8. See *id.* at 316-34.

9. See *id.*

Initially, a stimulus or precipitating action occurs (see A in Figure 1), such as the passage of a state or federal law regulating CAFOs, a proposal for siting a CAFO in a community, or an incidence of environmental damage from a particular site. The stimulus generates responsive actions by other stakeholders that either fuel or circumvent conflict.¹⁰ Although the model presents only one cycle of stimulus and reaction, it is understood to be cumulative, occurring against an existing backdrop of history and established relationships among the stakeholders.

The stimulus triggers one (or more) of five critical cognitive or affective reactions from concerned stakeholders (see B in Figure 1). These cognitive reactions, alone or in combination, cause stakeholders to experience perceptions of more or less control over the situation. The interviews with Pennsylvania stakeholders revealed that they experienced less control over the situation when (1) their perception of uncertainty about the situation, including the legal, scientific and/or economic issues implicated in the situation increased; (2) their perception of the risk associated with CAFOs increased; (3) they believed the actions taken by others were unfair; (4) an important aspect of their own identity was threatened; and/or (5) their mistrust of other parties increased.¹¹

Using portions of the interviews with stakeholders, this Article will now briefly explain the underpinnings of stakeholders' perceptions regarding uncertainty, risk, fairness, social identity, and trust.

A. *Perceptions of Uncertainty and Risk*

A stimulus or precipitating action (A in Figure 1) may either increase or reduce the level of uncertainty an individual feels about a situation, as well as how much risk the individual perceives as associated with the situation. In Pennsylvania, one such stimulus was the negotiation and passage of the Nutrient Management Act.¹² This state legislation, which became law in 1993, was intended to define the terms for legitimate public decision-making regarding the impacts of manure generated by CAFOs in Pennsylvania.¹³ The Act protects water quality by requiring certain CAFOs to develop nutrient management plans and to

10. *See id.* at 18-19.

11. *See id.* at 19-32.

12. *See id.* at 18-19.

13. *See* The Pennsylvania Nutrient Management Act, 3 P.S. § 1702 (1999) ("The purposes of this act are as follows: (1) To establish criteria, nutrient management planning requirements and an implementation schedule for the application of nutrient management measures on certain agricultural operations which generate or utilize animal manure. . . .").

operate in a manner consistent with those plans, once they are approved, or face sanctions.¹⁴ The Act also pre-empts local government authority to pass regulations or ordinances that are inconsistent with or more stringent than the requirements of the Nutrient Management Act.¹⁵

Because the Nutrient Management Act specifies precisely how CAFO operators can achieve compliance with Pennsylvania's environmental requirements, agribusinesses and farmers who wish to build CAFOs have experienced an increased level of certainty regarding their obligations in managing animal nutrients.¹⁶ For other stakeholders, however, the new statute presents a confusing morass of information that creates discomfort and uncertainty about what rights they have, how enforcement will occur, and what is or is not covered by the law.¹⁷ This confusion generates uncertainty regarding the protection provided by the law and also appears to lead to a decreased sense of control for these stakeholders, especially when they perceive that their efforts to clarify the confusion produce little or no result.¹⁸

As community activists in Pennsylvania discussed the concerns triggered by the passage of Act 6, their comments centered around perceptions of uncertainty regarding the safety of CAFO-generated odors, the impact of state pre-emption of local authority to regulate CAFOs, and the likelihood of enforcement of environmental regulations.¹⁹ For example, one community stakeholder said, "Pennsylvania's Nutrient Management legislation has some pre-emptive language which has left a lot of questions in the minds of people as to what rights they really do have A lot of municipalities are just struggling with this thing as to what they're legally allowed to do."²⁰ Others noted:

Here is a new program to oversee these large operations to require a permit, and nobody knows where to call to get the answers for that You're supposed to go to the regional offices to get your answers and the regions haven't been trained on it yet. They don't know what the answers are. People are calling conservation districts that don't have authority under that for knowing what the answers

14. *See id.* at § 1706, 1711-12.

15. *See id.* at § 1717. *See also* Michael Meloy, *An Overview of Nutrient Management Requirements in Pennsylvania*, 10 Penn St. Envtl. L. Rev. 249 (2002).

16. *See* ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 19. It should be noted, however, that agribusinesses and farmers experience uncertainty in other areas. *See id.* at 18-21.

17. *See id.* at 18-21.

18. *See id.* at 21.

19. *See id.*

20. *Id.* at 20.

are.²¹

We require the [state agency] to get the answers on that. They don't know. They don't know where to go to get the answers themselves. There is no recognized regulatory authority for agriculture and how this relates to agriculture . . . [w]ater consumption . . . nobody knows where to go for that. Do you go to SRBC for that? Do you go to [a state agency]? And it's very confused about what to do for water consumption.²²

Consistent with studies of risk perception,²³ different Pennsylvania stakeholders demonstrated distinctively different assessments of the level of risk presented by CAFOs. Most important was the difference between the perceptions of technical and lay observers. Previous studies have found that the former focus more on expected risks while the latter emphasize extreme possibilities.²⁴ For community members who were concerned about the potential long-term health effects of the odors associated with CAFOs, perceptions of risk were quite high. In the words of one stakeholder:

The first thing I did was I went to the medical literature to see whether they really did represent a risk. Despite what the CAFO operators say and despite what everyone else says, the literature in the scientific community is pretty well established that these things do represent a substantial risk, environmentally and from a lot of other perspectives; particularly some of the research that has been done in Europe is rather compelling.²⁵

Farmers too indicated that the current situation in Pennsylvania involved risks, but the farmers focused primarily upon the economic risk of not being permitted to operate CAFOs:

You [have] got this farmer that built this building, and has this mortgage, and if that thing is empty, they've lost. The building is worthless. The land doesn't sell for more, a lot more, just because it has a building on it. There is no return on that thing short of growing birds They're [the farmers] taking a lot of the risk They

21. *Id.* at 21.

22. *Id.* at 14.

23. *See, e.g.*, M. Elliott, *The Effect of Differing Assessments of Risk in Hazardous Waste Facility Siting Negotiations* 6-8 (unpublished manuscript, Ga. Inst. of Tech.) (1988); Gregory Fischer, M. Granger Morgan, Baruch Fischhoff, Indira Nair, & Lester B. Lave, *What Risks Are People Concerned About?*, 11 *RISK ANALYSIS* 303, 309-10 (1991).

24. *See* Elliott, *supra* note 23 at 6-8.

25. ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 8.

feel vulnerable.²⁶

B. Perceptions of Unfairness and Threats to Identity

A stimulus or precipitating action also triggers perceptions regarding fairness, and it can pose a threat to particular stakeholders' social identity (e.g., as farmers, environmentalists, community members, or even citizens). When people believe that they (or their social group) have been treated disadvantageously, *i.e.*, unfairly, in relation to other groups, they are less willing to accept existing social policy and more inclined to take legal action and engage in protest.²⁷ Fairness concerns or identity threats often provoke conflict or exacerbate already existing conflictual relationships. Examples of this dynamic can be found in the environmental justice movement, for instance, in which African-Americans have been spurred to protest over the disproportionate number of toxic sites in their communities.²⁸

The interviews with Pennsylvania stakeholders revealed that nearly all stakeholder groups perceived themselves as being treated unfairly and/or that their social identity was under attack.²⁹ Community activists and environmentalists insisted that they had not been allowed to play a meaningful role in decision-making at the state level. Meanwhile, agribusiness representatives and local farmers indicated that local government officials were treating them unfairly by passing new ordinances to regulate CAFOs. All of these stakeholders perceived a lack of respect for their rights and roles as valuable members of communities and as citizens in a democracy. These perceptions of unfairness and threats to social identity are significant, and the Article will return to them in Part II.

C. Perceptions of Mistrust

Finally, a stimulus or precipitating action may generate an increase or reduction in the level of trust that one stakeholder group feels toward other stakeholders in the dispute. Trust arises when parties can rely on

26. *Id.*

27. See Kelly Mollica & Barbara Gray, *Layoff Survivors Become Layoff Victims: Propensity to Litigate*, 24 HUMAN RESOURCE MANAGEMENT 4-5 (2001); GAMSON, *supra* note 3 at 193-4. See also Craig McEwen & Richard Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984); Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. LAW. Q. 1, 819-20 (2001).

28. See R. D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 10-20 (1990).

29. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 24-27.

others to fulfill their expectations; conversely, mistrust arises when a violation of one's expectations about another's expected behavior occurs.³⁰ Classic research on intergroup relations has shown that ruptures in trust are difficult to repair because competing groups develop stereotypes of each other as the enemy and engage in selective listening that reinforces those stereotypes.³¹

The interviews with Pennsylvania stakeholders revealed substantial perceptions of mistrust.³² Most dramatic was mistrust toward governmental agencies, which were perceived as, at best, incapable of fulfilling their responsibilities and, at worst, biased and not committed to protecting the welfare of all affected stakeholders.³³ This perception will be examined in greater detail in Part II.

D. The Effect of Cognitive and Affective Perceptions

Collectively, these cognitive and affective reactions play a key role in the progression of conflicts over CAFOs. The reactions in Step 2 lead an individual or a group to reach a critical judgment in Step 3 regarding the degree to which they are able to exercise control, direct or indirect, over the situation (see C in Figure 1). The individual stakeholder or group exercises *direct* control when there will be no outcome unless the individual or the group agrees to such an outcome. In contrast, the individual stakeholder or group exercises *indirect* control if they can influence the outcome or provide input that will be considered by the decision-maker. Stakeholders whose cognitive or affective reactions are negative (feel threatened, distrustful, etc.) are likely to feel that they have little control, either direct or indirect, over their situation.

Stakeholders' behavior in Step 4 of the model (see D in Figure 1) stems directly from their perceived ability (or lack thereof) to exert control over the situation. Loss of self-efficacy and control leaves people feeling extremely vulnerable and provokes self-protective, defensive behavior.³⁴ Thus, it affects the extent to which they become mobilized in the conflict and the mechanisms they select to pursue their goals. The less control they perceive they have, the more likely they will be to engage in some form of conflict behavior in order to protect or restore their own sense of well-being and control. And, if they believe they have been denied any meaningful level of control in the traditional decision-

30. See R. Bhattacharya, T. M. Devinney & M. M. Pillutla, *A Formal Model of Trust Based on Outcomes*, 23 ACADEMY OF MANAGEMENT REVIEW 459-72 (1998).

31. See SHERIF, *supra* note 3 at 194-5.

32. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 27-29.

33. See *id.*

34. See JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICT 7-13 (1997).

making process, they will be more likely to select an alternative forum in which to raise their concerns and effect change. In Pennsylvania, this dynamic helps to explain why disgruntled stakeholders have pressed township boards to adopt anti-CAFO ordinances, have engaged in boycotts, and have even committed acts of violence.³⁵ On the other hand, stakeholders who perceive themselves as having a high degree of control are unlikely to feel any need to seek alternative forums or take protective actions that might lead to conflict.

While all five cognitive and affective factors affect the degree to which CAFO stakeholders perceive they have control over the issues in CAFO conflicts, the remainder of the Article will focus on the three affective and cognitive reactions regarding fairness, identity, and trust and their relationship to procedural justice research and theories.

III. Procedural Justice and Its Relationship to the Perceptions of Pennsylvania Stakeholders

A. *A Brief Overview of the Procedural Justice Literature*

Often, fairness or justice is defined in terms of the substantive fairness of a decision (“distributive justice”). Equally important is the fairness of the procedure used for reaching the decision (“procedural justice”).³⁶ Indeed, a significant body of research in psychology, law and management has been devoted to the concept of procedural justice.³⁷ Significantly, this research has shown that fair procedures affect perceptions of distributive justice and, indeed, can mitigate unfair outcomes.³⁸ Applying this finding to community conflicts, if citizens believe that an authority’s decision-making process was procedurally just, they are more likely to conclude that the process produced a substantively just result.³⁹ Further, an authority’s decision-making procedures, by themselves, strongly influence whether citizens will

35. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 7.

36. See Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 41-42 (Morton Deutsch & Peter Coleman eds., 2000) (discussing distributive justice, procedural justice, a “sense of justice,” retributive or reparative justice, and the scope of justice).

37. See J. Thibaut & L. Walker, PROCEDURAL JUSTICE: A PSYCHOLOGICAL APPROACH (1975); G. S. Levinthal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27-55 (Kenneth Gergen, M.S. Greenberg & R. H. Willis eds., 1980); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

38. See Lind & Tyler, *supra* note 37 at 66-70, 205.

39. See *id.*

comply with the authority's decisions.⁴⁰ To the extent that citizens perceive that the decision-making procedures are fair, citizens are more likely to comply with the decisions reached through those procedures, even when the decisions are disadvantageous to them.⁴¹ Additionally, perceptions of procedural justice affect whether citizens judge the decision maker's authority to be legitimate.⁴²

Because perceptions of procedural justice are so influential, decision makers should consider what procedural "markers" matter. Citizens base their assessment of the procedural fairness of governmental decision-making on four process characteristics: 1) Opportunity for voice (*i.e.*, Was the citizen given the opportunity to tell her story and to control the telling of that story?);⁴³ 2) Consideration (*i.e.*, Did the authority demonstrate that s/he had considered the citizen's story?);⁴⁴ 3) Even-handed treatment (*i.e.*, Did the authority demonstrate that s/he was trying to be fair and even-handed?);⁴⁵ and 4) Dignity and respect (*i.e.*, Did the authority treat the citizen with dignity and respect?)⁴⁶ Importantly and perhaps surprisingly, research has found that citizens' perceptions of fairness are influenced as much⁴⁷ or more⁴⁸ by their

40. See E. Allan Lind, *Procedural Justice, Disputing and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 185-91 (Austin Sarat et al. eds., 1998); T. R. Tyler & P. DeGoey, *Conflict Restraint in Social Dilemmas: Procedural Justice and Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSYCHOL. 493 (1995).

41. See McEwen & Maiman, *supra* note 27 at 44-45.

42. See Lind & Tyler, *supra* note 37 at 209; Lind, *Procedural Justice, Disputing and Reactions to Legal Authorities*, *supra* note 38 at 185-91; Tyler & DeGoey, *supra* note 40 at 493.

43. See Lind & Tyler, *supra* note 37 at 101-04.

44. *Id.* at 236.

45. See Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 853 (1994).

46. See Lind & Tyler, *supra* note 37 at 214, E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 66 (1989).

47. See P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. PERSONALITY & SOC. PSYCHOL. 1148, 1154 (1987); Tom R. Tyler, *Psychological Models of the Justice Motive*, *supra* note 45 at 859 (finding that "both decision and process control mattered" in the legal arena while decision control mattered less in the managerial setting).

48. See Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 283 (1976) (finding that United States "participants prefer to control the process of evidence presentation themselves while a third party controls the result"); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 965 (1990) (reporting that litigants perceived trial and arbitration as fairer than bilateral settlements or judicial settlement conferences).

process control than by their control over the ultimate decision.⁴⁹

Together, two theories help to explain the profound importance of voice, consideration, and even-handed, dignified treatment. First, the opportunity to express one's views permits citizens to influence the final outcome of decision-making or dispute resolution processes.⁵⁰ This opportunity for voice reassures citizens that the final decision will be fully informed and increases the likelihood that it will be substantively fair. Citizens are able to conclude that they have thus exercised *indirect*, yet meaningful, control over the final decision. Indeed, some scholars theorize that perceptions of procedural fairness represent a heuristic, or mental shortcut, for assessments of substantive fairness.⁵¹ Second, citizens use procedural "markers" to judge whether they can trust that the decision-maker respects them and will try to be fair. The decision-maker is an authority who represents the larger society. When the authority manages the process so that citizens *feel* heard and respected, this signals to the citizens that they are acknowledged as valued members of society.⁵² The citizens' loss of direct control over the final outcome thus becomes less worrisome. "If people are able to infer a benevolent disposition, they can trust that in the long run the authority with whom they are dealing will work to serve their interests."⁵³ In contrast, when the procedural attributes described above are absent, the authority sends the message that society considers these citizens to be undeserving or inferior. Consequently, trusting the fairness of the society's decision-makers, their processes, and the outcomes of those processes becomes more difficult.

Because procedures have such influence upon citizens' perceptions of substantive fairness and legitimacy, as well as the likelihood of their compliance, some decision-makers may be tempted to cloak intended unfairness in procedural niceties. Others may pledge to citizens that their

49. See e.g., E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (finding that people's fairness judgments are enhanced by the opportunity to voice their opinions even when this opportunity does not occur until after a decision has been made; having a "voice with the possibility of influence . . . leads to even greater perceived fairness"); Tom Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (based on field study and laboratory studies, concluding that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision).

50. See Lind, *Procedural Justice, Disputing and Reactions to Legal Authorities*, *supra* note 40 at 179.

51. See *id.* at 177, 185.

52. See *id.* at 182; Tyler, *Psychological Models of the Justice Motive*, *supra* note 45 at 852.

53. Tyler, *Psychological Models of the Justice Motive*, *supra* note 45 at 854.

voice will influence the decision-making process when, in fact, the decision-makers do not intend to be influenced. The procedural justice literature suggests that citizens are aware of their vulnerability to intentional and unintentional manipulation and, if they perceive any evidence of unfair treatment or perceive “false representations of fair treatment[,]” they respond with “extremely negative reactions.”⁵⁴ Thus, the temptation to engage in proceedings that could be characterized as “sham” carries a high potential cost, in terms of triggering both severe mistrust and doubts regarding the legitimacy of public officials and institutions.

B. The Procedural Justice Implications of Stakeholders’ Perceptions Regarding Unfairness, Threats to Social Identity and Mistrust

Concerns regarding procedural justice appear to underlie many of the affective and cognitive perceptions of the Pennsylvania stakeholders who have been involved in CAFO-related disputes. Virtually every stakeholder group in Pennsylvania raised doubts regarding governmental authorities’ real consideration of all stakeholders’ voices and the authorities’ commitment to behaving in a fair and even-handed manner. For example, as the following quote illustrates, many of the community activists and environmentalists who objected to the unfairness of the regulatory scheme established by the Nutrient Management Act perceived that they had never been given a real opportunity for voice in the state or federal decision-making processes governing CAFOs or in the changes occurring in their communities as a result.⁵⁵ They also perceived that state officials were not treating them in an even-handed and fair manner:

It was clear that at a federal and state level, there are so many people giving lip service to protecting the family farm, protecting the environment, regulating these industries and it’s all hogwash. The industry is well entrenched with the politicians and the farm laws are designed to protect the corporate farms and there is no question about that. That was disgusting and it was very clear that if anything was going to be done politically, we had to do it at a grassroots level. That’s where it had to happen.⁵⁶

54. E. Allen Lind, *Procedural Justice, Disputing and Reactions to Legal Authorities*, *supra* note 40 at 187. See Tom Tyler et al., *Influence of Voice on Satisfaction with Leaders*, *supra* note 49 at 74 (explaining that under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “frustration effect”).

55. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 16, 24-25.

56. *Id.* at 13.

State pre-emption of local government authority to regulate CAFOs particularly led community members to perceive that they had been denied meaningful voice and even-handed, fair treatment. One such community member declared, “[O]ur rights are being taken away very much. We don’t even get a vote on it. Nobody is getting a vote on this piggery. Nobody at all has a vote.”⁵⁷

Meanwhile, agribusiness representatives and farmers also perceived that governmental decision-makers were not giving them voice, consideration, and even-handed treatment. These stakeholders, however, focused upon local government officials who they perceived as ignoring the Nutrient Management Act’s provisions regarding pre-emption. As the next three quotes demonstrate, farmers and agribusiness representatives expressed skepticism regarding these authorities’ fairness and even-handedness because they saw the townships as trying to change the “rules of the game.”⁵⁸

[T]wo townships passed township ordinances which are illegal. They are definitely contrary to Act 6. They are going beyond Act 6, which they are not allowed to do . . . illegal, plain and simple Well it’s frustrating to me that we have regulations passed by the Senate and the House that deal with farm rules, and [education about] Act 6, and how things work and this is the way it is supposed to be. A township cannot put an ordinance in place that is contrary to that⁵⁹

[B]ut the worst of it is that the townships are putting regulations in, a couple that they know are not correct. Especially Nutrient Management. And they are sitting there smiling waiting for someone to sue them. We know that as a fact . . . even though we have the Nutrient Management law in this state. It’s being violated, being violated a lot.⁶⁰

There is no question about it. They’re illegal. But yet they pass them and then they say, “Well, let’s see if they’re [challenged] or not. Let’s see if anyone has the guts to challenge us. Well, how are we supposed to challenge them when we have township ordinances passed?”⁶¹

Stakeholders come into these conflicts with a specific set of expectations for their elected and appointed government officials. Citizens expect public officials to help them, to protect their interests, to

57. *Id.* at 24.

58. *See id.* at 24-26, 27-29.

59. *Id.* at 24-25.

60. ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 29.

61. *Id.* at 29.

be responsive to their concerns, to follow the statutes and regulations that have been established, and to be honest in their dealings with constituents. When these expectations are not perceived as met, group members feel a sense of violation regarding who they are and their right as citizens to have a voice in public decision-making.⁶² As noted above, for some stakeholders mistrust was kindled by their perceptions that government personnel were not acting even-handedly and were, instead, aligning themselves with farming interests (by giving preferential treatment to certain nutrient management plans and/or acting as advocates of CAFOs), or with community activists' interests (by adopting ordinances that were viewed as violating the pre-emption provisions of the Nutrient Management Act), rather than protecting and responding to the interests and concerns of *all* citizens.

Stakeholders on both sides of the CAFO issue also perceived that even when public officials gave them an opportunity to "tell their story," they were not treated with dignity or respect and their concerns were delegitimized:

You know, I subjected myself to that for what? Because when I came back . . . a positive thing I thought I was doing, to show that I wasn't a big corporate executive, that I cared about the community. I am not going to sit down there and say I don't care, to come up and spend practically seven, eight hours at a meeting . . . and this is what you get?⁶³

It is very frustrating when dealing with these systems, when you have people that are complaining of real health problems or perceived changes. They are seeing them and, essentially, they are being called liars because the studies have not been done, so it must be your imagination. But, "Oh, by the way, no, we don't know because we haven't done any work to monitor ourselves."⁶⁴

Perceptions of de-legitimization and disrespect from other stakeholders often pose a threat to people's salient social identity.⁶⁵ Social identity refers to that part of an individual's sense of self that comes from his or her affiliation with particular groups (*e.g.*, community member, activist, farmer, farm advocate, environmentalist, citizen, etc.). Generally, social identity provides a source of structure and security that reinforces group members' sense of belonging, their confidence in their

62. *See id.* at 26.

63. *Id.*

64. *Id.* at 13-14.

65. *See* H. Tajfel & J. C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7-24 (S. Worschel & W.G. Austin eds., 1986).

voice,⁶⁶ and, we suggest, their confidence that they will be heard in a prescribed venue.⁶⁷ Consequently, threats to salient social identities often evoke strong protective responses.⁶⁸ Repeatedly, the interviews revealed that stakeholders believed that their identities as citizens in a democracy and as valued members of communities were threatened:

The crux of the whole thing: Do we live in America or do we live in the Soviet Union where the government says this is how it will be and be damned with who doesn't agree? We should have been given, according to the DEP plans, a public hearing, which never occurred. At least it was never formally said that there was a public hearing. We went up and bitched at our [township] supervisor, but they just sat there and said there is nothing we can do, and that was basically a lie.⁶⁹

Whatever happens the farmer who is contemplating putting in a CAFO begins to feel like an outsider. He was once a part of a community; all of a sudden because of something he is contemplating he no longer belongs to the community. It may have him giving second thoughts as to what he needs to do farming wise to expand his operation.⁷⁰

The local farmer depending on the level of citizen activism is also confused because he still sees this as a part of traditional farming and cannot understand why the community he has belonged to all his life is resisting his need to expand his farming operations.⁷¹

Conflicts over CAFOs can force community members to redefine their identities and can even create animosities among long time allies.⁷² In some circumstances, these cleavages are so wrenching that they produce immobilization rather than mobilization. People withdraw from the process completely rather than endure the derision of their neighbors.

In summary, concerns regarding procedural justice emerged as one of the repeated themes in our interviews. All stakeholder groups expressed disappointment regarding their inability to be heard in decision-making processes, to receive consideration from the authorities,

66. *See id.* at 15-16.

67. *See* GAMSON, *supra* note 3 at 30-32.

68. *See* ROTHMAN, *supra* note 34 at 7-13, BARBARA GRAY & RALPH HANKE, FRAME REPERTOIRES AND COLLABORATIVE AND NON-COLLABORATIVE BEHAVIOR IN INTRACTABLE ENVIRONMENTAL DISPUTES 6 (Ctr. for Research in Conflict and Negotiation, Pa. St. Univ.) (2001).

69. ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 26.

70. *Id.* at 27.

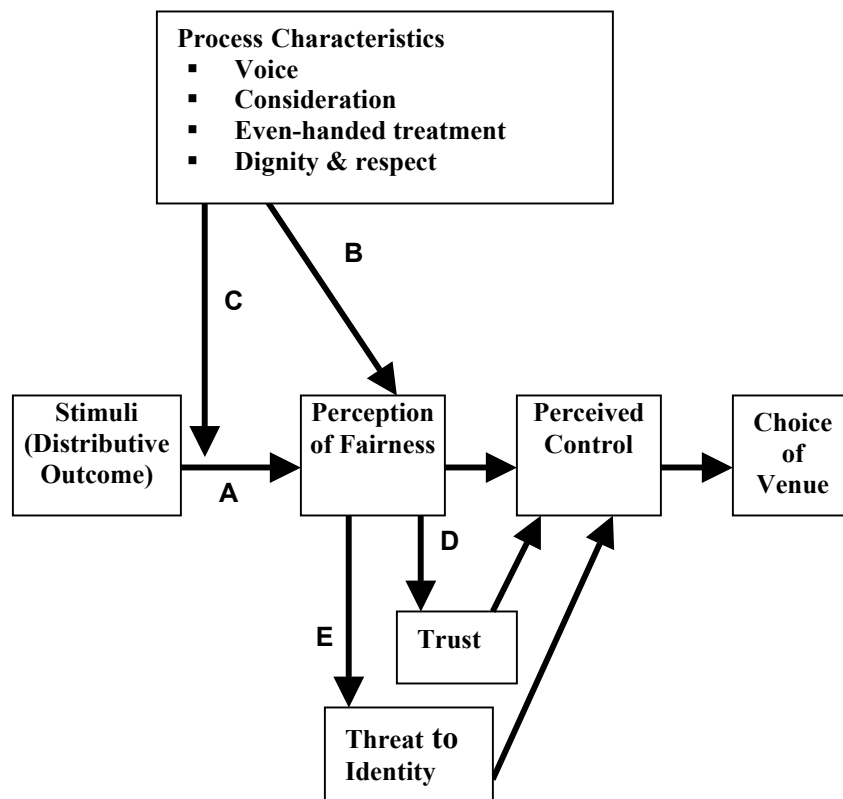
71. *Id.*

72. *See id.* at 15-16.

and to be treated with fairness, dignity, and respect. Environmentalists, agribusiness representatives, local farmers, government officials, and community members consistently objected that governmental decision-making procedures had failed to provide real consideration of their interests, needs, and concerns. The Pennsylvania stakeholders' perceptions that their voices had been ignored helps to explain much of their skepticism regarding the substantive fairness of governmental decision-making regarding CAFOs, their lack of trust in public officials, and their perceptions that their social identities were seriously threatened.

Figure 2

How Process Affects Fairness Judgments, Trust and Threats to Identity



In Figure 2, the model presented in Figure 1 is expanded to show how differences in procedures can affect stakeholders' perceptions of fairness and how fairness, in turn, affects trust and threats to identity. Arrow A indicates whether a decision or action is perceived as distributively fair. Arrow B shows the direct effect of the decision making process or procedures upon fairness perceptions. Arrow C indicates that procedures also ameliorate any perceptions of distributive justice that may have been caused by the initial stimuli.⁷³ Arrows D and E indicate that fairness perceptions also affect perceptions of trust among the parties and whether stakeholders perceive threats to their identities, as discussed *supra*. All three of these perceptions, as well as the perceptions of risk and uncertainty shown in Figure 1, ultimately affect how much control stakeholders believe they have. The revised model in Figure 2 shows that when stakeholders judge that the *process* of decision-making is unfair, they are likely to: 1) perceive the situation as unfair; 2) perceive that their identity is threatened; and 3) experience distrust of authorities. Consequently, the stakeholders experience less control—either direct or indirect—over a situation in which legal and scientific uncertainties have already left them feeling vulnerable and at risk.

When people feel they have no recourse to ensure that their views will be heard or to effect change, they will either resort to another, more trusted forum for dispute resolution, through conflict mobilization and/or non-traditional forums, or they will withdraw entirely from the process.⁷⁴ The breadth and depth of stakeholders' procedural justice concerns in federal, state, and local CAFO-related decision-making in Pennsylvania strongly suggests a need to find alternative dispute resolution and decision-making processes that respond to stakeholders' concerns.

In our interviews, stakeholders' yearning for procedural justice and some form of control were reiterated when we asked them to identify their criteria for the successful resolution of disputes over CAFOs. The stakeholders frequently and strongly expressed preferences for processes that would produce outcomes responding to all stakeholders' interests and inspire both compliance and ongoing collaboration.⁷⁵ For example:

I think that success is when the two parties involved can both live with the arrangement. Where each person comes away feeling like they've gained something from the experience. Maybe they haven't gotten everything they've wanted but they've gained from the experience and their losses have been minimized.⁷⁶

73. This is treated mathematically as a moderating effect.

74. See GAMSON, *supra* note 3 at 30-32.

75. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 33-36.

76. *Id.* at 35.

That there is a permanent ongoing dialogue between the producers, the Department of Ag[riculture], Department of Environmental Protection. Not just created for initial, but for an ongoing institutionalized arrangement. Each and every one is kept informed of changes and movements in animal agriculture in the Commonwealth.⁷⁷

To a lesser but still significant extent, stakeholders also associated “successful” resolution with respectful procedures that promote real dialogue.⁷⁸ One stakeholder observed: “How would you know that disputes have been handled more successfully? Well, if every proposal doesn’t threaten to launch World War III that would be some progress.”⁷⁹ Other expressions of the need for respectful dialogue were less colorful but equally heartfelt:

I think they would be more willing to bring the parties together and try to find ways to solve issues, if they think that it would be productive [T]hey say, “These public meetings are non-productive a waste of my time.” . . . Nobody’s ready to listen, and you are not going to change anybody’s mind in that situation. It is such a shame.⁸⁰

I think you can find remarkable contrast in how issues are resolved based on how elected officials at the municipal and county level deal with the issue The most successful ones in our experience seem to be those that are able to forge some true collaborated response within the limiting frameworks of our statute So where you are able to bring the bodies to the table, give them the clear understanding of your limitations and prerogatives, give them clear understanding of their voice or give them a genuine voice to the greatest extent you are permitted by law and the practicalities of the process, we tend to achieve outcomes that are more harmonious in the community than antagonistic. Particularly that’s in contrast to the ones where one side feels ignored or feels pushed away from the table.⁸¹

As the earlier discussion of the procedural justice literature reveals, decision-making and dispute resolution processes that provide a real opportunity for disputants to feel heard and that treat disputants with dignity and respect have the effect of producing outcomes that are more likely to be perceived as substantively just and that inspire greater

77. *Id.* at 36.

78. *See id.* at 35-36.

79. *Id.* at 36.

80. *Id.*

81. *Id.*

compliance and finality. In focusing on the need for civility and real dialogue, the stakeholders invoked the need for real voice accompanied by real consideration and a willingness to be open to fairly assess the concerns and arguments made by all stakeholders. Real dialogue also suggests an acknowledgment of all stakeholders' place in the discussion and their value in the dispute resolution or decision-making process and to society as a whole.

The stakeholders also specifically identified the process characteristics they considered important in resolving CAFO-related disputes.⁸² Many of these process characteristics echo procedural justice considerations. For example, many stakeholders expressed a preference for processes that allow:

- The participants and constituents to trust in the honesty of the process;
- The participants and constituents to trust that the outcomes of the process will be truly considered and/or implemented by government agencies;
- Inclusion of all viewpoints;
- Two-way discussion and dialogue; and
- Fair, inclusive outcomes.⁸³

To a large extent, procedural justice considerations also were reflected in stakeholders' preferences regarding third parties. If processes required the involvement of third parties, the stakeholders sought individuals who were neutral, impartial, and trusted by all sides.⁸⁴ Of course, these characteristics would be important to ensure that all stakeholders felt heard and treated in an even-handed, respectful manner. Stakeholders also wanted third parties to:

- Exercise control over communication;
- Keep the process moving and on track;
- Ask good questions;
- Allow all parties to have a voice; and
- Listen effectively.⁸⁵

Stakeholders' preferences regarding process and third party characteristics, however, also acknowledged the legal and scientific complexity of CAFO-related disputes and the extent to which different stakeholders rely on different and inconsistent information. Many stakeholders wanted to be sure that alternative processes offered access to relevant, accurate information and enabled informed decisions. Of

82. *See id.* at 36-37.

83. *See id.*

84. *See id.* at 37.

85. *See id.*

course, this preference for decision-making based on full information is consistent with the procedural justice literature described *supra*.

In describing their preferences regarding third parties, however, stakeholders identified some characteristics and functions that have the potential to undermine the perceived procedural justice of alternative decision-making and dispute resolution procedures. Particularly, the stakeholders expressed a preference for third parties who were knowledgeable about CAFO-related issues and who would:

- Educate the parties;
- Make and provide judgments about what is relevant and/or truthful; and
- Provide advice to the parties.⁸⁶

Procedures that honor these preferences have the potential to undermine perceptions of procedural justice in several ways. For example, if a third party is knowledgeable about CAFO-related issues and his/her role includes educating the parties or providing advice to the parties, this may necessarily mean that the third party will express views that are consistent with one stakeholder group's perspective and inconsistent with another's. In this case, questions about the legitimacy of the third party will likely be raised.⁸⁷ Legitimacy issues arise when the third party and the process s/he facilitates are not perceived to treat all of the stakeholders in an even-handed and fair manner.⁸⁸ If a third party's role includes making and providing judgments about the truthfulness of a stakeholder's presentation, the third party may be perceived as failing to demonstrate genuine consideration of that stakeholder's voice. Research suggests that these evaluative interventions may be consistent with perceptions of procedural justice, but only if the third party exercises restraint in the use of evaluation.⁸⁹ The third party's evaluative interventions should occur only after a meaningful opportunity for voice and after s/he has clearly demonstrated consideration of what was said. Any evaluation also should be expressed in a respectful, even-handed manner.⁹⁰ Use of the third party's knowledge and ability to advise has to be managed very carefully because the need for procedurally just processes is so clear.

86. *See id.*

87. *See* BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 70-72 (1989).

88. *See id.*

89. *See* Welsh, *supra* note 27 at 846-51 (examining the impact of evaluative interventions in court-connected mediation upon participants' perceptions of procedural justice).

90. *See id.* at 849-50.

IV. A Proposal for Processes that Respond to Stakeholders' Concerns Regarding Procedural Justice and a Sense of Control

Because stakeholders' perceptions of lack of control appear to be so related to their perceptions of lack of procedural justice in current decision-making and dispute resolution process and because these perceptions are exacerbated by stakeholders' perceptions of uncertainty and risk arising out of the legal and scientific complexity of CAFO-related disputes, any proposal for alternative forums must respond directly to these identified problems. Any proposal must also acknowledge that CAFO-related conflicts are triggered by very different stimuli (e.g., a proposal to site a CAFO, a township's consideration of a proposed ordinance, a state agency's response to complaints regarding the operation of a facility) and invoke different decision-making contexts (e.g., local government decision-making regarding a proposed permit, a conservation district's decision-making regarding a proposed nutrient management plan, a state agency's decision-making regarding a CAFO's compliance with environmental requirements).⁹¹ These different contexts can require different emphasis in responding to the need for procedural justice and for education regarding complex legal and scientific questions. Therefore, this Article will not propose just one alternative process to respond to all of the situations in which CAFO-related disputes arise. Rather, the Article will recommend consideration of five different processes and suggest the ways in which implementation of the processes will determine their actual responsiveness to stakeholders' concerns.

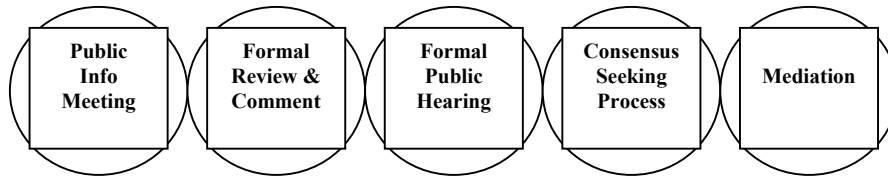
The five recommended processes are: public information meetings, formal review and comment, formal public hearings, consensus-seeking processes, and mediation.⁹² As illustrated in Figure 3, the first three processes, also described generally as "community participation" processes, focus upon community education and/or the opportunity for the expression of voice but do not aim directly for resolution. The last two processes, also described generally as "dispute resolution" processes, focus upon providing an opportunity for voice and the achievement of consensus and commitment to a solution. Only the last dispute resolution process, mediation, provides all stakeholders with the opportunity to exercise *direct* control over the decision making process.

91. See JOHN BECKER, CHARLES ABDALLA, NANCY WELSH, BARBARA GRAY & CELIA COOK-HUFFMAN, A GUIDEBOOK ON COMMUNITY PARTICIPATION IN ADDRESSING DISPUTES OVER INTENSIVE LIVESTOCK OPERATIONS 53-92 (2000) (describing the application of relevant laws and potential use of community participation and dispute resolution processes in various contexts).

92. See ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 38-39.

The first four processes, in contrast, provide increasing degrees of *indirect* control through the expression and consideration of voice. Each of the recommended procedures is described briefly below, with suggestions for implementation to ensure their responsiveness to the need for procedural justice.

Figure 3. Recommended Processes



A. Community Participation Processes

1. Public Information Meetings

This process provides an opportunity for all interested citizens to be educated about a proposed land use (such as a CAFO) or a decision related to a proposed land use that a township board or other agency must make. Information regarding complex issues of law, science, and technology can be raised and discussed. Although anyone can organize a public information meeting, government agencies often hold such meetings to help citizens become informed.⁹³ The agencies generally determine the identity of the presenters and the issues that will be discussed. The focus in this process is clearly upon education and this may be conceived as one-way communication,⁹⁴ from the presenters to the stakeholders sitting in the audience. Structured in this way, public meetings offer stakeholders little opportunity for voice. Indeed, when stakeholders speak, they often are perceived, and may intend to be perceived, as disruptive. Public information meetings have the potential, however, to permit voice. For example, representative stakeholders may be invited to consult with the sponsoring agency to determine the timing

93. See PUBLIC ISSUES EDUCATION: INCREASING COMPETENCE IN RESOLVING PUBLIC ISSUES 22-23 (D. D. Dale & A. J. Hahn eds., 1994) (Pub. Educ. Materials Task Force of the Nat'l Pub. Pol'y Educ. Comm. & PLC & PODC subcomm. of the Extension Comm. on Org. & Pol'y, Univ. of Wis.-Extension). See also JAMES CREIGHTON, INVOLVING CITIZENS IN COMMUNITY DECISION MAKING: A GUIDEBOOK 30-38 (1992).

94. See PUBLIC ISSUES EDUCATION, *supra* note 93 at 23; Creighton, *supra* note 93 at 11, 111-17.

of such meetings, the issues to be discussed, the identity of trusted presenters to speak to these issues, and a means to permit members of the audience to raise questions and provide feedback in a constructive way.⁹⁵ The focus of these meetings would remain upon education, but it would be education that demonstrates respect for the views and experience of the people in the audience.

2. *Formal Review and Comment*

Sometimes a government agency that is making a decision about a CAFO is required to offer the public an opportunity to submit written or telephone comments about the proposed land use.⁹⁶ However, no requirement of a formal, in-person meeting exists. This process offers some opportunity for voice in the decision-making process, in the form of letters, e-mail correspondence, and voicemail messages. Thus, the community is ostensibly given an opportunity to influence the decision-making process but, in effect, usually knows little about whether or how their input was considered. Thus, formal review and comment does not generally provide the decision-maker with a procedural means of demonstrating consideration, fairness, and even-handedness or respect for the citizens providing input. While the possibility of acknowledging and responding to all stakeholders' comments in a document that explains the agency's final decision exists, this procedure is cumbersome and rarely used. Consequently, formal review and comment may present the greatest challenge to achieving a process that will be perceived as procedurally just.

3. *Formal Public Hearings*

Government agencies are required by law to hold formal public hearings at certain points in the process of siting CAFOs.⁹⁷ Citizens have the opportunity to present their views to government agencies at these hearings. Although agencies are required to record and take these comments into consideration when they make their decisions, they are not obliged to agree with them.⁹⁸ This procedure, like public information meetings, can be structured either to enhance or hinder perceptions of procedural justice. For example, the timing of public hearings is likely to affect stakeholders' trust that their views will be considered in

95. *See id.* at 20-21, 25-29.

96. *See e.g., id.* at 67 (describing formal review and comment period as part of process for approving individual permits under the Clean Water Act).

97. *See e.g., id.* at 56-74.

98. *See Creighton, supra* note 93 at 120-21.

determining the final outcome.⁹⁹ Hearings that are held relatively early in the decision-making process are likely to be perceived as granting greater consideration.

Changes in format—e.g., traditional,¹⁰⁰ open house,¹⁰¹ or roundtable¹⁰²—are also likely to affect stakeholders' perceptions of their opportunity for voice, consideration, and treatment that is fair, even-handed, and respectful. The open house and roundtable formats provide an opportunity for real dialogue and even one-on-one education regarding the complex legal and scientific issues involved. The traditional format is less likely to foster real dialogue.¹⁰³

Agencies also can choose whether to use neutral facilitators to manage the communication in public hearings.¹⁰⁴ Again, this can affect the potential for real dialogue. If public hearings are structured to permit stakeholders to have voice and to demonstrate consideration, even-handedness, and dignity, stakeholders are likely to be reassured that they are valued members of the community who will exercise some influence in the decision-making process. Decision-makers must, of course, avoid conducting a proceedings that are, in reality, a mere sham.

B. *Dispute Resolution Processes*

1. *Consensus Seeking Processes*

In this procedure, an agency invites representatives of different stakeholder groups or perspectives to join an advisory committee.¹⁰⁵ Members of the committee then search for areas on which they all agree or can reach a "consensus." If the committee reaches a consensus, the agency may make a decision that is consistent with the agreement or use

99. *See id.* at 11, 120-21.

100. Agency representatives generally sit at the front of the room and citizens take turns speaking, sometimes into a microphone. The representatives may or may not respond to the citizens' comments. The proceeding is recorded.

101. This is a more informal format, with agency representatives displaying relevant information at various stations around the room. Citizens visit each station, study the information, and provide comments to the agency representatives. The representatives record the citizens' comments. *See* Creighton, *supra* note 93 at 161-62.

102. This is another informal format, with agency officials or facilitators sitting at tables with eight to ten citizens. The official or facilitator at each table invites the citizens to speak and records their comments on a flipchart. *See* Creighton, *supra* note 93 at 155-56.

103. *See* Michael Elliott, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, in *THE CONSENSUS BUILDING HANDBOOK* 216-18 (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer eds., 1999).

104. *See id.* at 199-239; Creighton, *supra* note 93 at 195-97.

105. *See* Creighton, *supra* note 93 at 117-18, 163-73.

parts of it. However, the agency may be required to consider other information. Therefore, the agency is not required to adopt the precise agreement recommended by the committee.¹⁰⁶ This procedure should only be used, however, when the agency has agreed that it will be significantly influenced by the committee's agreement. Otherwise, the procedure may be considered a sham with the severe negative consequences described earlier.

Consensus seeking processes, when managed appropriately, clearly provide an opportunity for voice, consideration by decision-makers, and treatment that is fair, even-handed, and respectful. They also offer an opportunity for education regarding key issues and real dialogue with other stakeholders, including the representatives of the sponsoring agency.

In some circumstances, particularly when there is distrust of the sponsoring agency or the agency concludes that it cannot behave in a manner that will communicate openness and even-handed treatment of various viewpoints, the agency would be wise to involve a neutral facilitator. The characteristics and role of the facilitator, however, are very important. That person will be required to behave in an effective manner that demonstrates a commitment to even-handed treatment, as well as a commitment to opportunities for voice, consideration, and respect. In Pennsylvania, the interviews with stakeholders suggested that the identity of and trust in the individual playing the role of the third party should be a central process design consideration.¹⁰⁷ Pennsylvania stakeholders' preference for facilitators who are knowledgeable regarding CAFO-related disputes and will be responsible for educating or advising the disputants also may present challenges to process design. Indeed, this preference may suggest the need for a facilitator to find and involve a team of trusted substantive experts, available to conduct an early education session regarding legal or scientific issues and/or to be available throughout the process to respond to stakeholders' questions. Another option might be a facilitator team, with one person responsible for guiding the process and the other(s) responsible for providing even-handed, substantive information.

2. *Mediation*

In mediation, as in consensus seeking processes, representatives of stakeholder groups and perspectives are invited to participate in

106. *See id.*, at 118; Dwight Golann & Eric Van Loon, *Legal Issues in Consensus Building*, in *THE CONSENSUS BUILDING HANDBOOK* 505-10 (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer eds., 1999).

107. *See* ABDALLA ET AL., PENNSYLVANIA REPORT, *supra* note 4 at 36-37.

discussions and to attempt to reach consensus on an issue. The agency charged with legislative or administrative authority for the issue is also represented in the process. This process is different from consensus seeking processes, however, in one very important way. The stakeholders involved in mediation together decide the resolution of the conflict or make a decision. The decision will be binding. Thus, the responsible agency maintains control over the final decision, but shares that control with the involved stakeholders.

Mediation always involves a third party, the mediator, who helps the parties communicate and negotiate with each other to reach resolution. This procedure, managed appropriately, provides an opportunity for voice, consideration by those at the table, and treatment that is fair, even-handed, and respectful. This process also provides an opportunity for real dialogue. Finally, mediation provides all stakeholders with direct, rather than indirect, control over the situation. As with consensus seeking processes, however, if mediation is meant to respond to concerns regarding procedural fairness, the selection of the appropriate mediator is crucial. This individual or team must manage the process in a manner that allows stakeholders to trust in the process, the mediator(s), and the ultimate outcome.

C. *A Continuum of Processes*

As should be clear from their description, the five processes recommended here respond to varying degrees to the different needs identified in the interviews with Pennsylvania stakeholders. Public information meetings, in particular, are meant to respond to perceptions of risk and uncertainty by providing stakeholders with easy access to relevant and accurate information regarding the relevant law, science, and technology. To the extent that this procedure permits stakeholders to have an opportunity for voice, the opportunity is designed primarily to provide reassurance regarding stakeholders' social standing. Formal review and comment, public hearings, and consensus seeking processes respond most directly to stakeholders' search for an opportunity to exercise *indirect* control through the opportunity for voice. Public hearings and consensus seeking processes, unlike formal review and comment, additionally have the potential to provide direct reassurance to stakeholders that their voices and identities are valued. Mediation, finally, is the one process that can provide to stakeholders an experience of procedural justice, as well as *direct*, if shared, control over their situation. Depending upon the situation and the needs of the stakeholders, some of these processes can be combined or used in a planned sequence.

V. Conclusion

Making decisions regarding the regulation of CAFOs and other CAFO-related disputes is undeniably difficult. Dispute resolution and decision-making in this context requires consideration of complex and often conflicting legal and scientific information. Some stakeholders' perception of risk is very high. Public officials must weigh one citizen's right to be assured of a safe and aesthetically pleasing environment against another citizen's right to use his property for economic benefit or even survival. Each of these citizens is raising a legitimate set of rights and concerns. If these citizens can be permitted, through mediation, to experience procedural justice *and* exercise *direct* control over the resolution of their dispute, the outcome is most likely to provide some advantage to both, to inspire their compliance, and to permit the maintenance of a relationship.

Even if these citizens cannot be permitted to maintain direct control over the final resolution of their dispute, however, they and their communities (whether a local community, a region, or even a state) will benefit from the use of decision-making processes that respond to the yearning for procedural justice. In evaluating Pennsylvania stakeholders' dissatisfaction with the processes that have been used or are being used to address CAFO-related disputes, the extent to which their dissatisfaction and perceived lack of control is grounded in procedural justice concerns is striking. Citizens, as members of a democracy, need to be able to believe that their voice counts and that public decision-making offers them some level of indirect control over decisions. Thus, if the public authorities responsible for making decisions regarding CAFOs can focus as much on listening to and considering the voice of the people affected by these disputes as they do on the legal analysis and scientific studies that have been done, they may be able to help communities, and the sense of shared control that distinguishes a democracy, weather the consequences of the changing face of agriculture.