

Participating in the Permit Process: An Overview of the Public Comment and Permit Appeal Process for Kentucky Environmental Permits

**Environmental Practitioners' Workshop
Air & Waste Management Association, Kentucky and Indiana Chapters**

**November 11, 2016
Henderson, KY**

Kelly Bartley
Bingham Greenebaum Doll LLP
300 W. Vine Street
Suite 1200
Lexington, Kentucky 40507
859-288-4652
kbartley@bgdlegal.com

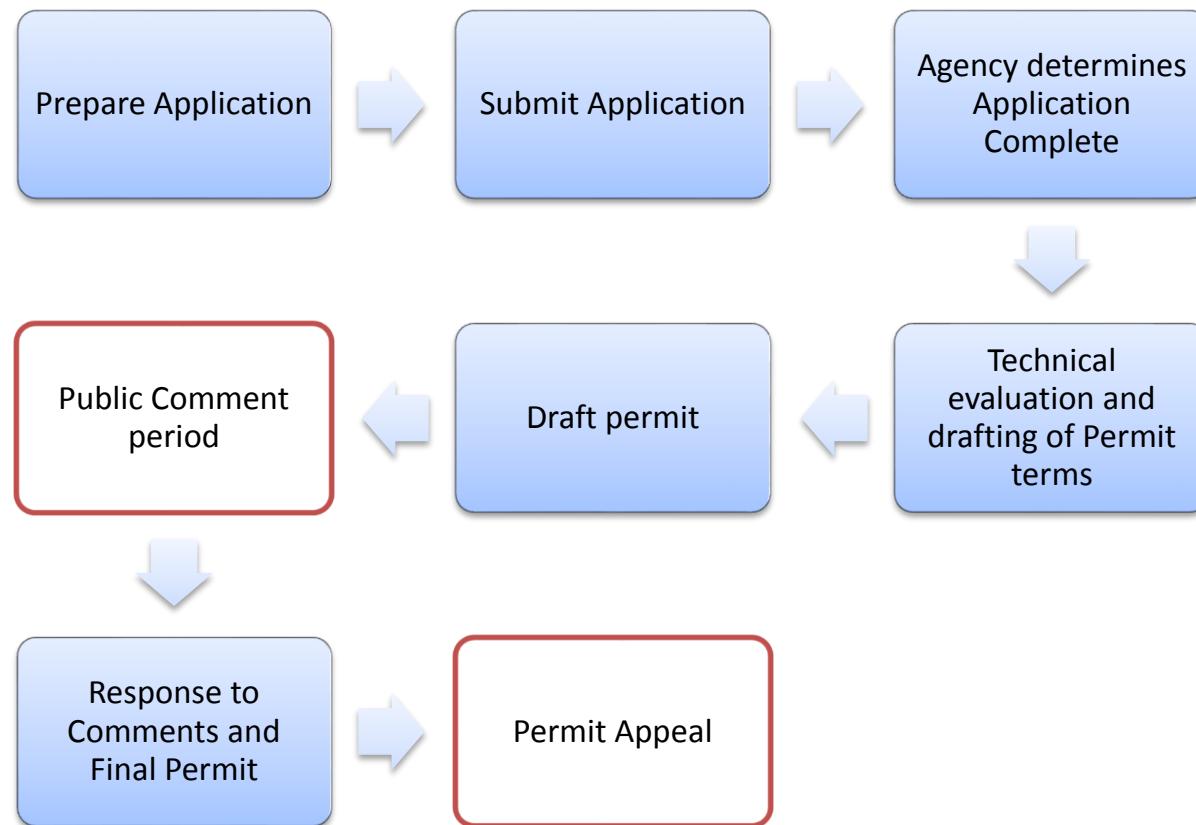


OVERVIEW

- What Every Environmental Manager wants - the Elusive Perfect Permit
 - Accurately and completely reflects facility operations
 - Correctly and clearly states applicable requirements and methods for compliance
 - Contains terms and conditions with which the facility can comply
- In this session we will discuss the two primary avenues available to permittees to achieve if not a “perfect permit” at least a “livable permit” – the public comment process and the permit appeal process.
 - Overview
 - Rules governing
 - Strategies and tips to optimize outcomes

OVERVIEW

Basic Permit Process



Public Comments



gg79236386 www.gograph.com

BINGHAM
GREENEBAUM
DOLL LLP

Effective Public Comments

I: Understand your opportunities for comment

- Formal Comment opportunities
 - KPDES Discharge Permits: first time permits, Major modifications, Renewals
 - Air Permits: For Title V and FEDOOP permits, a formal public comment process is afforded for first time permits, major modifications and renewals
- Other Opportunities
 - Informal comment opportunities are available
 - Explore “predraft” and other opportunities for input with the Cabinet

Effective Public Comments

II: Lay the Groundwork

- Submit a complete, accurate permit application
 - Start early
 - For renewals, start a list or spreadsheet of known changes in processes, operation or equipment that have occurred since prior permit
 - Form a “permit team” – review current permit, conduct walk through a facility, consider regulatory changes since last permit application
 - Engage appropriate outside assistance – consultants or legal counsel
 - Remember the permit writer only works with what you have submitted
 - Internally document rationale for determinations reflected in application to help with any deficiency notices or other questions from the agency

Effective Public Comments

II: Lay the Groundwork

- Provide updated information when necessary during application process
- Consider inviting the permit writer to visit the plant
- Ask for an opportunity to see an informal draft of the permit
- Provide the Permit writer with actual language for insertion in the permit as part of permit application.

Effective Public Comments

III: The Actual comments

- Formal Public Comments are written in letter form with comments in the text of the letter or as an attachment
- Comment letter should reference permit number and must be submitted within the public comment period
- Review the draft permit carefully, make sure that you raise comprehensive comments
 - In some instances your permit appeal may be limited by the issues raised in your comments.
- Provide information to back up the statements in your comments
- Be clear as to permit condition(s) at issue
- Offer to meet with the permit writers and others as appropriate regarding comments raised as a follow up

Effective Public Comments

Finally, the Final Permit

- Don't delay! Review the final permit as soon as it is received
 - Your ability to further raise concerns is limited to 30 days
- Discuss concerns with Management, outside assistance

Kentucky Permit Appeals

Wait – This still isn't right. . .



Kentucky Permit Appeals

The Next Step

- Your comments did not result in the changes requested.
Concerns with your permit remain.
- What next?
- Consider filing an appeal
 - Agency may say that your concern will be addressed through revision or in other ways. However, filing a Petition for Hearing is the only way to preserve your right to continue to contest or otherwise object to a permit term.
 - Petition can always be dismissed if the agency provides the relief needed
 - Filing a Petition sometimes provides a vehicle for resolution of difficult issues through an agreed order
 - If Petition is not filed, right to raise objections concerning permit is waived

Kentucky Permit Appeals

Applicability

- With few exceptions, environmental permits for regulated activities in Kentucky are issued by the state and, therefore, subject to a state appeal process.
 - Kentucky is a SIP-approved state under the Clean Air Act
 - Kentucky is authorized by EPA to implement the Clean Water Act NPDES program
 - Kentucky is authorized to implement the hazardous waste program under RCRA

Kentucky Permit Appeals

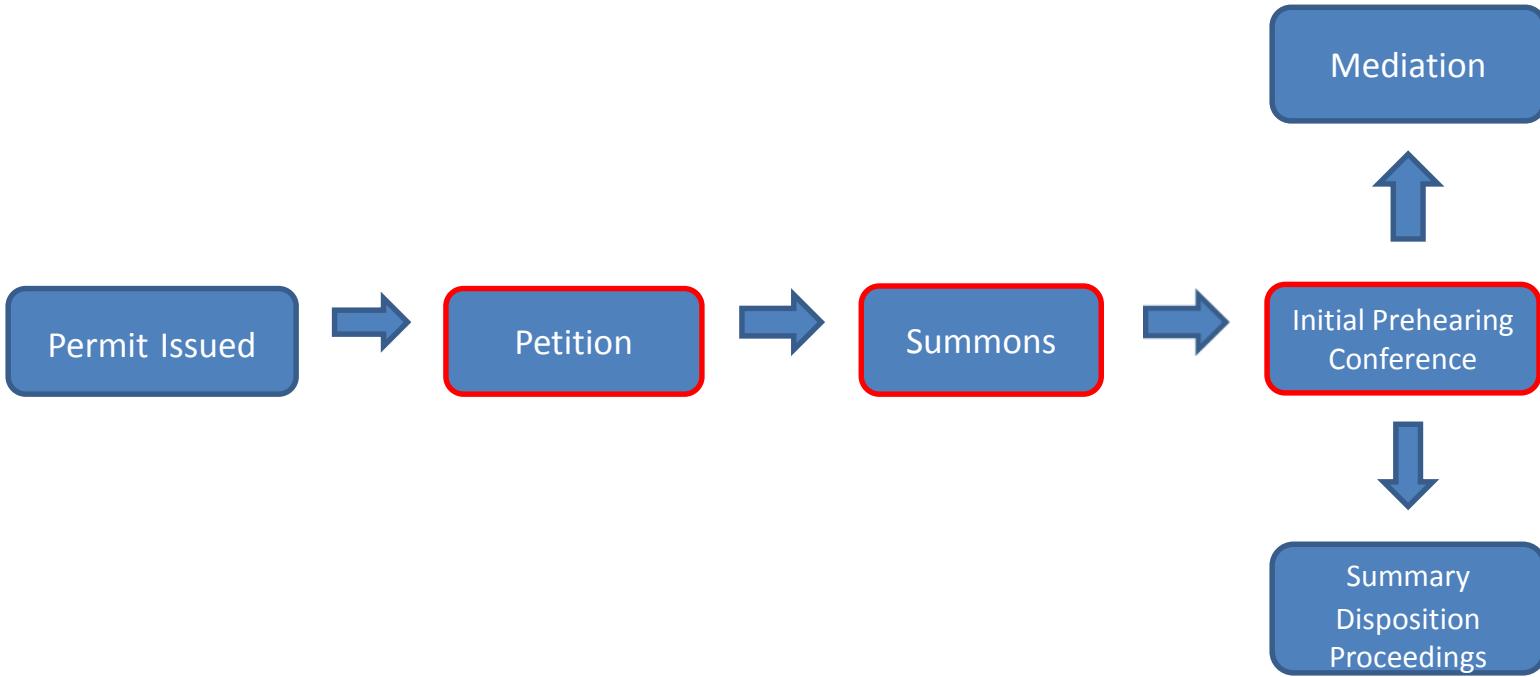
Applicability

- Some determinations are subject to federal review processes outside the scope of this presentation
 - Clean Water Act Underground Injection Control program
 - Toxic Substances Control Act requirements
 - Any project triggering NEPA review will implicate federal procedures
 - Clean Water Act Section 404 (dredge and fill) permit program
- Discussion here is limited to state permit review process

Kentucky Permit Appeals

Applicability

- Examples of Permits/Determinations subject to state appeal processes
 - Air permitting determinations issued pursuant to 401 KAR Chapter 52
 - KPDES permitting determinations
 - Others, for example: Floodplain permitting determinations, solid waste and hazardous waste permitting or other program determinations
- Note: Any final determination can be appealed
 - Agency takes position that NOVs are not final determinations



Kentucky Permit Appeals

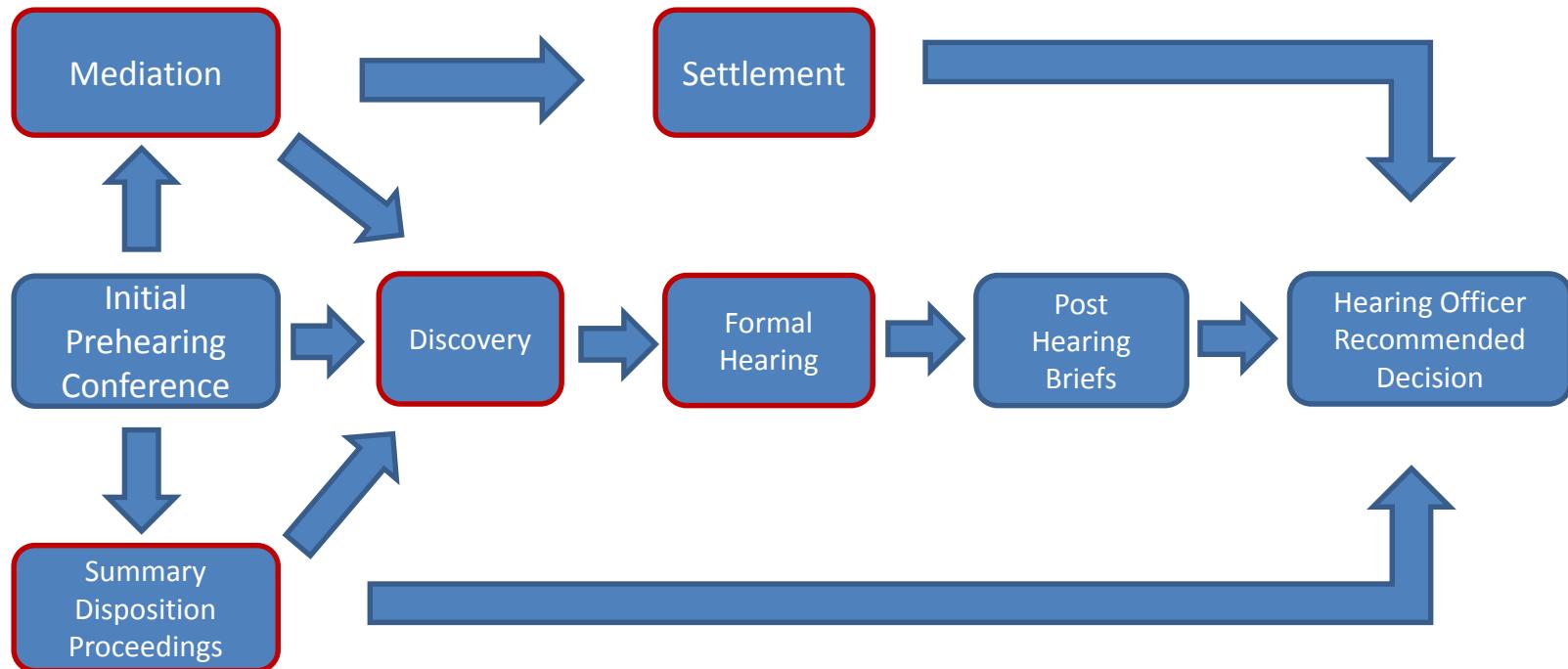
Steps in the Appeal Process

- Step 1: Filing the Petition
 - Called a “Petition for Hearing” or “Administrative Complaint”
 - Sets out the basic facts of claim and explains reason(s) why company believes there are errors in the permit
 - Note: Any person “aggrieved” by a final determination of the Cabinet may file so someone other than the permittee can challenge permit
 - Must be filed no later than 30 days after actual notice of the determination or could reasonably have had notice
 - Filing of Petition does not automatically stay permit.
 - Must seek injunction in Court or, for KPDES permit, seek stay in administrative forum
 - May also seek agreed stay of permit enforcement through agreed order with Cabinet

Kentucky Permit Appeals

Steps in the Appeal Process

- Step 2: Hearing Officer assigned and Summons issued
 - Energy and Environment Cabinet, Office of Administrative Hearings hears all Petitions
 - Hearing Officer, a lawyer, is assigned the case and acts as the judge
 - Executive Director Lesly A. R. Davis: Sets overall policy and supervises Office, assigns cases and reports to Secretary
 - Hearing Officers Susan Green, Elizabeth A. Heilman, Virginia Baker Gorley: conduct hearings
- Step 3: Initial Prehearing Conference
 - Informal meeting to discuss scheduling, possibility for mediation
 - Corporations must be represented by an Attorney
 - Note: third parties may seek to intervene



Kentucky Permit Appeals

Steps in the Appeal Process

- Step 4A: Mediation
 - After consulting with the parties the Hearing Officer may issue an order referring the case to a mediation conference
 - Informal, nonbinding process that may bring about a mutually agreeable resolution to a dispute
 - If resolution is reached, settlement is reflected in an “Agreed Order” which must be filed and approved by the Hearing Officer and Secretary.
- Step 4B: Motions for summary disposition
 - The Hearing Officer may build into the schedule an opportunity for summary disposition motions
 - Summary disposition motions ask for a determination on all or part of the claims in a petition as a matter of law where discovery of facts is not necessary.
 - Opposing parties have an opportunity to respond and oral argument before the Hearing Officer is usually held

Kentucky Permit Appeals

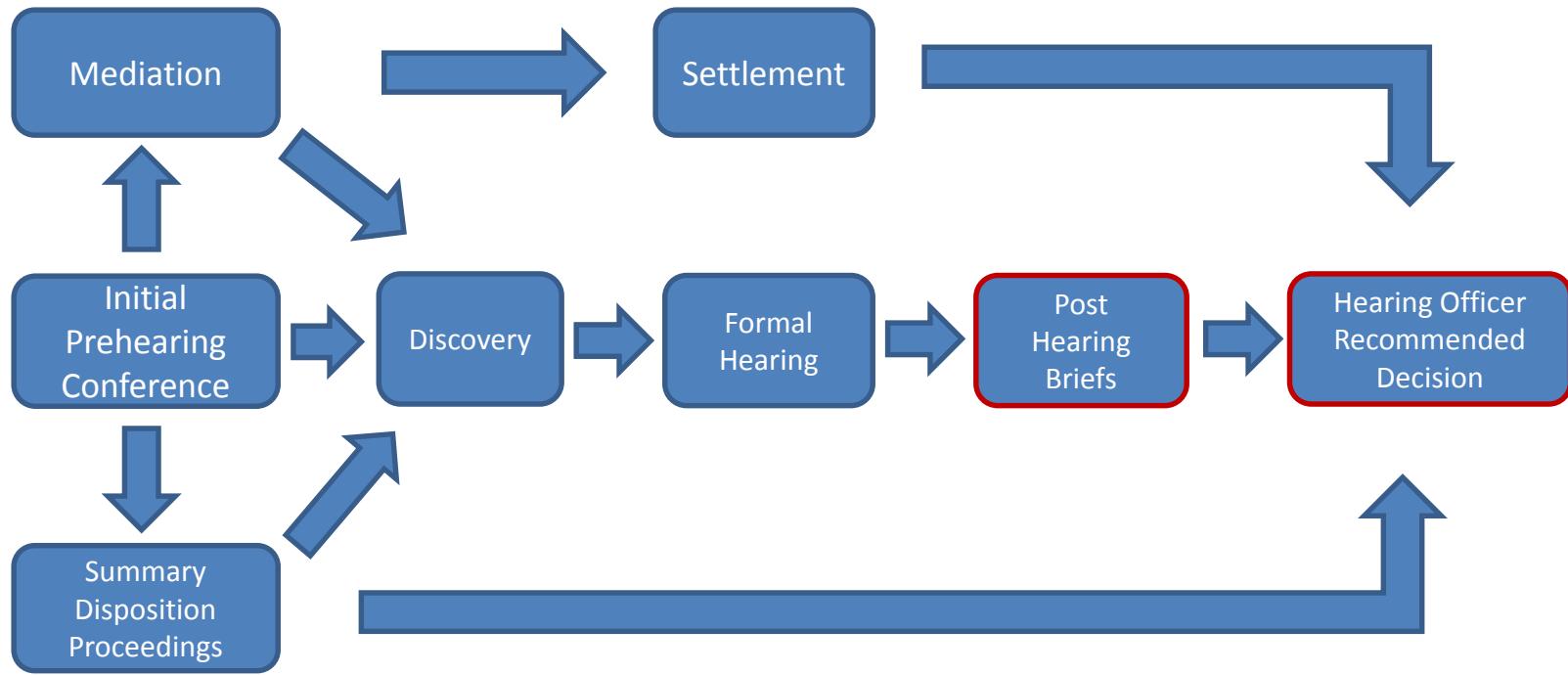
Steps in the Appeal Process

- Step 4C: Discovery
 - Depositions, interrogatories, production of documents
 - Motions for summary disposition or to dismiss particular claims may accompany or precede

Kentucky Permit Appeals

Steps in the Appeal Process

- Step 5: Formal Hearing
 - Trial type proceeding
 - Evidence may consist of factual and/or expert testimony, documents, photographs
 - “pre-filed” written testimony may be utilized
 - Most formal hearings are held in Frankfort.
 - Coal mining case are scheduled in an area close to the mine site if requested in initial document
 - Hearings regarding solid waste landfill permits are held in the county where the landfill is to be located
 - Rules provide for irrelevant, immaterial or unnecessarily repetitious evidence to be excluded but, in general, evidentiary rules are more relaxed than in a court proceeding



Kentucky Permit Appeals

Steps in the Appeal Process

- Step 6: Post hearing briefs are filed and Hearing Officer issues Report and Recommended Order
 - Reflects the Hearing Officer's recommendation to the final decision maker, the Cabinet Secretary, as to how the claims should be resolved
 - In the case of a permit appeal, the Hearing officer can recommend that the permit be issued, issued with additional conditions, denied or remanded to a division of the Cabinet for further consideration.
 - Absent extension, Hearing Officer must issue recommendation within 30 days of the date the record closes (20 days for surface mining permits)



Kentucky Permit Appeals

Steps in the Appeal Process

- Step 7: Exceptions
 - The parties have 14 days to file exceptions to the Hearing Officer's Report and Recommended Order
- Step 8: Secretary issues Final Order
 - May adopt or reject the Hearing Officer's recommendation; may issue own findings
- Step 9: Further appeals
 - Secretary Order is subject to appeal, typically to Franklin Circuit Court.
 - Circuit Court would then docket appeal and the appellant would seek briefing schedule
 - Circuit Court decision may be appealed to the Kentucky Court of Appeals and potentially to the Kentucky Supreme Court

Kentucky Permit Appeals

Special Notes: Standard of Review

- In the administrative proceeding –
 - Proceedings are “de novo”
 - Important distinction from determinations reviewing EPA determinations
 - Secretary’s decision must be based on substantial evidence in the record as a whole.
- On appeal to the Circuit court
 - Decision on factual issues is to be upheld if there is any substantial evidence to support it
 - Issues of law are reviewed anew but deference is afforded to the agency’s interpretations of its regulations and governing statutes

Kentucky Permit Appeals

Special Notes: Stays

- Of all state-issued Permits, only KPDES permits can be stayed in the administrative proceedings. Otherwise, permit opponents must go to circuit court and attempt to obtain an injunction or negotiate agreed order for stay



Kentucky Permit Appeals

Special Notes: Litigation timeline

- For any permit issued pursuant to KRS Chapter 224, deadlines for resolution of permit challenge apply
 - Does not apply to non-KRS 224 permits such as water withdrawal permits, floodplain construction permits, mining permits
 - With limited provisions for extensions, statute provides that, absent waiver by the parties, 180 days after petition is served, Hearing Officer must issue Report and Recommended Order and that Secretary must issue Final Order 90 days after submission
 - As a result,
 - Best reasonable case timeline for a permit appeal is 9-10 months after permit issuance
 - Worst case timeline (without an agreement to extend timelines): 18 months

Kentucky Permit Appeals

Conclusions

- Recognize the Key roles that the public comment process and permit appeal process can have on efforts to achieve the “perfect,” or at least livable, permit
- Participate effectively and clearly in the public comment process and take advantage of informal ways to “comment”
- Preserve your rights and effectively use the permit appeal process to further discussions and ensure a permit you can live with

A Few Additional Words

EPA proposes changes to Title V public comment process

- On August 24, 2016, EPA proposed changes to 40 CFR Part 70 that if finalized impact the process state and local authorities must follow in responding to public comments on draft permits.
 - As part of the same proposal, EPA also proposed changes to the procedure and format requirements for Petitions requesting that EPA object to Title V permits.
 - Public comment period closed October 24, 2016.
 - No final rule has been issued as of the date of this presentation.
- By separate proposed rule published December 29, 2015, EPA has proposed to allow for the option of electronic based public notices under Clean Air Act permitting programs.
 - Kentucky voiced support for proposal.
 - Final Rule published October 18, 2016. Kentucky has not yet changed its regulations.

A Few Additional Words

EPA proposes changes to Title V public comment process

- EPA is proposing to require states to provide public notice of proposed permit's transmittal to EPA for 45 day review.
- EPA is proposing to add regulatory language expressly requiring permitting authorities to respond in writing to significant comments received on a draft permit during the public comment period.
 - Note: Agencies already do this but commenters have submitted that proposed language is vague and unclear.

A Few Additional Words

EPA proposes changes to Title V public comment process

- Under EPA's proposal, any proposed Title V permit transmitted for 45 day review period must be accompanied by statement of basis and response to significant comments. If no significant comments are received, the permitting authority would be required to send a statement to that effect to EPA. EPA's 45-day review period would not commence until all these materials are received.

Questions?

Kelly D. Bartley

Bingham Greenebaum Doll LLP
300 West Vine Street
Suite 1200
Lexington, Kentucky 40507
859-288-4652

kbartley@bgdlegal.com

