



BMHAVOCATS

Accelerating the permitting procedures for
onshore wind farms – French perspective

6 December 2022

French onshore wind energy development targets

- France aims to increase, by 2030, the share of renewable energy to :
 - at least 33% of gross final energy consumption
 - 40% of electricity production(Article L. 111-4 of the French Energy Code)

- Objectives set by the French multiannual energy plan for onshore wind energy:
 - 24.1 GW installed by 31 December 2023
 - Between 33.2 and 34.4 GW installed by 31 December 2028(Decree No. 2020-456 of 21 April 2020)

- Objectives set out by Emmanuel Macron (February 2022): double the installed capacity of onshore wind farms to achieve 40 GW by 2050

- Since 26 September 2022, a Government bill on the acceleration of renewable energy production is being discussed before French parliament. It contains various provisions aimed at enabling the achievement of these objectives but also some provisions creating new restrictions for the development of onshore wind farms.

Legal framework resulting from the order and decrees of 26 January 2017: Urban planning rules

- Onshore wind farms subject to “*environmental permit*” (*autorisation environnementale*) are exempt from building permit (Article R. 425-29-2 of the French Urban Planning Code)

- But they still must comply with urban planning regulations:
 - Under Article L. 151-15 of the French Urban Planning Code, municipal and intercommunal urban planning documents (“*plans locaux d’urbanisme*” and “*plans locaux d’urbanisme intercommunaux*”) may allow the implementation of onshore wind farms in areas they identify as agricultural (“*zones agricoles*”) or natural (“*zones naturelles*”).
 - According to Article L. 151-42-1 of the French Urban Planning Code, these urban planning documents may define areas in which onshore wind farms are subject to specific conditions and may, to this end, be amended in accordance with the simplest procedure provided for by the French Urban Planning Code (“*procédure de modification simplifiée*”).
 - In its current wording, Article 1BA of the Government bill provides for the establishment of territorial landscape plans (“*plans territoriaux de paysage*”) aiming to define, among other things, landscape integration objectives for energy production facilities.

New layout rules (Government bill)

In its current wording:

- Article 1 CBA of the Government bill provides for the amendment of Article L. 515-44 of the French Environmental Code so that it states that environmental permits relating to wind farms must take into account:
 - the production capacity
 - the number of existing wind farms in the area involved
 - the need to diversify renewable energy sources and prevent visual saturation effects

- Article 3 of the Government bill foresees the creation of acceleration zones for the implementation of renewable energy facilities (*“zones d’accélération pour l’implantation d’installations de production d’énergies renouvelables”*)

Legal framework resulting from the order and decrees of 26 January 2017: scope of environmental permit



The environmental permit replaces all the permits still required for onshore wind farms under various regulations:

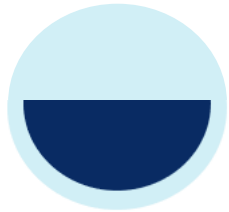
- the French Environmental Code
- the French Energy Code
- the French Forestry Code
- the Heritage Code...

(source : greenunivers.com)

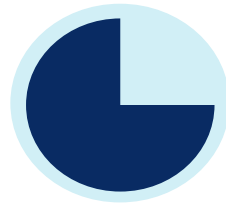
Focus on the protection of protected species

- Where necessary, the environmental permit includes the derogation to the prohibition of destruction, alteration or degradation of protected animal or plant species
- According to Article L. 411-2, 4° of the French Environmental Code, the derogation may only be granted if:
 - there is no other satisfactory solution
 - the derogation does not adversely affect the maintenance in a favourable state of conservation of the populations of species concerned in their natural area of distribution
 - the exemption is justified by one of the five grounds restrictively listed in Article L. 411-2, I, 4° of the French Environmental Code, among which the existence of an “imperative reason of overriding public interest” is the only one applicable to onshore wind farms.
- In its previous wording, Article 4 of the Government bill intended to add a new Article L. 411-2-1 to the Environmental Code providing that renewable energy production facilities “*are deemed to meet an imperative reason of overriding public interest*”. The Article was deleted by the Commission on economic affairs of the Assemblée nationale, but the issue was brought up again during the public session which took place on 5 December 2022 through a Government amendment proposing to enshrine this presumption in both the French Energy and Environmental Codes.

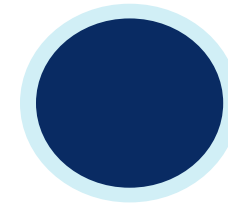
Current administrative permit-granting process (Article L. 181-9 of the French Environmental Code)



Examination phase
4 to 5 months



Public enquiry phase
3 months



Decision phase
2 to 3 months

- In practice, the examination phase is frequently suspended due to the administration's requests for additional documents and information.
- According to Regulation (EU) 2018/1999 of the European Parliament and the Council of 11 December 2018, the permit-granting process shall not exceed two years.
- In fact, the whole instruction process can last up to 6 years, the average duration being 3 years.

Foreseen amendments of the administrative permit-granting process (Government bill)

- Rules applying to the applications filed within four years of the enforcement of the Law:
 - Developers shall not be able to request the Prefect (“*Préfet*”) to provide them with a “project certificate” (“*certificat de projet*”).
 - The Prefect shall be able to reject applications for environmental permits during the examination phase - and not only at the end of this phase - if he considers that the file shows that requested permit cannot be issued.
 - The public enquiry shall last thirty days and will not be extendable by the investigating commissioner.
(Article 1 of the Government bill)

- A referent to the Prefect (“*réfèrent à l’instruction*”) shall be appointed in each department (“*département*”) to facilitate the administrative procedures for developers and to coordinate the work of the administrative units responsible for the permit-granting process.

Specificities of the legal proceedings relating to environmental permits for onshore wind farms

- Original jurisdiction of Administrative Courts of Appeal (Article R. 311-5 of the French Code of Administrative Justice)
- Impossibility for the claimants against an environmental permit relating to a wind farm to raise new legal arguments more than two months after the filing of the developer's statement of defence (Article R. 611-7-2 of the French Code of Administrative Justice)
- Extensive powers of the Court:
 - power to postpone its decision in order to allow the file to be regularized
 - power to grant the environmental permit(Article L. 181-18 of the French Environmental Code)
- All the provisions foreseen in the initial version of the Government bill to limit appeals against environmental permits (obligation to notify the appeal, restriction of persons entitled to file an appeal, possibility for the developer to claim compensation for abusive appeals) have been deleted from the current version.

Implementation of environmental permits

- The commissioning of an onshore wind farm is subject to the provision of guarantees to ensure the completion of site restoration operations at the end of the wind farm's operation in the event of the operator's default (Article R. 515-101 of the French Environmental Code).
- Amendment proposed by the Government bill : Prefects may subject the construction or commissioning of new onshore wind farms to the operator paying for equipment to compensate for the inconvenience caused by its facility for the operation of military detection equipment, radars and navigational aids used in support of civil air navigation (Article 16 bis of the Government bill).
- It is also proposed that the Prefects may subject the construction or commissioning of new onshore wind farms to the submission by the operator of observation data to Meteo France to compensate for the inconvenience caused by its facility for the operation of Meteo France's facilities.

Current rules applying to renewal of onshore wind farms

- Rules currently applicable to modifications to onshore wind farms:
 - significant modifications (“*modifications notables*”) must be reported to the Prefect before their implementation
 - substantial modifications (“*modifications substantielles*”) are subject to a new environmental permit (Articles L. 181-14 and R. 181-46 of the French Environmental Code)

- Guidelines set out in the Government Circular of 11 July 2018 for assessing the nature of modifications to onshore wind farms:
 - any increase in the number of wind turbines constitutes a substantial modification
 - renewal of the turbines with turbines of the same dimensions (same overall height and blade length) and at the same location requiring work on the foundations constitutes a significant modification
 - the modification or replacement of an identical part on a wind turbine does not constitute a significant or substantial modification
 - all other modifications are subject to detailed analysis by the Administration

- The Government bill provides that environmental impacts of a renewal shall be assessed in relation to the potential impacts resulting from the modification or extension in relation to the existing facility (Article 1 quinquies A of the Government bill).

Focus on the Government circular dated 16 September 2022

➤ Aims at speeding up renewable energy projects

- Requests the prefectural services to put in place all the necessary actions to accelerate the instruction of the files being examined, which represent nearly 10 GW of solar and wind projects
- An instruction time not exceeding 24 months (18 months for repowering projects)
- Study of timelines and coming up with solutions for projects of more than 5 GW having been instructed for more than 12 months and every third month monitoring by the Directorate General for Energy and Climate ("*Direction Générale de l'Énergie et du Climat*") of compliance with instruction deadlines
- No use of consultation bodies that aren't legally necessary
- Only use of the 2020 onshore wind project impact assessment guides
- No consultation of non-essential commissions
- Delivery without delay of permits granted pursuant to a court decision and end to automatic requests for revision by the Ministry of Ecology

➤ So far, no impact: 2 GW of onshore wind projects waiting for the signing of the environmental permit by the *Préfet* and 3 GW in the instruction process (source: FEE)

Proposal for Council Regulation laying down a framework to accelerate the deployment of renewable energy of 24 November 2022

- The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid and the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety with regard to environmental rules (Habitats directive, Bird directive, water framework directive).
- Member States may restrict the application of these provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans.
- Member States shall ensure, at least for projects which are recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of energy plants from renewable sources and the related grid infrastructure development is given priority when balancing legal interests in the individual case. Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for this purpose.
- The permit-granting process for repowering of projects, including the permits related to the upgrade of the assets necessary for their connection to the grid where the repowering results in an increase in capacity, shall not exceed six months including environmental assessments where required by relevant legislation.

CONCLUSION

- Current version of the Government bill : a deceleration rather than an acceleration of the deployment of renewable energies (final text to be voted at the end of January 2023)

- Proposal for Council Regulation laying down a framework to accelerate the deployment of renewable energy :
 - once adopted it will be directly applicable in the member States and legally binding on the administrative authorities and on the Courts

- The Government can act by monitoring closely the implementation of its instruction to the *Préfets* and give their services the appropriate human and financial resources.



Thank you for your attention!



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