

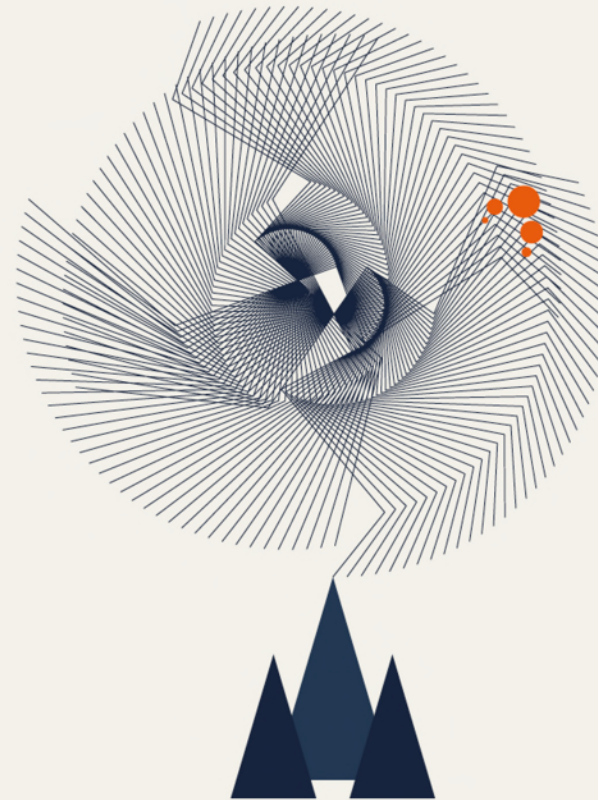
/ Overview of Obstacles to Onshore Wind Energy in the Context of Immission Control in Germany

As part of the conference

“Immissions from Onshore Wind Turbines:
Night-time Marking, Sound and Radars”

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/ Permitting Procedure – Key Points (1)

- Wind turbines higher than 50 metres in total height require a permit pursuant to the Federal Immission Control Act (*Bundes-Immissionsschutzgesetz*, BImSchG).
- The immission control permit has to be granted pursuant to Sec. 6 (1) BImSchG if
 1. the **basic immission control obligations** under Sec. 5 BImSchG are met (above all, no harmful effects on the environment due to immissions; immissions are noise, light, vibration, air pollution, heat, radiation and similar effects, Sec. 3 (2) BImSchG) **and**
 2. if **other regulations under public law** do not preclude the construction and operation of the wind turbine.
- This leads to a multitude of aspects to be considered in the permitting procedure, e.g.



- Legal claim to the permit if the requirements are met; no discretion by the licensing authority.

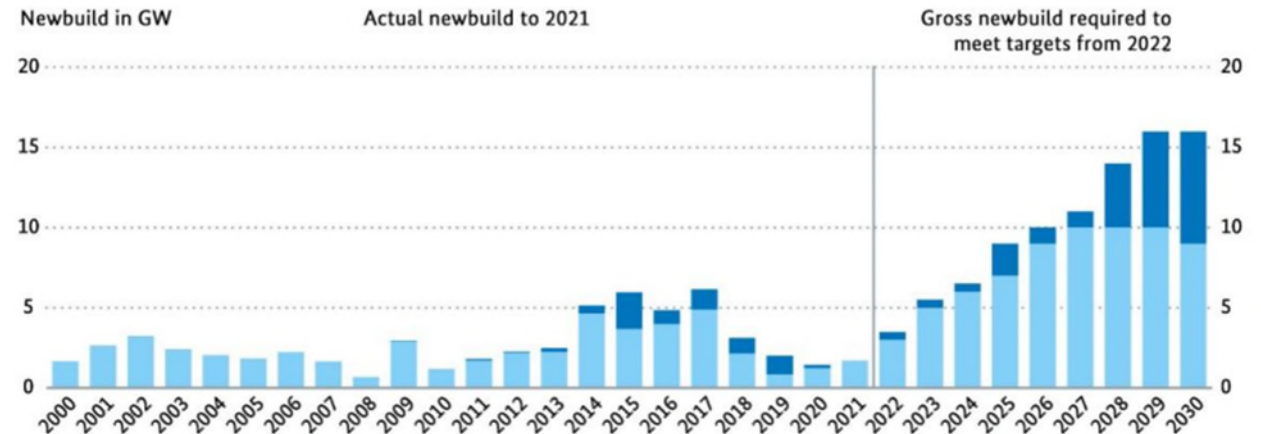
/ Permitting Procedure – Key Points (2)

- The immission control permit includes other related official decisions/permits (“concentration effect“, Sec. 13 BImSchG).
- After the permit has been granted, the concentration effect of the permit ends. Subsequently, different authorities are competent in the operating phase.
- Legal actions and objections against a permit have no suspensive effect (Sec. 63 BImSchG).
- Private persons can in principle only invoke an infringement of their own rights; but they can also invoke certain procedural errors such as the failure to conduct an EIA or preliminary examination (Sec. 4 Environmental Appeals Act, *Umweltrechtsbehelfsgesetz*, UmwRG).
- Recognised environmental associations can challenge permits and invoke violations of regulations.

/ Obstacles on the Way to Achieving the Expansion Targets

- Germany's expansion target for onshore wind energy so far: **71 GW by 2030** (EEG 2021)
- New target (Draft EEG 2023): **110 GW by 2030**
- **2021: 56 GW** installed capacity
- *"We make it our common mission to drastically accelerate the expansion of renewable energies and **to remove all hurdles and obstacles.**"* (Coalition Agreement 2021-2025 between SPD, Bündnis 90/Die Grünen, FDP, p. 56)

Expansion of wind and PV



Source: Federal Ministry for Economic Affairs and Climate Action, Germany's current climate action (Eröffnungsbilanz Klimaschutz), p. 13

- Obstacles are therefore all requirements and circumstances that stand in the way of achieving the expansion targets?
- Obstacles can ...
 - ▷ lead to delays in planning and permitting procedures,
 - ▷ completely preclude the realisation of a project,
 - ▷ or at least lead to constraints on a project that affect its economic viability.
- Obstacles can be legal requirements, which at the same time serve other (legitimate) objectives.
- Obstacles can also be due to the factual circumstances (e.g. too few administrative staff).

/ Obstacles from the Perspective of Industry and Government

Results of a survey among wind energy turbine manufacturers in 2018 (Fachagentur Windenergie)	Report of the Federal Government/Länder Cooperation Committee on the status of the expansion of renewable energies pursuant to Sec. 98 EEG 2021	Germany's current climate action (Eröffnungsbilanz Klimaschutz), Federal Ministry for Economic Affairs and Climate Action (11 January 2022)
<p>Important obstacles:</p> <ul style="list-style-type: none"> • Nature and species protection law (pertaining to birds) • Site planning • Air navigation services • Military air defense • Citizens' initiatives • Impacts on weather radars 	<p>Central obstacles from the perspective of the Länder:</p> <ul style="list-style-type: none"> • Insufficient availability of legally designated sites (problem: long and complex planning procedures) • Unclear requirements for nature conservation and species protection • Conflicting objectives in the area of air traffic control (civil and military) and with meteorological service installations • Acceptance problems 	<ul style="list-style-type: none"> • <i>“The shortage of available sites is a major problem”</i> • <i>“We will vastly speed up the planning and approval procedures, which currently take far too long, particularly for onshore wind energy”</i> • <i>“(…) we will reduce the distances to radio navigation equipment and weather radar, and implement measures to improve compatibility with military interests. In this way, we will be able to free up new sites for wind energy very quickly.”</i>
<p>https://www.fachagentur-windenergie.de/fileadmin/files/Veranstaltungen/2018-11-07_Kompetenztag_Windenergietage/FA_Wind_Block_5_Genehmigungs_hemmnisse_Quentin_07-11-2018.pdf (p. 10)</p>	<p>https://www.bmwi.de/Redaktion/DE/Downloads/E/EEG-Kooperationsausschuss/2021/bericht-bund-laender-kooperationsausschuss-2021.pdf?__blob=publicationFile&v=4</p>	<p>https://www.bmwi.de/Redaktion/EN/Downloads/E/germany-s-current-climate-action-status.pdf?__blob=publicationFile&v=11</p>

/ Obstacles related to Sound, Lights and Radars

- For **acoustic immissions**, the legal requirements are specified by an administrative regulation (*TA Lärm*), although its standards are challenged by new issues, e.g. sound spread calculation or infrasound (clear case law: infrasound and low-frequency sound from wind turbines generally do cause health hazards, cf. Higher Administrative Court of Münster, Decision dated 22 November 2021 - 8 A 973/15 -, para. 160, juris).
- Obstacles to the expansion of wind energy in connection with acoustic immissions:
 - ▷ Compliance with noise limits is relevant for the availability of sites (distance requirements).
 - ▷ Reducing acoustic immissions is also important for acceptance by the neighbours.
- **Light emissions** are mostly about periodic shadow flicker and night marking under aviation law.
 - ▷ On-demand night-time marking (*Bedarfsgerechte Nachtkennzeichnung*) of wind turbines can reduce lack of acceptance.
 - ▷ But ambivalent: new technologies and requirements can initially lead to delays in administrative procedures.
- Possible effects on the **functioning of radars and radio navigation facilities** are countered by minimum distance requirements. In certain areas, a case-by-case assessment is required; the assessment standards are under discussion.
- Such distances lead to a reduction of available sites for wind energy (obstacle).

/ Conclusion and Outlook

- Obstacles to the expansion of wind energy from the perspective of project-related legal advice:
 - ▷ Lack of site availability (site planning; restrictions by requirements of minimum distances)
 - ▷ Lack of clarity of legal requirements (especially in nature and species conservation law)
 - ▷ Lack of local acceptance, which can also lead to hesitant acting by public authorities/planning authorities
- In most cases, obstacles and problems can be solved through open and transparent communication with the authorities, making legal action the exception.
- Outlook: The new Federal Government has announced comprehensive changes and proposed the first measures (Draft EEG 2023, 4 March 2022).
 - ▷ An annual **“Progress Report on the Removal of Obstacles to Onshore Wind Energy”** has to be prepared to report on conflicts of use with radio navigation equipment, military concerns, weather radar equipment and seismological measuring stations (Sec. 99a EEG 2023).
 - ▷ The implementation deadline for **on-demand night-time marking is postponed to 1 January 2025** (Sec. 9 (8) EEG 2023).
 - ▷ A **“Wind Energy on Land Act”** with amendments to nature and species protection law and planning law is supposed to be passed by the Federal Government in summer 2022.

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Competences

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- Environmental law
- Administrative and constitutional law
- Public building and planning law

/ Noerr Energy Group

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