Stiftung Umweltenergierecht

Mehr Flexibilität bei der Genehmigung von Windenergieanlagen durch eine “typenoffene Genehmigung”?

More flexibility in the approval of wind turbines through a “open-type permit"?

DFBEW, Onshore-Windenergie und Genehmigungsverfahren in Deutschland und Frankreich

Maximilian Schmidt

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Future laboratory for the legal framework of the energy transition

- Non-profit, specialised research institute
- Guiding Question: How must the legal framework change in order to achieve energy and climate policy goals?
- Interdisciplinary research partners, close exchange with practice
- Advice in legislative processes

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Agenda

- Preface:
  Research Project “Typenunabhängige Genehmigung für Windenergieanlagen” (“open-type” permit for wind energy installations”)
- Open-type permits
  - What does open-type permit mean?
  - Expected advantages
  - Compatibility with administrative law
  - Potential disadvantages
- Conclusions

Research Project “open-type permit for wind energy installations”

Brief information

„Open-type permit for wind energy installations“

- Subtitle: „Feasibility and restrictions“
- Cooperation project (07/2019 to 06/2020) between
  - Fachagentur Windenergie an Land und
  - Stiftung Umweltenergierecht.
- Supported by
  - Deutsche Bundesstiftung Umwelt (DBU)
  - Bundesländer
    - Baden-Württemberg
    - Hessen
    - Rheinland-Pfalz

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„Open-type permits for wind energy installations“

- Research focus
  - Assessment of feasibility, advantages and disadvantages of open-type permits irrespective of market actors
  - Inventory and discussion of legal and technical barriers
  - Solutions for certain aspects
- Methodology
  - Literature and jurisprudence review
  - Assessment of existing procedures (Hessen)
  - Expert interviews with different stakeholders (agencies, project developers, lawyers)

What does open-type permit mean?

Status quo: Type-specific permit

- Construction and operation of wind energy installations based on the specific type of the installations
- Designation of a specific type provides information of a specific configuration of a wind turbine, e. g.
  - Rotor diameter 125 meter
  - Sound power level 102 dB(A)
  - ...

Open-type permit

- Permit without specification of a specific type
- However, it is not a question of detachment from mere type designation, but rather detachment from one single system configuration behind it
- Permit covers a span/range, allowing – within certain limits - for some flexibility regarding the development and operation of the wind energy installation, such as
  - Rotor diameter between 115 to 130 meter
  - Hub height between 130 to 140 meter
  - …

Type-specific permit

System type

Rotor diameter

Hub height

Sound power level

...

Open-type permit

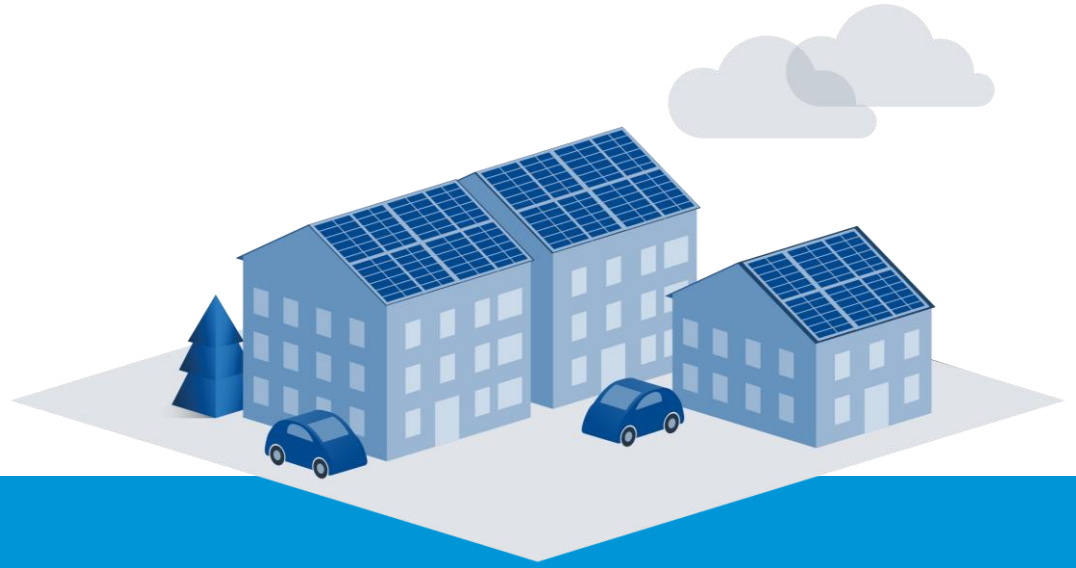
Rotor diameter

Hub height

Sound power level

...

- Neither definition of the concrete type nor of the configuration of the installation
- Span/Range of different settings



Expected advantages

Initial situation

- Status quo: Type-specific permit
- Time between permit application and beginning of the construction gets longer, e.g because of
  - length of the administrative procedures
  - judicial proceedings
- Once the permit is issued and construction can start,
  - there may already be newer models/types (more efficient/economic)
  - or the installation type as covered by the permit is not even available on the market anymore

  → Need to change the granted installation type in the permit (type modification)

Problem

- Procedural classification of type modification is not clear
  - „Änderungsanzeige, § 15 BImSchG“ (notification of modification)
  - „Änderungsgenehmigung, § 16 BImSchG“ (permit of modification)
  - „Neugenehmigung, § 4 BImSchG“ (permit of entire wind turbine)
- The kind of procedure determines the scope of the assessment
- Consequences
  - Legal uncertainty
  - Possibly the failure of entire projects, if the criteria to be considered in the assessment have changed since the first issuance of the permit

Advantages of open-type permits (for permit holders)

- As no concrete configuration defined, more room for different settings (range)
- The concrete installation can be chosen shortly before start of the construction works, provided its configuration falls within the range determined by the permit
- Issues with type modification can be avoided
  - Legal uncertainty
  - Problems
  - Time
  - Costs
- Plus: Better position in negotiations with wind energy installation manufacturers – as more freedom in what exactly to purchase

Compatibility with administrative law

Compatibility with administrative law

- Open-type permits not necessarily in conflict with administrative law
- No explicit requirement to define the type (BImSchG; 9. BImSchV)
- Rather: Permit needs to be sufficiently concrete

  → Location needs to be identified
- **Central requirement**:
  Review of the permit requirements needs to be possible

§ 6 Abs. 1 BImSchG (freely translated): The permit shall be granted if

1. *legal requirements of immission control are ensured and*
2. *other requirements of public law and occupational health and safety regulation do not conflict with the construction and operation of the installation*

Compatibility with administrative law

- Compliance with permit requirements is mostly subject to technical assessment, regarding potential
  - negative environmental impacts (pollution)
  - negative impacts on animal welfare and landscape protection (natural/habitat conservation)
  - etc.
- **Central question:**
  could those assessments be done without defining the type of installation („type-open“), thus
  - without defining the concrete configuration?
  - without defining the rotor diatemeter?

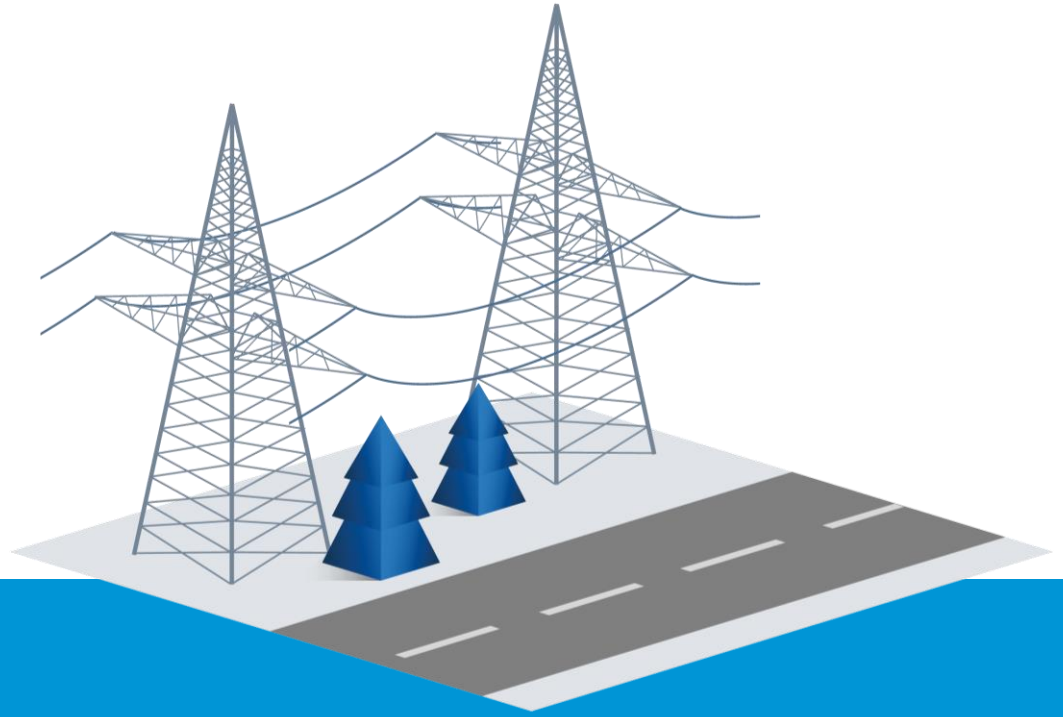
Technical assessment without specification of the type of installation

- Possible/less problematic
  - Areas where the requirements are more general in nature (e.g. fire protection, waste, water protection)
  - Areas where the assessment allows for the use of „worst case“ approaches (nature conservation, monumental protection, aviation)
- More problematic
  - Areas where type-specific information is (currently) most relevant
    - Sound power protection
    - Turbulences

  → Here entirely new approaches would need to be developed

Excursion: Worst case approach

- = General approach to allow for an assessment of the permit requirements for a range of different configurations
- Assumption of the **„worst case“** impact on the respective interest
- Rationale: When permit requirements are met assuming the worst case, then they will be met as well with a lesser degree of impact
- Example:
  Where impact depends on height of the installation, worst case assessment will be based on largest installation configuration possible



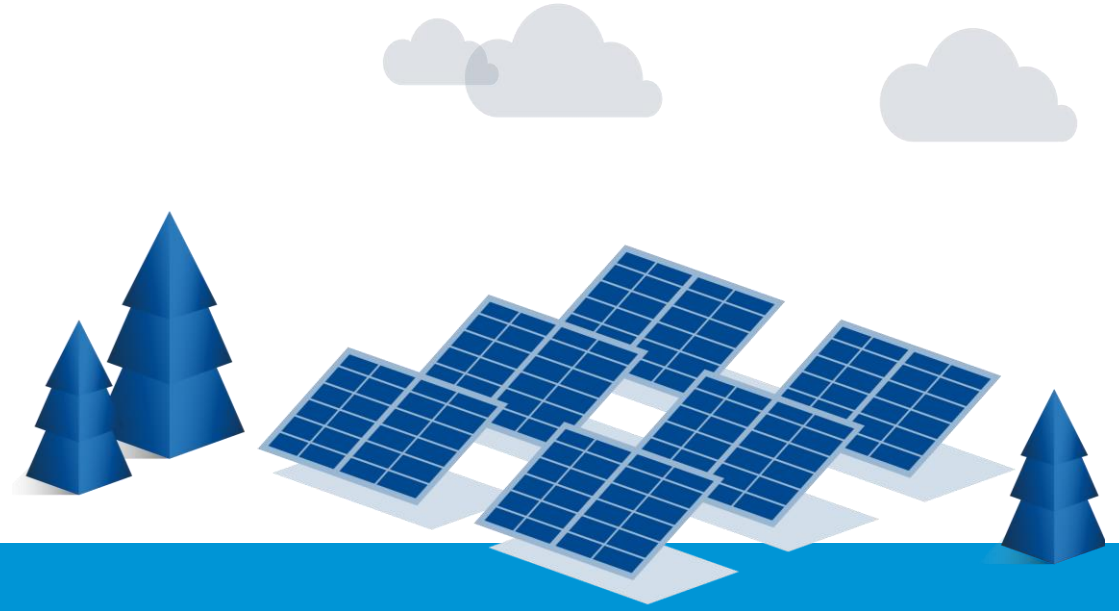
Potential disadvantages of open-type permit

Potential disadvantages

- Additional effort
  - Permit applicant (full permit application)
  - Technical experts (possibly new approach necessary)
  - Agencies („out of the norm“)
- Problems related to the worst case approach (follow-up problems)
  - Permit, such as additional requirements (e.g. restrictions on the operation of the installation) relate to the worst case
  - If the installation is „better“ than the worst case
    - additional requirements may be too strict (and impact the efficiency/economics of the installation)
    - Sub-optimal land use (blockage)

Problems related to the worst case approach: Example

- Permit coverage:
  - Wind energy installation with sound power level of up to 103 dB(A)
  - Based on sound power level of 103 dB(A):
    Legal need for restriction for night-time operation (noise protection)
- Actual installation:
  - Sound power level of 101 dB(A)
  - Restriction for night-time operation would not have been necessary
- Problems
  - Plant operator impacted by night-time restriction
  - For additional wind energy installations, a sound power level of 103 dB(A) has to be considered as starting point (depends on permit, not actual installation)
    - Not possible to use the available sound level range (blockage)
    - Potential consequence: Inefficient land use



Conclusions

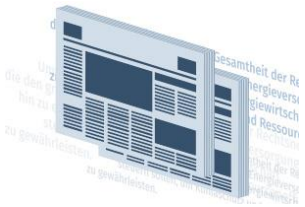
More flexibility?

- More flexibility
  - in case of change of the type of installation (type modification)
  - within negotiations with wind energy installation manufacturers
- **However: Assessment of all the permit requirements needs to be sufficient**
  - Less of a legal question (type-open permits are not generally incompatible with the legal requirements)
  - Rather question of the feasibility of the technical assessments
- BUT: What may be the price for flexibility?
  - Additional effort
  - Related problems (follow-up problems)
  - It would be a certain departure from the actual system

More flexibility?

- Currently no clear answer possible
- Research Project was just another step further
- More research needed, in particular
  - Feasibility of technical assessments and compatibility with current legal framework (e.g. noise protection „*TA Lärm*“) or identification of where changes may be necessary
  - Ways to address/solve problems related to the worst case approach
- Alternatives
  - Improvements to the handling of type modifications
  - Acceleration of the administrative procedures for new wind energy installations (→ less need for type modifications)

Stay up to date



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Hannah Lallathin
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Stiftung
Umweltenergierecht

Maximilian Schmidt
Senior Researcher

schmidt@stiftung-umweltenergierecht.de

Tel: +49-931-79 40 77-284

Fax: +49-931-79 40 77-29

Friedrich-Ebert-Ring 9 | 97072 Würzburg

www.stiftung-umweltenergierecht.de

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