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## A Guide to Navigating the DOD Siting Clearinghouse Process for Wind Farm Siting and Development



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The confluence of federal, state, and local regulations governing the siting and development of new wind farms in the United States has made it increasingly difficult for developers to navigate the murky waters of permitting and approvals. Congress has long recognized the fact that wind farms have the potential to interfere with certain military operations, which is why Congress created the Military Aviation and Installation Assurance Siting Clearinghouse in 2011 to protect DOD interests while encouraging new wind farm development.

In a recent meeting at the Pentagon, I had the opportunity to sit with various DOD personnel to discuss the Clearinghouse process for reviewing new wind farm projects. This process is more important now than it has ever been because military stakeholders are feeling increasingly constricted by the proliferation of new wind farms, many of which include turbines in excess of 200 feet tall. Regulators at all levels are responding to increased military pressure to protect military operations by making it more difficult to build wind farms that may interfere with military testing and training operations. This begs the question: what legal power does the DOD have over wind farm siting and development? The answer may surprise you.

The process by which the DOD Clearinghouse reviews new energy projects is governed by 32 C.F.R. Part 211.

That Part creates two separate review processes:

- (a) A **formal review** of projects for which applications are filed with the Secretary of Transportation under 49 U.S.C. 44718, to determine if they pose an unacceptable risk to the national security of the United States.
- (b) An **informal review** of a renewable energy development or other energy project in advance of the filing of an application with the Secretary of Transportation under 49 U.S.C. 44718.

### THE FORMAL REVIEW PROCESS

The formal review process is triggered when a project applicant submits a Form 7460 to the Federal Aviation Administration (FAA), and the FAA then submits the project to the Clearinghouse for formal review.

Federal Regulation Title 14 Part 77 establishes standards and notification requirements for objects affecting navigable airspace. Pursuant to §§ 77.7 and 77.9, any person or organization planning to erect any construction or alteration exceeding 200 feet above ground level must submit a completed Form 7460, "Notice of Proposed Construction or Alteration." Section 77.7 states that notification must be submitted 45 days prior to construction, to allow the FAA sufficient time to conduct an aeronautical study and make a hazard determination.

Under FAA Order 7400.2M, “Procedures for Handling Airspace Matters” (February 28, 2019) (FAA Handbook), a proposed object that exceeds the standards set forth in Part 77 is presumed to have a substantial adverse effect on the use of airspace and is therefore “presumed to be a hazard to air navigation unless the aeronautical study determines otherwise.” FAA Handbook § 6-3-2. The federal courts have held that the FAA Handbook is a binding set of FAA guidelines. See *D&F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1196 (D.C. Cir. 2000) (FAA Handbook is “controlling”). But the fact that these regulations are binding on the FAA does not mean that the regulations confer power on the FAA to regulate local land use decisions or to block building permits. The FAA has no power to regulate land use. (See, e.g., FAA Land Use Compatibility and Airports Guide at p. III-17 (“FAA has no land use control powers”).

Notwithstanding the FAA’s complete lack of jurisdiction to regulate land use, the FAA Handbook dictates that “[a]n aeronautical study must be conducted for all complete [7460] notices received.” FAA Handbook § 6-1-1. When a single Form 7460 has been submitted for multiple structures (including windmill clusters), “[e]ach structure must be assigned a separate aeronautical study number and a separate obstruction evaluation study must be conducted. However, a single determination addressing all of the structures may be issued.” FAA Handbook § 6-1-2. The FAA Handbook requires the FAA to make “a sincere effort” to negotiate equitable solutions to airspace obstruction issues. FAA Handbook § 1-2-1. The FAA Handbook explains:

**6-3-16. NEGOTIATIONS.** Negotiations must be attempted with the sponsor to reduce the structure’s height so that it does not exceed obstruction standards, mitigate any adverse effects on aeronautical operations, air navigation and/or communication facilities, or eliminate substantial adverse effect. If feasible, recommend collocation of the structure with other structures of equal or greater heights. Include in the aeronautical study file and determination a record of all the negotiations attempted and the results. If negotiations result in the withdrawal of the OE notice, the obstruction evaluation study may be terminated. Otherwise, the obstruction evaluation must be continued to its conclusion.

FAA Handbook § 6-3-16. The FAA Handbook also includes several other references to the required negotiations and the process by which the FAA must circulate certain applications for comments, etc. The United States Court of Appeals for the District of Columbia Circuit has interpreted the regulations governing the 7460 process to require the FAA to engage in a “meaningful give-and-take” with the project proponent. *BFI Waste Sys. of N. Am., Inc. v. FAA*, 293 F.3d 527, 533-34 (D.C. Cir. 2002). The D.C. Circuit has also held that the FAA’s denial of a Form 7460 is arbitrary and capricious if the FAA fails to “adequately explain its result.” *D&F Afonso Realty Tr. v. Garvey*, 216 F.3d 1191, 1194-97 (D.C. Cir. 2000) (“the FAA’s abandonment of its own established procedure and its lack of reasoned analysis on the record constitute arbitrary and capricious agency action in violation of the law. Due to the shortcomings in the FAA’s hazard determination, we reverse and remand D&F’s case to the agency in order for it to undertake an appropriate hazard analysis.”).

When the FAA receives a Form 7460 application for a new wind turbine, the FAA sends the application to the Clearinghouse to initiate a formal review pursuant to 32 C.F.R. § 211.6. The Clearinghouse will then follow the regulatory process outlined in that section:

- (1) *The Clearinghouse will convey the application as received to those DoD Components it believes may have an interest in reviewing the application.*
- (2) *The DoD Components that receive the application shall provide their comments and recommendations on the application to the Clearinghouse no later than 20 days after they receive the application.*
- (3) *Not later than 30 days after receiving the application from the Secretary of Transportation, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:*
  - (i) *Determine that the proposed project will not have an adverse impact on military operations and readiness, in which case it shall notify the Secretary of Transportation of such determination.*
  - (ii) *Determine that the proposed project will have an adverse impact on military operations and*

readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. When the Clearinghouse makes such a determination, it shall notify the Secretary of Transportation of such determination.

(iii) Determine that the proposed project may have an adverse impact on military operations and readiness. When the Clearinghouse makes such a determination it shall immediately -

(A) Notify the applicant of the determination of the Clearinghouse and offer to discuss mitigation with the applicant to reduce the adverse impact;

(B) Designate one or more DoD Components to engage in discussions with the applicant to attempt to mitigate the adverse impact;

(C) Notify the Secretary of Transportation that the Department of Defense has determined that the proposed project may have an adverse impact on military operations and readiness, and, if the cause of the adverse impact is due to the proposed project exceeding an obstruction standard set forth in subpart C of part 77 of title 14 of the Code of Federal Regulations, identify the specific standard and how it would be exceeded;

(D) Notify the Secretary of Transportation and the Secretary of Homeland Security that the Clearinghouse has offered to engage in mitigation discussions with the applicant.

(4) The applicant must provide to the Clearinghouse its agreement to discuss the possibility of mitigation within five days of receipt of the notification from the Clearinghouse.

## THE INFORMAL REVIEW PROCESS

The informal review process provides a mechanism for a wind farm developer to seek DOD review of a project prior to submitting FAA Form 7460. A project applicant can submit a request for an informal review directly to the DOD Clearinghouse without first involving the FAA, whereas a formal review can only be initiated by the

FAA upon receiving a completed Form 7460 from the applicant.

The [Clearinghouse website](#) states the following about the informal review process:

The Clearinghouse encourages all energy proponents to seek informal reviews as early as possible to identify potential compatibility concerns. Developers of an energy project; a landowner; a State, Indian tribal, or local official; or other Federal agency should request a preliminary determination from the Clearinghouse in advance of filing an application with the Secretary of Transportation under Title 49 U.S.C., Section 44718 or where a preliminary DoD determination is desired.

The informal review process is set forth in 32 C.F.R. § 211.7(b), and requires the project applicant to provide information to the DOD about the location of the project, the number of structures, the specifications of any wind turbines, solar towers, etc., and related information about associated transmission lines, intended grid connection, and the identity of the applicant. Currently, the Clearinghouse prefers to receive an Excel spreadsheet listing the latitude/longitude of each turbine tower and a map of the project in Adobe or PowerPoint format. Applications containing proprietary or sensitive business information can be submitted confidentially and protected from public disclosure under the Freedom of Information Act.

As stated in the regulations, “The Clearinghouse shall, within five days of receiving the information provided by the requester, convey that information to those DoD Components it believes may have an interest in reviewing the request.” That, in turn, triggers the following:

(1) The DoD Components that receive the request from the Clearinghouse shall provide their comments and recommendations on the request to the Clearinghouse **no later than 30 days after they receive the request.**

**(2) Not later than 50 days after receiving the request** from the requester, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:

(i) Determine that the project will not have an adverse impact on military operations and readiness, in which case it shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(ii) Determine that the project will have an adverse impact on military operations and readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. The Clearinghouse shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(iii) Determine that the project will have an adverse impact on military operations and readiness.

(A) When the requester is the project proponent, the Clearinghouse shall immediately -

(1) Notify the requester of the determination and the reasons for the conclusion of the Clearinghouse and advise the requester that the DoD would like to discuss the possibility of mitigation to reduce any adverse impact; and

(2) Designate one or more DoD Components to engage in discussions with the requester to attempt to mitigate the adverse impact.

Further, pursuant to subdivision (c) of 32 C.F.R. § 211.7, “If the requester is the project proponent and agrees to enter into discussions with the DoD to seek to mitigate an adverse impact, the designated DoD Components **shall engage in discussions with the requester in an attempt to reach agreement on measures that would mitigate the adverse impact of the project on military operations and readiness.**”

## **WHEN THINGS GO RIGHT**

When the Clearinghouse reviews a proposed wind farm project and determines that the project will not have an adverse impact on military operations and readiness, the Clearinghouse will notify the FAA of that determination, and the FAA will approve the form 7460 application unless the FAA has determined that the project poses a hazard to air safety on some independent basis (for example, if the project is dangerously close to an airport runway).

Typically, the project applicant will then forward the federal approvals to the local land use jurisdiction in support of the applicant’s permit applications. This critical process demonstrates how the DOD and FAA – two federal agencies with no land use powers – exert control over local land use decisions. **The DOD and the FAA depend upon local governments to enforce their hazard determinations, and the vast majority of local governments around the country have established practices for doing so.** This is federalism at work.

## **WHEN THINGS GO WRONG**

What happens when a project applicant follows the process outlined above and reaches a dead end at the Clearinghouse? In other words, what if the Clearinghouse determines that your project poses an unacceptable risk to national security and that there are no feasible mitigation options? At that point, the wind farm developer has a couple of options: (1) abandon the application as it currently exists (by pursuing a project at a different location, by changing the nature of the project, or by dropping the project altogether); or (2) see the application through to a final determination.

A “final determination” means that the FAA, upon receiving a determination of unacceptable risk from the DOD Clearinghouse, issues a “Determination of Hazard to Air Navigation.” Additionally, the Clearinghouse will independently report its determination that the project poses an unacceptable risk to national security to the congressional defense committees (as mandated by 32 C.F.R. § 211.10). As of the time of the drafting of this guide, only one wind farm developer has ever pushed an adverse determination this far. Why? Because most energy companies would prefer not to have DOD tell the House and Senate Committees on Armed Services and Appropriations that their company is persisting in pursuing a project that poses a risk to national security.

Notwithstanding the political reasons for wanting to avoid an adverse final determination, there are legal reasons for pursuing such a determination to preserve an applicant’s rights and exhaust administrative remedies. The Takings Clause of the Fifth Amendment provides that no “private property [shall] be taken for public use, without just compensation.” U.S. Const. amend. V. “While it confirms the State’s authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.” *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32 (2003) (emphasis added).

The procedural vehicle for litigating a takings claim against the United States government is an action for inverse condemnation filed in the Court of Federal Claims within six years of the “accrual” of the claim.

Inverse condemnation “is a cause of action against the government to recover the value of property taken by the government without formal exercise of the power of eminent domain.” *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)). To state a claim for inverse condemnation, a plaintiff must show: (1) that under the circumstances, treatment under takings law, as distinguished from tort law, is appropriate and (2) “that it possessed a protectable property interest in what it alleges the government has taken.” *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

Even if the proponent of a potential wind farm project does not own the land where the project will be located (as is common in the industry), a leasehold interest is a property interest protected by the Fifth Amendment. See *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 525 (2009).

In addition to the option of pursuing a regulatory takings claim, a project proponent receiving an adverse determination may also opt to pursue a claim against the federal government pursuant to the Administrative Procedure Act (APA). Under the APA, a court can compel a federal agency to take an action that has been unlawfully withheld or unreasonably delayed. See 5. U.S.C. § 706(1). Additionally, a court can set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See 5. U.S.C. § 706(2)(A).

## CONCLUSION

Congress created the Clearinghouse process to facilitate a meaningful give-and-take between wind farm developers, the DOD, and the FAA. Due to growing DOD concerns about protecting military training and operations, developers of new domestic wind farm projects are facing increased scrutiny by the DOD while navigating a complicated Clearinghouse process. This tinderbox of conflicting interests will inevitably result in legal challenges to federal hazard determinations. Such challenges will likely take the form of federal lawsuits pursuant to the Fifth Amendment of the Constitution or the federal APA.