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## Extending title insurance to renewable energy risks

Use of title insurance is growing beyond traditional applications to address the unique issues related to wind and solar farm developments in the UK and Europe



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Investment in wind farms, solar parks and geothermal drilling has been growing at an annual rate of 5.6% for the past 12 years, driven in part by government tax credits and other incentives.

The overwhelming success of inducements has sometimes outstripped the financial resources of government agencies, leading them to review – and often challenge retroactively – the process under which those subsidies were granted. This can lead to uncertainty and raise the spectre of invalid permits, thus forcing temporary or permanent shutdown of renewable energy projects.

Title issues for wind and solar farms can also prove quite complex since they often involve obtaining easements and rights-of-way from multiple landowners. Furthermore, the accelerated market expansion has also given rise to a proliferation of new land title issues.

Title insurance can now help mitigate these legal risks for developers or investors by protecting against losses resulting from invalidity of leases, environmental, operating, building or planning permits. There is also increasing demand from lenders and private equity funds for policies to cover these litigation risks.

In France, title insurance products are used to cover the validity of permits for residential buildings. Because the cover was so well-received by developers, lenders and investors, it led to enquiries from brokers about the applicability of the title insurance cover to energy projects.

Title insurance had already been providing this kind of coverage for years for traditional power plants and we were able to transfer this expertise to renewable energy. Secure Legal Title has already facilitated the insurance of solar projects in Slovakia and Romania, wind farms in Ireland, Denmark, France and Spain, and a geothermal project in France.

The basic needs for title insurance are common to all investors, developers or lenders – confirmation the person or entity leasing the land where the turbines will be placed is the rightful owner, and the developer's leasehold title is valid and enforceable.

In energy projects, however, title insurance cover is expanded to include permitting risks. Insurance covers issues with zoning, building and operating permits, in case they are challenged and lost on a permanent basis. The policy can also protect against temporary suspension of opera-



tions where an injunction halts the project due to a title issue.

The US recognised the unique needs for title coverage for wind and solar energy projects in 2012, when the American Title Insurance Association (ALTA) issued a new series of endorsements to the ALTA standard form policy for energy projects, as well as a new form of zoning endorsement. In Europe, Secure Legal Title issued its first policy on a wind farm in 2014.

Policies for this form of title insurance offer a broader interpretation of what makes up the value of the project and can include development rights. The policy can also provide cover where there are existing defects in title and even where there are existing challenges to permits.

The title company is also expected to insure the validity of easements and rights-of-way obtained from the private landowners to connect the project to the grid.

It should be noted the title insurance policy does not pay for

failure to win a concession, loss of incentives or unrealised profits because of operational issues. It does, however, cover loss of value of the infrastructure and fixed operational costs which a developer is contractually obliged to pay, whether or not the project proceeds. Nor can it cover project slowdowns or cancellations because of environmentalist activism or technical problems.

### Risk types

There can be uncertainties about some of the most basic elements in a renewable energy project. In many cases, permits become invalid if a project was not started – or completed – by a particular date.

Furthermore, there can be ambiguity about the definition of start or completion dates, leading to major uncertainty.

Because much of the land that is suitable for wind farm development is in rural areas, there may be certain restrictions in relation to the possible uses of agricultural land. There could be

conservation agreements or covenants that require the farmers or landowners not to change the use of the property.

In certain countries, there are issues in relation to the interpretation of the law and the way it is sometimes applied differently by government agencies.

Other examples that can leave planning permission open to challenge concern the validity of the tender process according to EU guidelines or ambiguities on the definition of “connection to a grid”.

There is also the risk of permitting issues for renewable energy projects in the proximity of larger/major infrastructures, such as airports, which are usually built on government or municipal land.

While there may not be title risks, there could be permitting issues in relation to major infrastructures that could be covered by title insurance. ■

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