Thinking Green but what are the Risks?

Ian Borders explains why effective risk management strategies are key to ensuring the successful completion of renewable energy projects and how title policies assist developers minimise risks.

There is currently pressure across all sectors and industries to think seriously about sustainability. The energy sector has long been involved in thinking about the long-term effects of the industry and its resources and the interest in renewable energy projects has increased dramatically over the last five years.

Lately there has been a particularly significant amount of activity around onshore wind power projects, which can be attributed to a race to benefit from the Renewable Obligation Certificate rates going up in April.

This and the government's pledge to continue supporting investment in renewable energy will undoubtedly encourage new and increasingly sophisticated development in the macro-generation sector which will bring with it fresh challenges and opportunities across the entire industry.

Effective risk management targeted at protection of the income stream from the project is likely to become more of a focal point for European renewable project developers and funders looking to secure a good return on their investment.

The impact of an improperly managed latent title risk can be fatal to a project's cash flows. Such an impact, if not properly addressed at the onset, may deter potential future investors.

Types of Risks

Onshore wind and solar projects, given their arguably offensive visual impact, are particularly exposed to third-party challenges aimed at preventing these projects from being sited at the developer's preferred location.

A third party with title to part of an area required for access to the site for installation, maintenance and decommissioning of a turbine, PV panels and/or other equipment can seek to hold the developer to ransom which can significantly impair a project's cash flow.

This ransom scenario may equally apply to areas within third-party ownership that are required for cabling and grid connection.

Although they may not be directly affected by ransom claims, offshore wind projects located on land belonging to the Crown may be indirectly impacted where access is required over third-party lands for onshore grid connections or for access to the offshore departure points.

Ransom claims may also stem from defects to the title and to the site itself rather than lack of rights required over lands in third-party ownership. It may be that there is no title to an area on which turbines or PV panels need to be placed and this prompts a challenge by an objector..

For offshore wind sites, onshore locations may be required for turbine assembly and those can be affected by lack of title issues. It may be that the site is burdened by minerals reservations or manorial rights, which the party with the benefit may threaten to exercise, and there could also be restrictive covenants which prohibit specific uses including for noisy and offensive purposes.

Impact of Risks

In all of these scenarios, the costs of obtaining a discharge of burdens or of acquiring the title to the affected areas could mean that critical cash flow at the initial stage of a project would need to be diverted to claims settlements. More importantly, depending on the profile of the potential claimant, payment of a ransom may not be an acceptable resolution.

In such cases, the impact of legal costs, time spent on defending a claim and consequential losses on the project become paramount considerations. Depending on the timing of the challenge, wind measuring, site due diligence, planning and other professional outlays would have already been incurred and would be irrecoverable.

It is imperative that as the sector moves towards maturity there is an established risk management process for anticipating title challenges that may affect renewable energy sites and for removing title risk from the balance sheets and the cash flow models of macro-generation projects.

Ideally, title risks should be analysed and managed during the site assembly/preoption phase so that the one-off costs of cover are built into the project outlays and the policy wording is drafted and agreed with potential investors and purchasers in mind.

It has to be said that at the very core of these risk management strategies should be the adequate provision for latent title risk. The profile of latent title risks will fluctuate from low to high depending on the category of risk for each phase of the project including:

- Assembly
- Planning
- Construction
- Decommissioning
- Repowering

Indeed, when one considers the potential consequences of a title risk becoming real; it could be argued that the longevity of the renewable energy sector is perhaps as equally reliant on proper title risk management strategies as it is on other certainty factors such as governmentbacked incentives.

Ian Borders is European Underwriting Director at First Title Insurance plc.

First Title offers a suite of tailored indemnity policies for the renewables sector called ‘Green Title’.