

The Climate Show – Episode 32

Transcript

00:00:04 Linnéa Nordlander

Hi, and welcome to the Climate Show, a podcast that explores the law and politics of climate change. This podcast is brought to you by the University of Copenhagen.

00:00:16 Beatriz Martinez Romera

Hi, we are Beatrice Martinez,

00:00:18 Linnéa Nordlander

And Linnéa Nordlander

00:00:19 Beatriz Martinez Romera

And we are your host at the Climate Show.

00:00:24 Beatriz Martinez Romera

Welcome to the Climate Show. Today's episode focuses on climate and energy law, specifically offshore wind energy development in Denmark, which has expanded over recent decades.

00:00:35 Beatriz Martinez Romera

Denmark launched its first commercial offshore wind farm in the 90s, producing just a few megawatts and has increased to nearly three gigawatts today, with ambitious plans in place for increasing its capacity by 2030.

00:00:48 Linnéa Nordlander

There are legal complexities surrounding environmental impact assessments and environmental protection when it comes to building wind farms at sea.

00:00:55 Linnéa Nordlander

Our guest today is Professor Helle Tegner Anker from the Department of Food and Resource Economics (IFRO) here at the University of Copenhagen, who will help us unpack these complexities.

00:01:04 Beatriz Martinez Romera

The conversation is hosted by Anya Kristina Cheng Dahl, a PhD researcher at CLIMA whose project is carried out in collaboration with the Ocean Institute, and the project explores the intersection between offshore wind development and marine biodiversity law.

00:01:19 Beatriz Martinez Romera

Together, they discuss how Denmark and the EU are regulating the offshore wind sector, what challenges arise in protecting the marine environment, and how environmental law is evolving in response. Let's get started.

00:01:40 Anya Kristina Cheng Dahl

In today's episode, we focus on renewable energy law, specifically talking about offshore wind energy and focusing on environmental protection. We'll be discussing the interactions between environmental impact assessments and environmental protection and how this can be particularly challenging in the context of offshore wind.

00:01:59 Anya Kristina Cheng Dahl

My name is Anya Kristina Cheng Dahl, and I am a PhD student at the Research Centre CLIMA at the Law Faculty of the University of Copenhagen.

00:02:08 Anya Kristina Cheng Dahl

I'm currently working on a project on offshore wind energy and biodiversity, exploring the intersection between ocean law, environmental law, and energy law, and really trying to pin down how we can legally ensure environmental protection and biodiversity as we install and operate the massive amounts of planned offshore wind across the EU.

00:02:29 Anya Kristina Cheng Dahl

We're very fortunate to be joined today by Helle Tegner Anker. She is a professor of law at the Department of Food and Resource Economics, which is part of the Faculty of Science here at the University of Copenhagen as well.

00:02:44 Anya Kristina Cheng Dahl

She is an expert on environmental and planning law, including public participation, environmental impact assessments, and strategic environmental assessments, nature, water resources, and renewable energy.

00:02:58 Anya Kristina Cheng Dahl

So there has been a rapid development of offshore wind projects in Denmark and in the EU over the past years.

00:03:06 Anya Kristina Cheng Dahl

There is no doubt that offshore wind can play a central role in the green transition and help to achieve climate goals while also contributing to energy security, something that has also become a very high priority during the last years.

00:03:22 Anya Kristina Cheng Dahl

At the same time, though, offshore wind is facing strong criticism with regards to environmental concerns, such as how it disturbs marine life in the air and in the sea during and after the construction, as well as also economic concerns due to the very high costs of installation and maintenance.

00:03:40 Anya Kristina Cheng Dahl

There are also other concerns at play, such as aesthetic concerns over how offshore wind energy impacts seascapes and has negative effects on property value, all of which we could probably talk about for hours.

00:03:52 Anya Kristina Cheng Dahl

But today we'll be focusing on environmental considerations and concerns on how we legally are dealing with the environmental impacts of offshore wind energy.

00:04:03 Anya Kristina Cheng Dahl

Welcome, Helle, and thank you so much for joining the Climate Show.

00:04:07 Helle Tegner Anker

Thank you very much for the kind invitation.

00:04:11 Anya Kristina Cheng Dahl

So, Helle, to begin, how do you see the legal developments on offshore wind energy in the last years in Denmark?

00:04:20 Helle Tegner Anker

I think there are several challenges related to the offshore wind energy projects and many of which are related to the scale of offshore wind energy and also the huge cost and complex decision-making processes associated with the development of offshore wind energy.

00:04:39 Helle Tegner Anker

I think there are two main challenges. One is related to the complex decision-making procedures to the multi-phase decision-making. And sort of the other main challenge is, in my view, related also to the lack of knowledge or limited knowledge, for example, regarding biodiversity, in particular in relation to mature 2000 sites and also to protected species, including birds and other species.

00:05:11 Helle Tegner Anker

So at least for the complexity in decision-making procedures and this multi-stage decision-making. One important challenge is the timing of the relevant environmental assessment requirements in this multi-stage decision-making.

00:05:34 Helle Tegner Anker

So, in Denmark, there are, as in many other countries, also several levels of decision-making when it comes to offshore wind energy.

00:05:43 Helle Tegner Anker

Starting first, perhaps, with the sort of the designation of potential sites for offshore wind energy. And then in Denmark, there would be like 3 different permit levels for making a decision on a particular project. A preliminary investigation permit, an establishment permit, and a production permit.

00:06:09 Helle Tegner Anker

And this, at the same time, intertwines with the tender procedure, because most of the offshore wind energy projects are decided through a tender procedure. So, this creates a very complex decision-making context. And also, the question is where is the most appropriate level for environmental assessment procedures? So, what should be examined by who and at which stage in this decision making?

00:06:44 Helle Tegner Anker

So that's like one major challenge that is sort of also is more complex when it comes to offshore wind energy than in relation to onshore wind energy, where it's often more simple decision-making procedures.

00:07:02 Helle Tegner Anker

But the other challenge is the one that relates to the lack of knowledge about potential effects on biodiversity in particular and also combined with in the EU the strict interpretation by the Court of Justice of the European Union on the requirements of, for example, the Habitats Directive and the Birds Directive.

00:07:29 Helle Tegner Anker

So, the question is, how can we fulfil these requirements in this decision-making process related to offshore wind energy? So that includes, again, in particular in relation to 2000 sites and also the species protection requirements of the EU directives.

00:07:53 Anya Kristina Cheng Dahl

So, as you know, my PhD is done in collaboration with Tænketanken HAV, in English, the Ocean Institute, which is this independent and knowledge-based think tank here in Copenhagen that has its main agenda to push for a clean and healthy ocean, basically.

00:08:09 Anya Kristina Cheng Dahl

And as we know, to mitigate climate change and reach our climate goals, we must transition towards renewable energy sources, offshore wind energy being amongst one of the favourites'.

00:08:20 Anya Kristina Cheng Dahl

And at the same time, there are some real environmental concerns, as we also already talked a little bit about, connected to installing offshore wind energy and protecting the marine environment and biodiversity. Although we don't quite know how to do this.

00:08:41 Anya Kristina Cheng Dahl

So, we need to not only tackle the climate crises, but also this biodiversity crises that we're in and a pollution crisis come to that. And I would really like to hear your views on this green versus green dilemma, like climate change versus biodiversity. How should we be balancing these two in the context of offshore wind energy?

00:09:04 Helle Tegner Anker

Yeah, that's a good question and it's a true dilemma. And there is certainly a need to reconcile these conflicting interests by ensuring that climate initiatives and renewable energy projects, offshore wind energy, does as little damage to biodiversity and the environment as possible.

00:09:28 Helle Tegner Anker

And so what we've seen for the last couple of years is that there might be a tendency to give the climate concerns sort of the, and renewable energy projects sort of the upper hand, perhaps due to these sort of ambitious policy targets that are set both in climate law at EU level and also at national level in Denmark.

00:09:56 Helle Tegner Anker

So that might sort of lead to, or that has led to situations both in the EU and in Denmark where laws are being adopted to sort of pave the way for renewable energy and setting biodiversity legislation aside. So that's reflected, for example, in the EU emergency regulation and also, in the renewable, in the revision of the Renewable Energy Directive.

00:10:29 Helle Tegner Anker

And in Denmark, we also see it, we haven't seen it for like offshore, but we have seen it onshore for those sorts of state energy parks that can be designated setting aside national nature protection legislation.

00:10:45 Helle Tegner Anker

I think this is, in my view, is not a good way of reconciling these conflicting interests. On the country, I think there's a need to improve environmental assessment, not to get around environmental assessment. And one need is in particular to create more knowledge about the potential adverse effects and also more guidance to decision makers.

00:11:15 Helle Tegner Anker

But again, part of the EU legislation, the emergency regulation and also the revision of the Renewable Energy Directive, has also been a response to these very strict standards that has been set by the Court of Justice of the European Union in relation to the protection of habitats and species.

00:11:35 Helle Tegner Anker

For example, whether species should be protected at the individual specimen level or at population level, which makes a big difference when it comes to wind energy projects, both onshore and offshore.

00:11:52 Helle Tegner Anker

So maybe there is also a need to adjust also for the requirements in relation to protection of nature and biodiversity.

00:12:07 Anya Kristina Cheng Dahl

And how do you see environmental impact assessments playing into that?

00:12:14 Helle Tegner Anker

Environmental assessments, so basically serve this purpose to improve decisions and to make sure that when a decision is taken, then all relevant environmental issues have been examined and preferably that the harmful effects are either avoided or reduced, minimized so, it is sort of this way of making good decisions.

00:12:46 Helle Tegner Anker

I think it's important to note that environmental assessments are generally procedural requirements. So, it means that it's the process and the assessment of potential effects and also the involvement of the public and different stakeholders, environmental organisations that may have valuable information on how a project can affect the environment, but it's the procedure.

00:13:17 Helle Tegner Anker

So, making sure that the decision makers are informed in the best way on the potential environmental effects. While environmental assessment procedures, or at least the environmental impact assessment procedure, does not hinder the approval of harmful effects.

00:13:38 Helle Tegner Anker

But we do have other environmental assessment requirements, for example, related to the nature protection legislation, the habitats directive and the bird's directive and that has a more substantive character.

00:13:51 Helle Tegner Anker

So, meaning that you cannot adopt a project or give a permit to a project if it has a harmful effect on a 2000 site on the habitats and species, the site has been designated for the protection of or on protected species. And protected species includes all birds and all wild birds under the Birds Directive. And we also have these Annex 4 species protected under the EU Habitats Directive.

00:14:24 Helle Tegner Anker

So, this is a different sort of has a substantive character where you cannot allow a project if these protected habitats and species are harmed, unless you can use what is called the derogation clause under certain circumstances. Yeah.

00:14:48 Anya Kristina Cheng Dahl

So, coming back to some of the challenges associated with conducting environmental impact assessments, do you have any suggestions how we can deal with these challenges.

00:15:06 Helle Tegner Anker

Well, I think for this main challenge of the multi-stage decision making and determining at which stage or which level should the environmental impact assessment be carried out, it has been a challenge in Denmark, and it has also been illustrated in a particular case on the what's called "Vesterhav Syd" the West Coast or West South Wind Energy Project, because at that time it was the authorities, the Energy Agency, and also the "Energinet.dk", what do you call it?

00:16:00 Helle Tegner Anker

Yeah, or the authority responsible also for the transmission system that carried out, they had carried out an EIA in relation before the tender procedure. So, determining the site and also operating with a worst-case scenario, they had sort of carried out the main environmental impact assessment.

00:16:27 Helle Tegner Anker

But that was before the tender decision was made. And then after the tender decision, you knew then who was going to be the developer and then there were some amendments to the project because it was only at that time sort of the more specific details of this particular project came into place.

00:16:49 Helle Tegner Anker

But without an additional EIA so that was appealed to the Danish Energy Appeals Board, and they turned down the decision in the first round, saying that there was a need for a supplementary EIA. So that led to a significant delay in the project and also a little bit of, yeah, different issues. But that has been changed now, as far as I understand so now it's more clearly explained also in the Danish system that the EIA should not be made by the authorities but by the developer after the tender decision has been made. So, after it has been decided who will be the developer.

00:17:46 Helle Tegner Anker

But still there is a preliminary investigation carried out by the public authorities and also, there is some assessment made in relation to, strategic assessment in relation to the designation of potential sites for wind energy.

00:18:08 Helle Tegner Anker

So, and we also have cases that deal with this issue of the lack of knowledge, also offshore wind energy cases in relation to in particular biodiversity, both birds and other species. There has also been a case that was turned down because of, the lack of knowledge and in relation to birds and also bats, it was a coastal near offshore wind energy development.

00:18:43 Helle Tegner Anker

But more recently, I think just a couple of weeks ago, there was another decision by the Energy Appeals Board on another coastal near energy projects where they also acknowledged that there was a lack of knowledge, but using the precautionary principle, sort of taking this approach and saying, well, then in this project, they had established certain mitigation measures to avoid harmful effects on different species.

00:19:14 Helle Tegner Anker

So that's also a way to deal with this and I think, I hope also that this will also lead to or include different kinds of monitoring, because that's the way you can gather more information and gain more knowledge.

00:19:31 Helle Tegner Anker

But I think that would be important if it was also an EU-wide issue to actually gather knowledge, to increase the knowledge base based on what is actually the potential effects on biodiversity on 2000 sites and the different kinds of habitats and species that could be affected by offshore wind energy.

00:19:59 Anya Kristina Cheng Dahl

And maybe on that note also, focusing specifically on Denmark and looking ahead, what do you expect or hope for offshore wind energy?

00:20:11 Helle Tegner Anker

Well, at least we can hope that it will be handled in a proper way. I think we should not avoid or use the derogations. Well, maybe there's a need to use the derogations, but only after making sort of a proper assessment of the potential effects and also being sure that it's the right sites that are chosen for offshore wind energy development.

00:20:47 Helle Tegner Anker

And then there might be some of the more sort of nitty-gritty details and also dealing with this very strict protection requirements that we can perhaps in that respect, use the derogation clauses.

00:21:06 Anya Kristina Cheng Dahl

Thank you so much. And before we wrap up, is there anything else you would like to raise that we haven't talked about yet?

00:21:15 Helle Tegner Anker

Well, I do think that there is the point also raised by the EU Nature Restoration Regulation that if we really want to protect the marine environment, maybe we do not do it by assessment of individual projects in a nitty-gritty detail. There's really a need to take a more overall proactive approach to the enhancement and expansion of protected areas in accordance with the EU Nature Restoration Regulation.

00:21:49 Helle Tegner Anker

And I think this might also form the basis for a greater degree of prioritisation as regards marine areas and also be something that could play into the maritime spatial planning and the designation of potential sites for offshore wind energy, which I think is a crucial issue.

00:22:14 Anya Kristina Cheng Dahl

Thank you so much, this was really interesting.

00:22:17 Anya Kristina Cheng Dahl

Thank you so much for coming and sharing your insights on this really important topic.

00:22:23 Helle Tegner Anker

Okay, thank you.

00:22:28 Linnéa Nordlander

Thank you for tuning in to the Climate Show. We hope that you enjoyed this conversation.

00:22:32 Linnéa Nordlander

If you'd like to learn more about the research featured in this episode, check out the show notes.

00:22:36 Linnéa Nordlander

Stay tuned for our next episode.