

Has the Lightbulb Come on Yet?

Think Green.

ALTERNATIVE ENERGY & ENVIRONMENTAL LAW



RICHARD O. FAULK



DAVID L. RONN



JASON M. RYAN



Some People Talk Green. We Live It.

GT shareholder David Ronn doesn't just advise energy companies on making their businesses greener. David and his family live in Houston's first LEED-H – that's Leadership in Energy and Environmental Design for Homes – certified house. Thanks to solar panels, low-e windows and other technologies, it's about 60 percent more efficient than a conventional home. Reducing your carbon footprint, while also decreasing costs – now that's something to feel green about.

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There seems to be a “green revolution” happening in this country. Everywhere you look businesses and consumers are told how to become more “green.” What does this all mean? How does this affect energy and environmental law? How does it affect the energy industry? It seems pretty clear there are a lot of issues on the forefront in the areas of energy and the environment. So with it being such a hot topic, the business department of Texas Lawyer gathered some of the top environmental and energy law experts to discuss these complex intertwined issues. The following discussion has been edited for length and style.

MIKE ANDROVETT, moderator, attorney, and owner of Androvett Legal Media & Marketing, Dallas: . . . *If I could, Jason, start with you. Introduce yourself and talk a little bit about not only who you are and where you work, but what you do and the nature of your work.*

JASON M. RYAN, partner, Ryan Glover LLP, Houston: We primarily focus on the energy industry. It's not all we do, but it's a lot of what we do. I guess I can start by telling you what I did last week, and that'll give you a good idea of what we do here in our practice. In a short week, before the holiday, we worked on an application for electric utility to increase its charges to customers by about \$10,000,000 a year related to energy efficiency programs. We'll file that application with its regulatory authority next month. We represented a gas utility and a government investigation in a different state. It's one of those investigations that doesn't seem to end. We, unfortunately, have been in the position to file a number of breach of contract cases for some of our energy services companies. When prices have changed the way they have, other parties are tending to not want to perform under the contracts. So we've been hired in that and other bankruptcy-related issues for about a year

now. We've got a couple of alternative energy projects that we're advising on, both wind related and geothermal related, which raises interesting issues. We have a couple of international gas projects that are traditional oil and gas projects. One offshore project that raises interesting environmental issues, since it's very much a tourist destination, drilling offshore, just offshore, presents significant environmental challenges. The administration is very concerned about it. So a wide variety of litigation and transactional matters. We tend to specialize in what our clients specialize in, and then assist them in whatever problems come up in their areas.

RICHARD O. FAULK, partner, Gardere, Houston: We're a large Texas firm, approximately 300 lawyers. I'm the head of litigation firm wide, and I lead approximately 150 trial and appellate lawyers. To my knowledge, I am the first environmental lawyer to head the litigation department of a major firm. My practice has concentrated on environmental litigation for 32 years. I also supervise the firm's environmental practice group. We have a strong environmental, regulatory, counseling, legislative and administrative practice dealing with a wide variety of issues. We counsel clients regarding business issues, climate change, alternative energy and transactional planning. We've also worked closely with the United States Chamber of Commerce on climate change issues. We recently presented a conference there and we've been working on some new projects for later this year. For our energy clients, we're analyzing Representative Waxman's climate change bill and its ramifications. We were among the first to talk at the ABA's Keystone Conference last month on the EPA's endangerment finding for greenhouse gases, which is being released today. We'll talk a little bit later today about the collision that's coming between the EPA's endangerment finding and Representative Waxman's federal legislation. Primarily, we've focused recently on litigation issues; litigation avoidance from climate change; precautionary issues;

preparing for climate change and “cap and trade” issues, which seem to be inevitable. We've also been concerned with compliance and transactional risk evaluations. So that's what we've been up to.

DAVID L. RONN, shareholder, Greenberg Traurig, LLP, Houston: We are a multi-national firm. We have over 1800 lawyers, and actually have the most lawyers in the United States. We have 28 offices across the United States and our international offices are in China, Japan, the Netherlands and Switzerland. As you might expect with a firm that size, we do a lot of different things. Here in Houston, we have about 50 lawyers mainly concentrating in energy-related type business; but we do litigation, corporate securities, of which I'm a part, and banking, immigration, a variety of other areas. As I said, I'm a corporate securities lawyer. I do a lot of energy-related transactional type business, both counseling and assisting energy companies; and also a fair amount of venture capital and technology based companies, both in the alternative energy and the clean tech space in a variety of transactions, whether that be equity or debt raising, acquisitions or mergers, with a particular niche in master limited partnerships, which are publicly traded partnerships mainly in the midstream or the pipeline transportation business. One of the reasons I've been invited here is really a local aspect in that our house — we built a new home and moved in June of 2007 — was the pilot home for the southwest for the LEED-H program, which is leadership for energy and environmental design homes. LEED has been certifying commercial projects for quite awhile. In 2007, they started certifying homes for energy efficiency. Our home was certified gold, and it was the first home certified in the city of Houston under the LEED program. I'm going to get some questions out of the way. There are three questions I always get asked about my house; and I'll go ahead and tell you what those are, then we can talk about that later on. The first is: How long did it take to build? It took



Richard O. Faulk is the Chair of the Litigation Department of Gardere, which maintains offices in Dallas, Houston, and Austin, Texas, as well as in Mexico City. He leads the firm's Climate Change Task Force and the firm's Environmental Practice Group. Faulk concentrates his personal practice in complex environmental litigation. He is a board-certified specialist in federal and state appellate practice, and has argued cases before numerous federal and state trial and appellate courts, including, most recently, the U.S. Supreme Court in *Cooper Industries v. Aviall Services Inc.* Faulk has published more than 30 scholarly articles in his areas of practice, including his most recent articles with his partner John Gray, "Stormy Weather Ahead: The Legal Environment of Global Climate Change," and "A Lawyer's Look at the Science of Global Climate Change."

17 months. The second is: How much more did it cost over bricks and sticks? That one's a little more difficult. It's probably around 10 to 15 percent, although a little difficult to say. And the third one is: Did it work? And the answer is yes. We've been in it almost two years now. It's about 4200-square-foot home, and we've averaged \$235 a month for our electricity bill with another \$40 for our gas bill. A lot of that is just base charges. So we are very happy with that energy efficiency, and I'll talk a little bit more about that later. I'll be happy to answer questions on that topic.

ANDROVETT: *One of the unintended benefits, if you will, to revisiting topics as we do at Texas Lawyer once a year, is that when you go back and look at the sum and substances of the discussion from one year to the next, it really does help paint a picture of the surrounding circumstances and the times. A couple years ago when we did energy and alternative energy, we spent almost all of the 90 minutes talking about deals and all their derivatives. Then last year we talked about that a little bit. In fact, David, I remember you talking about, amidst all the doom and gloom, there being some great opportunities out there; and that's what I'm telling my clients. But we had just come out of the wake of Massachusetts v. EPA; and we were talking about, whether, from a legal context, global warming was a real deal. And I remember at that time there was some discussion about the credit markets freezing up. Deals are still getting done, but our clients are paying a higher premium. In terms of the huge forest here, can you provide us with a snapshot, those of you who are working in the regulatory and in the mergers and acquisition area, what's the last date there right now? Are deals being done? If so, what do they look like; and what's your take on what's being done generally to "fix" the economy?*

RONN: I'll take a stab on the deal side. Look, the credit market meltdown has not been helpful to the deal market. It's still very difficult. There are a lot of interesting and really good ideas out there. Our sense, with our clients is there's pent-up demand. There

are people who are looking for deals, ready to do deals, but concerned about spending cash. They are also concerned about what the financing may or may not be; and we can get into that. In the stimulus package there have been a couple new tax incentives for alternate energy projects. But in general, and everybody in this room knows this, it's been a little slow on the transactional side. But the sense is that those first three months of this year were rather brutal. The second three months are going to get a little bit better. By third quarter, by the time they get their act together — and look, they've had a lot of upheaval, the least of which is just people, not knowing where their jobs are and not knowing whether they're going to be there, not knowing who to report to. Once they get stabilized a little bit better and we have some real financing opportunities, there'll be a much better chance to get some deals done. There are deals that are happening now. There are things that are happening. It just takes more creativity.

FAULK: I had a very interesting meeting with our corporate lawyers recently where I reviewed climate change developments at the EPA and in Congress. To a person, each were concerned about the risks and uncertainties that these issues bring to deals. For example, we're starting to see a huge push for disclosures by public companies regarding the impact of climate change risks and their impact on corporate financial evaluations. For example, the National Association of Insurance Commissioners recently approved a mandate to American insurers to disclose the risks that climate change poses to their financial stability. Such disclosures begin with internal inquiries within insurers, but they will also need to obtain. This mandate came out no more than a month ago, and as it is implemented in individual states, insurers will face new standards. We are working very closely with both insurers and insureds to deal with this growing push for assessments and disclosures of climate change impacts. It's also important to realize what's going to happen in the context of deals. Clients will

need to know and appreciate climate change risks and the “carbon footprints” of the persons with whom they are negotiating. If they don’t, they risk shareholder derivative suits, Sarbanes Oxley issues, derivative liabilities, and potential criminal enforcement. I’m not here to tell people that they shouldn’t do deals at all. I want to see deals go down. But the uncertainties associated with climate change should motivate caution and greater due diligence. The SEC is considering whether to require direct corporate disclosures by all publicly held companies, and I believe that some disclosures will be mandated. It’s only a matter of time. Clients need to be aware of these issues when they are going into deals, and transactional lawyers should be advising them accordingly.

RYAN: Most of the projects we were working on prior to September, either died or went dormant and have not come back to life yet, if they ever will; and that’s true in alternative energy and your traditional oil and gas projects, both here and in the rest of the world, as well. But there is some excitement coming back that we’ve seen, some money that is looking for a home. They are paying attention more to risks, perhaps than they did this time last year. But we’re certainly seeing an up tick in the transactional matters that we’re working on. Not so much on the alternative energy side right now, but on the traditional oil and gas side.

ANDROVETT: *How about in the alternative energy area where there are incentives that have been in place? Has that development been dormant?*

RYAN: There are a significant number of people that are watching alternative energy; and in particular, some technologies, like geothermal development is not progressing as quickly as it was, but it will come around. There are just a number of challenges that that particular technology has had. A number of challenges long before the economic challenges that the country and the world faces today. The policy of Texas back in 1975 or ‘76 was to encourage the rapid development of the use

of geothermal energy in the state of Texas. Obviously, the development of geothermal energy in the state of Texas has been less than rapid. So that I don’t blame entirely on the economic situation, but the slow-down development of geothermal energy production in the state was hampered by it after it started ramping up when it saw what wind energy was doing.

FAULK: The big alternative energy news in Texas is the decline of opportunities within the ethanol market. Construction of ethanol plants is slowing and has even stopped in a number of areas here in Texas, despite huge pushes by the Texas Commission of Agriculture to fund and subsidize and encourage ethanol development. The market is not supporting investment and construction necessary for ethanol production — an enterprise that, no more than a year or so ago, everyone thought was a boom industry. It’s a disappointing development. I’m not sure what can be done to rut the tide. Certainly, demand for fuel products has to increase for that to take hold; and automobile construction, automobile manufacturing, the use of those energy consuming vehicles has to grow. The overall market has to be restored in order for that to happen, and none of us knows when that’s going to happen. Ethanol seemed to be a great alternative fuel investment, and it still provides a substantial input into our fuels; but it’s surely depressed, and I don’t foresee exactly when it’s going to recover.

RONN: I’d say the things that we’ve seen that have a little burst of energy, no pun intended, is on the solar side and a little bit on the wind side, particularly with the new production tax credits and the investment tax credits. And not necessarily to bog us down in a tax discussion because everybody might go to sleep, and I only know enough to be dangerous, but the real difference is with the stimulus bill, is on the investment tax credit side. Instead of just getting tax credits for a period of time, you can actually apply for a cash grant equal to what you might otherwise get on the investment tax credit side.



David L. Ronn is a shareholder in the Houston office of Greenberg Traurig, LLP and has experience in a wide-range of corporate and securities matters, with concentrations in the energy and technology industries. As the owner of the first LEED-H certified home in Houston, he has worked with green building issues, including coordination with Mayor Bill White’s green building task force. Areas of experience include representation of public and private entities (including securities offerings and mergers and acquisitions), master limited partnerships, energy trading, special committees in conflict situations or investigations and representation of venture capital investors and start-up entities. Ronn is also a member of the firm’s Israel practice and spoke at the Israel Prime Minister’s first Alternative Energy Conference in November 2006. He has been selected as a “Texas Super Lawyer” from 2005-2008 and was recognized by The Best Lawyers in America in 2008 and 2009. Ronn received his J.D. from the University of Houston Law Center, his M.B.A. from Tulane University and his B.A. from Rice University.



Jason M. Ryan is a founding partner of Ryan Glover LLP, where he primarily represents energy industry clients in U.S. and international transactional, regulatory and litigation matters. His clients include *Fortune* 500 corporations, small businesses, and individuals. Ryan is an executive officer of the Houston Young Lawyers Association. His community and pro bono efforts have been featured in the *National Law Journal*, *Texas Lawyer*, "Texas Super Lawyers," *Broward Daily Business Review*, *Miami Daily Business Review*, *Palm Beach Daily Business Review*, and *San Francisco Recorder*, and on Law.com. Ryan was commissioned an intelligence officer in the United States Navy by the President of the United States and currently serves with a reserve unit. Ryan and his wife Megan reside in Houston and attend St. Vincent de Paul Catholic Church. In addition to her full-time position serving energy-industry clients at PricewaterhouseCoopers, Megan serves on the board of the Houston Bar Association Auxiliary.

What that means is how these deals have been structured in the past is that you have owner/operator who then brings in, in essence, a tax equity partner. Because usually the owner/operator doesn't have any profits to be able to offset any of these credits, so you have to bring in somebody who does have the taxable income. Now, it's possible — again, each deal is going to be a little different — with this cash grant that a particular project may not need that tax equity player. So there are a variety of deals out there, particularly I would say in the solar area. In the solar area not only building some arrays in various places in the United States, but also talking about setting up solar panels on tops of buildings. We've got a client who is doing that throughout the southwest, setting up power purchase agreements, and, in essence, providing electricity to the building and then also having an off-take agreement. So there are a variety of tax incentives right now that, depending on the deal, might work pretty well. The other things that we've been saying, I agree with Rick. The food-based product ethanol projects, just are for all practical purposes dead. What we are seeing, though, is there's a lot of interesting activity in the algae area. In fact, for those of you who don't know Barry Cohen, I'll put in a little plug. There's an algae group based up in The Woodlands that has a lot of interesting things going on. There are also things going on in a variety of other biomass projects, one interesting biomass project based in Peru. So there are things coming to fruition. We're still on the front end of trying to figure out how to make those things work in the current economy.

ANDROVETT: . . . *How important is it to have a president who articulates those goals; or ultimately, how is this going to be if the economy regenerates? Will we be back doing more wind energy, certainly in Texas more solar energy? Is there a way to define the equation?*

RYAN: Let me redefine the question just a little bit. Whether we have a president or an administration that is pushing this agenda does matter;

however, the core question that you get to is: Are we really facing global warming? What are we going to do about it? The interesting answer is: it just doesn't matter. It's here. The green revolution is rolling. You see it in advertisements. You see it in everything that you do. It's on everybody's lips. Whether you believe it or not, you can go watch Al Gore's "Inconvenient Truth" and that certainly shows one edge of the view of the climate change. If you haven't read Michael Crichton's "State of Fear," I would highly recommend that one. It shows the other side of it; and the truth is probably somewhere in the middle, as it usually is. But the truth doesn't matter. What matters is what is public perception and where is this going, and there is no question that the Obama administration is going to be pushing this. As Rick mentioned, they are coming out today with a CO2 statement that really may flip everything on its head. That's much more Rick's area, so I'll let him talk about that; but where we're going is this is on a roll. It's not going to stop. The clean tech revolution is here; and unless you get educated and understand what's going on, your clients are going to pass you by because you're going to have to deal with SEC issues. You're going to have to deal with environmental regulatory issues. You're just going to have to deal with what is going on out there in the economy; and the answer is, there are a lot of good things going on. There were 900 some odd clean tech patents filed last year that the patent office specifically identifies as clean tech. Now, about 500 of those were in fuel sales. Well, what industry is the industry that's got a lot of problems right now? It's certainly the automobile industry, but they are the ones who are also looking forward and trying to find new ways to do things. They are going to continue to be innovative technologies that come along. And the question is: How are we going to put those into practice? Some of them are pretty wacky. Some of them are really good ideas. The mistake that a lot of people make is you think clean tech, oh, it's got to be some kind of

wild technology. It's got to be something really brand new. And that's not really true. We are just talking about efficiency issues here. For instance, just in the regular oil and gas industry, we only end up using, as a consumer, about 5 percent of the energy produced off of coal by the time it finally gets to your house. Well, there are a whole lot of efficiencies we could ring out of that system using technology that would make a huge difference without actually changing the way we actually manufacture electricity. I'll let somebody else speak, but the main concept is we need to expand our ideas about what clean tech means and how we go about building efficiency through the entire system.

FAULK: Well, I absolutely agree with David that whether global warming is real from a scientific perspective doesn't really matter. The legal storm is already on us. It's already happened. The drivers are in place. Certainly, President Obama is a major force to be reckoned with in this area. There is no doubt that he is going to try to push major "cap and trade" legislation through the U.S. Actually, it's already pending in Waxman's bill. There's no doubt that the President is going to push very hard to get a global agreement on Copenhagen later this year. He is a formidable force. He has formidable people in the EPA. He has formidable people in Congress, and business interests need to be very much aware of these developments. Change is coming and people need to get ready for it. That said, however, before I am convinced of the merits of a "green economy," frankly, you'll just have to "show me the money." Where is the money to finance the thousands of projects that are being proposed? Where will it come from, other than tax incentives, other than subsidies? What is the real investment payoff from a "green economy" as opposed to the "bricks and mortar" economy — an economy where people understood how to make money, understood how to market their products and had predictable markets that they could rely upon? Moreover, where is the money

for a "cap and trade" economy coming from? We are in the midst of a financial crisis caused by blindly trusting in markets to govern our financial affairs. After this disaster, are we really going to trust markets again to govern "cap and trade?" Is the American public ready to rely on the market to solve a global problem? You need to think about that in terms of your shareholders, in terms of your customers, in terms of your clients because — let's face it — the market has not shown itself to be predictably reliable. If we've learned anything from the current meltdown, we've certainly learned that. Certainly we've learned that we need heavy regulation in ordinary financial sectors; but imagine what will be needed on the global scale to deal with climate issues, not to mention the problems of verification and enforcement. For example, where do you buy trustworthy credits? How do you audit and determine their value when they're being bought and sold in the global economy?

ANDROVETT: *Gentlemen, talk a little bit about how the cap and trade market or program would work, at least as contemplated right now.*

FAULK: That's an interesting question. When President Obama was running for president he said that 100% of the credits were going to be sold and auctioned. Everyone who needed them would have to buy them. We've heard that he's now more flexible on that issue, and that some of them may be grandfathered or given away; but we don't have any details yet. It's an extraordinarily complex process. In order to evaluate the economic efficacy of any "cap and trade" system, everyone's "carbon footprint" must be calculated, audited by third-party verification, and confirmed by the government. The European system has been generally considered by many to be a failure because they literally didn't set reliable values for their carbon trade units. And frankly, the regional greenhouse gas initiatives that are currently operating in the US are so disparate and complex that that it's not only difficult to evaluate whether they are really making any money, but also whether they are actually doing



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

any good. If you look at the 600-page bill by Congressman Waxman — and it'll probably take you several nights to do it you'll see that it contains a very complex verification program.

ANDROVETT: *And, Rick, philosophically, the notion is if there's cap and trade society wide, it brings down the level of greenhouse gases. That's the thinking.*

FAULK: The idea of "cap and trade" is based on two premises. First, the amount of greenhouse emissions that are coming out of company operations will be capped. Second, those who can operate below the cap will generate credits that they can trade to other people who cannot operate below the caps. The credits will be purchased to reduce their emissions totals to within the acceptable limits. It's a market-based system.

RYAN: Just another point on the original question in terms of policy and incentives and whatnot, with respect to alternative energy, a good argument could be made that the market ought to pick winners and losers in alternative energy technologies. When you have incentives that are put in place by federal or state government that pick winners and losers, you can have practical problems that result that the market may or may not have brought about also. For example, let's take wind in Texas. If all of the projects — and they probably won't all be built — are built, you're looking at a significant number of megawatts in the Texas electric market that will be wind, something approaching 20,000 megawatts. On a very nice spring day, like some of the ones that we have had in March and April of this year, the maximum peak electric usage in the state is about 20,000 megawatts. You can't have all of your electricity generated by wind. It creates reliability issues. If the wind stops blowing or starts blowing in a different direction, all of a sudden you have tremendous strain that's put on your traditional thermal generation resources that may or may not be able to act and react as the wind blows and doesn't blow. It will cause nuclear facilities to not be chosen in bid stacks because it actually costs money,

whereas wind can bid in for zero and get chosen to provide power; or wind could actually put in to lose money because as long as it's going, it's getting its production tax credits. So it creates incentives and practical problems when the government's policies pick winners and losers of technologies. So I will throw that idea out there, that the market does have a role in picking what projects should go forward and which ones should not.

ANDROVETT: *Jason, just a naive question, but most citizens who are not well versed in this topic might at least emotionally think, well, if the United States has created this mosaic electric grid of oil and gas, solar, wind, geothermal, algae and biomass, that's all good because we're not relying on one source. What I'm hearing you say is something somewhat different.*

RYAN: Yes. In a world that has no constraints on how power actually moves. There are practical problems that are realized after the fact in many situations. It's an after-the-fact problem that Texas faces now in: How do we accommodate all of this wind that's been built as a result of both a good economy and incentives at different levels of government that were put in place? How do we, practically, deal with all of that now? Not to get into great details of it, but a wind power facility in West Texas doesn't necessarily do a lot of good for us here in Houston. In fact, it could cause our prices to go up depending on how constraints in the transmission facilities are dealt with. And you're right, I don't think everybody understands that or even cares possibly; but there shouldn't be simply an emphasis on let's go green with everything and forget coal facilities and forget natural gas facilities because you do need a mix of everything. You probably need traditional thermal resources co-located with wind resources. That's probably a place that could be filled by geothermal resources instead of your traditional gas-fired plants or coal fired plants. I'm not advocating that incentives be put in place for that necessarily; but that to the extent you want to continue going green, that's a possible

alternative to having a traditional facility with wind. But those are practical problems that often the policymakers don't have to deal with. That's put off on market participants to deal with years after the fact when the government's policies have been created and issued.

ANDROVETT: *Be it the politicians or society as a whole, do some forms of energy just become favored because they sound warm and fuzzy? I'm thinking, for example, about MTBE, which many advocates say was the greatest thing since sliced bread, and it had to be abandoned because of reasons like lawsuits, controversy, and favor of ethanol. And now I hear you saying, well, ethanol, at least for now, might be dead and nuclear power may be in favor. In Europe nuclear power was much more a part of the solution. David, is some of this perception, getting out and getting the right slant on that alternative energy?*

RONN: It's a real mish-mosh at the moment, that's a technical legal term. I don't think we know where we're going. What my two distinguished co-panelists are saying is that nobody has a clue. We don't know where the government is going to push us. We don't know where this regulation is going to apply. The thing we have to remember is the oil and gas industry isn't going anywhere. Unless you want to live without plastics, we're going to have an oil and gas industry. There are, as we touched on a little bit before, a lot of efficiencies that we can ring out of the system on the oil and gas side. It's still going to be the dominant energy player for the foreseeable future unless somebody comes up with something nano that totally changes our grid; and personally, I believe that something is going to come along here in the next X number of years that we can't possibly understand right now because that's just the way history teaches us is, there's going to be some kind of monumental shift. I don't know what that's going to be. I personally think it will be something in the nano area. But until that time, the oil and gas industry is going to continue to thrive; and there are going to be a lot of things that are



incredibly positive out of the oil and gas industry. The biggest problem we've got is the rap on the oil and gas industry in light of the green revolution. It can coexist beautifully with the green revolution, and there are a lot of great things that can occur. Think of the things that are going to explode, particularly if the CO₂ issue goes the way that a lot of people think it will. If we are going to be doing a lot of CO₂ sequestration, we may have to build a pipeline system as big as the existing pipeline system in the United States to be able to deal with CO₂ transportation. That's a lot of work. Besides CO₂ extraction efficiencies, electric motors, that's another industry that's going to explode from the efficiency's perspective. You have to take it with a grain of salt and separate, as you say, the political process from what is actually happening on the ground and what our clients and our investors are actually looking to do.

FAULK: I agree entirely that our traditional oil and gas industry will remain essential. We cannot escape from that fact, nor should anyone want to escape from it. That industry, has been and will be critical for the foreseeable future, despite all of the hype about a "green economy." Those who claim

that our fossil fuel industry isn't a legitimate part of our economic future are dead wrong. But the adverse politics are pretty stark. Just last week the *Financial Times* wrote an article where the Obama administration's lead negotiator in Copenhagen said, and it's easy to quote, "High carbon goods and services will become untenable as the world negotiates a new agreement to cut carbon emissions." The statement was a warning that the Obama administration issued to people, essentially saying "Watch what you invest in. If you have high-carbon situations, such as our traditional oil and gas industries, you need to be careful because they may not be around for long." That's a pretty radical thought — and yet the person issuing that warning is the lead negotiator for the Obama administration in Copenhagen. You can say it's "politics as usual" — but the truth of the matter is that there's a huge push towards a mystical "green economy" that, to date, we do not understand. It's a little bit like jumping out of an airplane and trying to invent your parachute on the way down. We need to be aware of this situation. We need to be aware of it because money is scarce right now. We need to know how to spend our capital before we begin spending it. We can't rush

in and do things simply upon a "wing and a prayer." Such speculations aren't shouldn't be sufficient to justify investments in any economic situation — as we've learned to our disappointment over the past several months.

RYAN: There is a danger, both a political danger and just a general danger, that some projects may or may not actually be green projects even though they are couched in that term; and they try to couch themselves in that term for PR purposes of saying that it's a green project. You can have a LEED-certified gas station, for example, that's still hard to say that that is an environmentally-friendly building. It is still a gas station. You could have a LEED-certified building that has skylights so that it doesn't have to have as many fluorescent lights so it gets points in the LEED certification process, but perhaps it's heating and cooling bills are going to be higher because it now has the sun shining into the building the entire day where it normally wouldn't. So some programs you have to watch out for in terms of is that really a green building just because it meets certain criteria, or is it still a building that has a pretty large footprint, despite the fact that it has a certain name associated with it and it calls itself green. So there is a PR aspect to going green that people have to be a little bit skeptical of; and generally consumers are not aware that some of the labels that people put on things don't necessarily mean anything. There are electric products that call themselves renewable because they have 1 to 2 percent renewable resources in their generation portfolio. People generally think, I'm buying wind power when I'm buying that product for my house that's called the renewable energy product this company is offering. Instead of bearing that in fine print, it needs to be brought a little more to the forefront so that people know and can make more informed decisions on whether or not I should go with that

11 cent product that is mostly electricity generated by traditional resources or should I pay 21 cents, double, for a renewable product that may or may not be really all that renewable.

RONN: Jason brings up a really good point that is worth elaborating on in that like any new industry, there are a lot of people out there just trying to make a buck on it. For instance, there's already been a variety of lawsuits, exactly what he mentioned, where some builder promises that a building is going to be LEED certified. They don't know what they are doing. They don't get the LEED certification until the end. The owner is mad. The people moving in are mad. It just doesn't work. So, with any industry like this — particularly in the green side where it is a marketing issue a little more than substance in many circumstances — you have to watch what you're doing and make sure that your clients watch what they're doing so that they are not brought into something that, although they think might be green or they think might be a better way to do something, is merely somebody trying to make a buck.

ANDROVETT: *David, you walked the walk in terms of constructing your home*

so that it is LEED certified, and I'm guessing along the way you had to do a lot of homework and learn a lot of things you never thought you would about what goes into that. Rick makes the point — and I'm trying to tie some threads together — that the SEC requires greater disclosures regarding carbon footprints. If investors spurred on by the kinds of things that are showing up in the financial times start to downgrade the value of companies that have a core or a high carbon footprint in terms of advising clients. How easy is it to determine a carbon footprint and what that is?

RONN: It's not impossible actually at this point. It's very difficult on how to advise clients. It's like anything. Look, green is no different than any other project that you might go into. Know what you're doing before you take the step. Put the planning in. Understand what you're doing. Don't just say, oh, it's green. I'm going to throw my money after this or I'm going to go after this. You've got to understand it. You've got to put the time in. We took two years to plan our house, and we didn't have a whole lot of information. But that concept then applies across the investment spectrum. Like any good investor, you better make sure you understand whatever industry you're going to

invest in, you understand what the risks are, you understand what the benefits might be, and you certainly understand the management team and what their pros and cons might be and understand your risks. You're not going to get rid of all the risks in a business, and no one is ever going to. Just look at all the risk factors in any SEC document. But there are a lot of excellent profitable ventures even faced with a lot of those risks. But the key is — and this is what I preach when I talk to people about a LEED project — it's all about the planning. It's all about making sure that you know what your budget is, educating everybody on the project, making sure you understand what your goals are because you are not going to get there without a lot of work from everybody to then get your end result. And whether that's a LEED project, whether that's a non-LEED project — for instance, we're working right now on helping a major company go through and do an investment-grade audit on a variety of their buildings to try and retrofit the buildings with energy conservation measures, whether they be solar panels, whether they be HVAC efficiencies, et cetera. And you go in with your eyes open. You bring in an environmental service company who has the experience. You do a significant audit of your building to understand what you're dealing with, and then you build a plan on the correct energy conservation measures to make sure that you're going to end up with the right result; with the result being that the company who owns the buildings will be able to put these measures into their buildings at a zero cost because they'll end up paying for themselves. So it is all about planning that process. It is all about the detail that goes in to doing those things. I'll give another pop culture reference here. If you haven't read the book "Outliers," they talk in that book about the 10,000 hours. That's really what it's about is: Have you done your homework? Have you got the experience to do whatever it is that you're going to do? And that's where a lot of people are getting into trouble. They are just jumping off the edge of the cliff without really thinking about it.

FAULK: I agree with that. But can we calculate "carbon footprints" for major





industries? Sure. We know how to do that. It's been done. It's been done by companies here in Houston. El Paso, for example, knows its carbon footprints at every one of its facilities down to the emissions of the forklifts at the facilities. It was done by setting out a plan, working with consultants, and using the strict California "cap and trade regulations" as a model for compliance. Waste Management is working on a similar program. Dynegy is beginning work on a similar program, as I understand it. So we know that this can be done. We've watched it done. We've seen it done. We've advised clients in how to do it. Is it a lot of legal work? Yes, it is mostly work by consultants. It also requires verification and auditing. There are consultants who are certified in their international standards to conduct audits of industry facility emission situations, not only buildings but industrial facilities. There is a very good group of people at the University of Michigan that know how to do this extremely well and who have a lot of experience doing this. It is a growing industry. Believe me, by the time that "cap and trade" gets going,

you will be besieged by people say they know exactly how to calculate carbon footprints. Some of those you're going to have to sift through and you're going to have to know who's reliable and who isn't. Shareholder derivative risks and various other risks for your clients depend upon the accuracy of those calculations. Eventually everyone will have to go through that process in order to participate in "cap and trade."

RONN: Part of the difficulty currently is: What standards really are you going to use? How are you going to evaluate it? What are you going to compare it to? And how are those standards changing almost every day? That becomes the difficulty in trying to keep up with what's going on.

RYAN: I guess I'm about as skeptical as most people with reports on carbon footprints as I used to be about oil company's reserves reports. There has to be a fairly healthy level of skepticism when you're looking at what companies are putting out because they are only going to put out what's in their best interest. So that would be my input on it.

ANDROVETT: *But, Rick, you would*

say get it out there, wouldn't you?

FAULK: Yes. Even now, there is great pressure from shareholders, regulators and environmental organizations to push clients to report climate change concerns to the SEC, and insurers will soon be filling out disclosure forms to their insurance commissioners. Accuracy is critical. Do not hype this information – hyping can translate into liability in this area. If your client has a website that talks about how great a "green citizen" they are, they might want to reconsider their statements if they aren't entirely factual. Here's a perfect example. There's a big global warming case filed in California involving the Alaskan village of Kivalina. Kivalina is a Native-American village that is suing major energy companies, major oil and gas companies, and others for contributing to global warming and eroding their coastline. They are asking for hundreds of millions of dollars. The complaint is full of quotes from these company's websites about how they are great environmental stewards. It's also full of impeaching information that undermines those statements. The companies' statements are going

to be used as evidence against them in global warming litigation. Some of you may think it's a little premature to talk about this right now, but your clients' litigation risks increase with the amount of environmental hype that they issue.. For your information, you should check the website of a group known as CERES. It's headed by Mindy Lubber, whom I've met a number of times. CERES monitors the disclosures of corporations throughout the United States regarding climate change. If you want to see what everybody is doing, it's all collected and published on the CERES Web site. You can decide which ones you believe are good or bad. But models are out there. People should be looking at them, and for heaven's sakes, don't hype anything. Tell the truth.

RYAN: Also, in press releases. We have a case right now that the fraud allegations are based on a statement in press release. Whether you're filing something with the government where you pay careful attention to be accurate or whether it is information that you're just putting out to the public that you may not be as careful with, accuracy is absolutely the key to understanding; and you shouldn't hide, but it's being done. We have an obligation to inform our clients about the liability risks if they continue those practices.

ANDROVETT: *Global warming may be the ultimate Pandora's box. I've been checking my New York Times online to see if, as expected, the EPA this morning comes out with its finding that greenhouse gases endanger the public health. Panel, over the next 15 minutes, talk about why that's meaningful. And if we can, let's also talk about what the ramifications of such a finding would be in Texas.*

FAULK: The endangerment finding hit me right between the eyes the day before I was supposed to make a speech at the ABA's Keystone conference on something else. I spent the evening redoing my speech to talk about it. A couple of years ago, the Supreme Court decided in *Massachusetts v. EPA* that the EPA had to decide whether greenhouse gases were a dangerous air

pollutant or explain why they couldn't reach such a decision under the available evidence. Well, a year passed and nothing happened. Two years was coming up last month, and the Obama administration, the EPA leaked a PowerPoint presentation, which is all over the internet right now. The document announced that EPA was going to make an endangerment finding on April 16, 2009; and it addressed several issues. First of all, EPA will find that five greenhouse gases, including carbon dioxide, methane, nitrous oxide, and black carbons, are air pollutants under the Clean Air Act. They will find that the gases are an endangerment to health and welfare and that they must be regulated under the Clean Air Act. They are not going to issue regulations today. They are simply going to make the finding. Importantly, however, the finding will be based not only upon health, but also upon welfare, which means that it's going to invoke the permitting operations under the Clean Air Act. The Bush administration only addressed welfare, which meant that we wouldn't be dealing with non-attainment areas in various other things. But the Obama administration draft is going to address both. Also, significantly it's going to address the issue of environmental justice. Environmental justice, as many of you know, deals with the disproportionate impact of environmental issues, here specifically global warming, on minority and on low-income populations who are impacted by them. That opens up a completely new set of potential environmental regulations on environmental justice. Although the EPA



administrator suggests that the agency plans to focus on "large emitters," there are substantial questions whether the EPA has the discretion to make that call. Roger Martella, the former EPA general counsel under Bush, and I were at Keystone together, and we agreed that EPA will have difficulty limiting the scope of regulations. Once the EPA makes an endangerment finding, the EPA probably lacks discretion to refuse to regulate the entire scope of the issue. In plain English, this means is that every emitter of these five greenhouse gases, everything from leaf blowers and lawn mowers to the stacks at ExxonMobil, are going to be regulated.. Even agricultural interests, if you own more than 50 beef cattle, such as I do, will be regulated. If you own more than 25 dairy cattle, you will be regulated. If you raise hogs, chickens, or if you apply fertilizers to your agricultural operations, all of activities are implicated. This important finding sets the stage for regulation under the Clean Air Act — but since the CAA only applies within the US, it does nothing to redress the real problems of

climate change, which are, of course, global, not local. Interestingly, Representative Waxman's bill specifically precludes the EPA from regulating these under the Clean Air Act, so Congress and the EPA are on a collision course.

RYAN: At least one of the trends that I've seen in the state of Texas is landowners filing suit to shut down things that they don't like and to keep companies from condemning land to build those kinds of things, and that this could provide a mechanism for landowners to use to argue that company X should not be able to do Y in my backyard. So that's potentially an impact that we might see in Texas. We've seen those kinds of attempts with alternative energy projects that have failed so far; and I'm not sure that this would have any impact on alternative energy projects, but this would have an impact on your traditional thermal energy projects in the state because you do have an active group of landowners, both big and small, that are trying to fight those projects. And this may be just one more thing that they could raise. I don't know what impact this may have in Austin, but we are in that small

window at a time that happens every two years during which my clients get very nervous and hope nothing happens when the legislature is in session. There are a number of bills pending right now that probably have subject captions that amendments could be made to deal with these kinds of issues to the extent the state government has any say in these kinds of issues. So it will be interesting to see what happens in that regard in the next month.

RONN: The only thing I would have to add — this fits Rick well, and he said it very well — is that there's a flip side to it like last year when we talked is that never underestimate the creativity of American business. There will be some businesses that are hit hard by this regulation, and it will be difficult; but there will be other businesses where there'll be beautiful opportunities and very creative ways to deal with these kinds of things. So the business people need to look for those kinds of opportunities, while at the same time, trying to deal with some of the difficulties from the current activities, if you will.

ANDROVETT: *David, is it too early to be able to identify where generally those*

opportunities might take place?

RONN: Well, without knowing exactly what the regulations are going to be, it's going to be a little tough. As we talked about a little while ago, there are certain industries that are going to have opportunities. Anything having to do with efficiency in anything, any kind of efficiency technology is going to have a place. As I mentioned, the pipelines with the CO2 aspects, particularly if CO2 ends up being under the Clean Air Act. It's really the things I mentioned before. You're going to have to look for those spots; and until we know exactly what it is they are going to try and enforce upon us, it's a little difficult to say.

ANDROVETT: *Rick, if the Clean Air Act is not the vehicle — and I'm really wrestling with this — basically, we can do all that we can here in the United States; but we don't have one of those big cones over the mainland and Alaska and Hawaii. If China and India continue coal-fire plants and pollution and that level of ambient air quality is higher in terms of the greenhouse gases, what can we do? And finally, once federal regulars and the states come in, if not the Clean Air Act and if not the EPA, how do you implement a system consistent with the anticipated EPA endangerment finding today?*

FAULK: Well, first of all, since the EPA can only regulate under the Clean Air Act, they can't solve the problem. Carbon dioxide is a global problem. It's blown by the wind. Chinese carbon comes over here. Indian carbon comes over here. As we all know, we live in a non-attainment area for air pollution in Houston. That's a microcosm of the problem that will occur if the EPA continues down this path. If the Clean Air Act is applied, virtually every portion of the United States will be designated as a permanent non-attainment area — not because of domestic emissions, but because of foreign emissions wafting into our airspace. The only way to effectively deal with this problem is through an international agreement that fairly deals with emissions on a global basis. Unfortunately, it appears that India and China are not going to cooperate unless we provide them with the capital to





reach the reduction targets. They want the developed countries to help them to change their operations to reduce emissions. Think about that from an economic standpoint, and you'll see why it's so difficult to reach an international agreement. We're going to be asked to subsidize India and China for changing their operations so that we can reduce global emissions generally. It is a huge investment in infrastructure. Now, the Obama administration has floated the idea that perhaps private industry wants to get involved with "investing" in China and India to help them do those things. This is not as simple as waving a magic wand and everybody being happy. There are extraordinarily difficult issues to be negotiated. Our negotiators are probably going to come back with some sort of consensus to the American people after the Copenhagen meeting, and that is when the political difficulties will begin. Frankly, I don't think anyone, including the Obama administration has an idea about how this is going to work out. I don't think they are in control of the situation. We're going to have to study very carefully before we conclude any international agreement is really feasible

AUDIENCE MEMBER: *I'm Karen Schmidt. I have a question for David. The State plan for energy conservation*

and also to the interesting impact on the grid has allowed money to be available for companies. How much are they aware that it is available through the utility companies? They have millions of dollars to use; and that's the issue, is they are not aware for the monitoring services and also for the retrofits. The utility companies, CenterPoint, Encor, have the money. Unfortunately, there's no way to tie the two together. But my

question really is: The difficulty of putting together power purchase agreements and also for some of the smaller solar farms throughout the state that people are trying to do, but they are dealing with all the regulatory issues. Are they a generator? Are they a retail electricity provider? Do they have to register with FERC? How many attorneys in the state of Texas are really familiar with each one of those aspects to make these projects go forward?

RONN: Great question. I don't know. I haven't taken a poll on those. But there are a good number of folks who do understand those kind of issues; and the key point that you pointed out is that trying to pull something off like that is fairly, legally intensive. So that means that somebody trying to do it on a smaller basis gets rather difficult because then they have a choice of do I just do this and not necessarily try to comply with everything or not try to do it the right way versus let's get the right legal team in place. There are folks who understand these things. We do these kinds of things. I'm sure there are other varieties of customers that do these things. It's a difficult landscape; and that's one of the things, the themes we've heard throughout this thing is the legal accounting, the administrative burden, that's going to be placed

on trying to pull some of these alternative projects together. They are generally not simple out of the box things because you are trying to do things that are going to be a little bit different. You're not exactly sure how it pulls together. There have currently standard documents; but by the same token, trying to stick solar panels on roofs and trying to figure out how to make that work across a variety of businesses, it's a new frontier. So it gets a little complicated and expensive.

RYAN: You raised a really good point, too, for companies to be aware of in terms of money that's out there. Encor spent about \$50,000,000 on energy efficiency programs last year. CenterPoint spent close to \$30,000,000 on energy efficient programs, and the interesting things about those programs are that the costs are collected from the customer classes that benefit from them. So if you're a company that wants to do some kind of retrofitting and you qualify to participate in the program or if you go to your utility and ask for there to be a program created for next year to participate in, that cost is spread among the entire customer class that you belong to. So you have to make sure that you belong to a customer class that has more than you in it. But if you've got a customer class that, say, most of the Ship Channel companies fall into, you want to do Project A; but you don't want to spend your money to do it, at least to pay for all of it. Maybe I can get a couple dollars from this utility that then is going to be spread across me and my competitors so that I don't make the entire costs. ❖

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