North American Energy Standards Board

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Recommendation Prepared and Voted Out of the WGQ Interpretations Subcommittee
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Recommendation for C07003

7.3.x In the NAESB Base Contract for Sales and Purchase of Natural Gas , NAESB WGQ Standard No. 6.3.1, dated April 19, 2002 ("NAESB Base Contract"), are physical deliveries of natural gas made there under intended by NAESB to be subject to avoidance and potential unwinding pursuant to the fraudulent transfer provisions of Title 11 of the United States Code (the "Bankruptcy Code"), or did NAESB intend transactions under the NAESB Base Contract to constitute a "forward contract," a "commodity forward agreement," and a "swap agreement" (as those terms are used in the Bankruptcy Code), thus exempting transfers under the NAESB Base Contract from avoidance and unwinding under the Bankruptcy Code.

Interpretation:

NAESB's Base Contract for Sale and Purchase of Natural Gas, NAESB WGQ Standard No. 6.3.1, dated April 19, 2002 (the "NAESB Base Contract") includes Section 10.5 that reads:

> 10.5 The parties agree that the transactions hereunder constitute a "forward contract" within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each "forward contract merchants" within the meaning of the United States Bankruptcy Code.

NAESB's intent for inclusion of this language in the NAESB Base Contract was to assure that a transaction entered into pursuant to the NAESB Base Contract would constitute a "forward contract" under the Bankruptcy Code and that such transactions would be protected from post hoc judicial scrutiny to the greatest extent permitted under the Bankruptcy Code. This provision clearly entitled transfers under a NAESB Base Contract to various protections under the pre-2005 Bankruptcy Code, including exemption from avoidance as fraudulent transfers. *See, e.g.*, 11 U.S.C. § 546(e).

NAESB's intent continues to be that all physically settled commodity forwards transacted under NAESB Base Contracts receive the same benefits and protections provided by the Bankruptcy Code to financially or cash-settled forwards. The Bankruptcy Code also exempts "swap agreements" from avoidance as fraudulent transfers (11 U.S.C. § 546(g)). The Bankruptcy Code was amended in 2005, since the promulgation of the NAESB Base Contract, to expand the definition of "swap agreement" to include a "forward agreement". Thus, treatment of a transaction under the NAESB Base Contract as a "commodity forward agreement" within the Bankruptcy Code's definition of the term "swap agreement" is consistent with NAESB's original intent in including Section 10.5 in the NAESB Base Contract.