

Natural Gas Importer Sues U.S. Customs for Rejecting NAFTA Claims

An importer of natural gas from Canada filed suit on February 23, 2018, alleging that U.S. Customs and Border Protection (CBP) unlawfully denied preferential treatment for its imports under the North American Free Trade Agreement (NAFTA). The plaintiff, Emera Energy Services, Inc., seeks recovery of Merchandise Processing Fees (MPF) that are generally waived when imported merchandise originates from a NAFTA country (i.e., Canada, Mexico or the United States). Emera raises an issue confronting the natural gas industry: how do importers substantiate NAFTA claims for natural gas imports from Canada when the product is commingled in Canada and transported through pipelines to the United States?

The complaint, which was filed at the U.S. Court of International Trade (Court No. 18-cv-00033), acknowledges that Emera "could not identify the well-point of any" of its imports, but also asserts that this problem implicates "not just Emera but every cross-border natural gas supplier or importer." Emera notes that its imports were acquired from its affiliate Emera Canada and that Emera Canada acquired the natural gas through the Natural Gas Exchange or from third-party suppliers. Emera also claims that Emera Canada obtained NAFTA certificates directly from the third parties or issued them itself for the gas it purchased through Natural Gas Exchange. Emera believes that the Natural Gas Exchange terms and conditions of sale establish that the natural gas originates from Canada, and that it reasonably relied on these terms and conditions in substantiating its NAFTA claims to CBP. The complaint notes that CBP conducted a verification of Emera's NAFTA claims and found them to be unsubstantiated.

Emera claims it properly declared and substantiated that the natural gas imports originated from Canada, and seeks recovery of MPFs paid in the amount of \$12,400 per month (i.e., \$148,800 per year) for several years. The complaint attacks CBP's findings relating to Emera imports, and also claims that CBP's collection of daily MPFs is unlawful. CBP's practice is to collect a daily MPF for gas imports, up to \$400 per day, unless the imports are recognized as NAFTA originating.

This is not the first time the natural gas industry has raised with CBP the impracticality of obtaining a NAFTA certificate for imports from Canada. Other importers too have argued to CBP that it is impractical for natural gas importers to obtain NAFTA certificates because gas flowing in the pipeline systems is commingled from many producers and resellers, making traceability impossible. Moreover, the importers have claimed that natural gas imports from Canada had to be NAFTA originating because non-NAFTA sources of gas constitute a *de minimis* amount relative to the volume of natural gas that originates in the United States and Canada. CBP has taken the position, however, that NAFTA certificates must be acquired by importers to validly claim NAFTA status for imports.

Although it may take months (or even years) for Emera's judicial appeal to be resolved, importers of natural gas from Canada should expect increased CBP scrutiny of imports claiming NAFTA preference. It is also possible that the appeal may prompt CBP to clarify its position with respect to how importers can substantiate NAFTA claims relating to natural gas imports.

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