

Cooking with Steam

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In 2013 Nippon Paper Industries USA Co., Ltd. constructed a biomass facility that generates superheated steam, which can produce 20 megawatts of electricity for sale. Section 1603 of the American Recovery and Reinvestment Act provides for a cash grant for qualified investments in renewable energy properties. When the Treasury Department, which administers the grant program, failed to give Nippon the full grant award Nippon believed it was entitled to under the Section 1603 program, Nippon sued the United States in the U.S. Court of Federal Claims to recover the amount it believed it was owed, or \$5,863,726.

To support its claim, Nippon propounded interrogatories and requests for document production on the Government. The Government opposed, arguing that the requests were overly broad, unduly burdensome, and beyond the scope of discovery. In reviewing Nippon's motion to compel, the Court considered the Government's argument that the discovery requests were beyond the issues in the case. Nippon argued that the discovery was relevant to the Court's determination of how much deference under *Skidmore v. Swift* to afford the Treasury Department's reliance on its Guidance policy, used in deciding how much of the grant to award Nippon. The Government countered that how the agency applied its Guidance policy is irrelevant to the how much deference the Guidance should be given. The Government also argued that the Court may consider only whether the guidance is consistent with public agency pronouncements, and not with internal, non-public agency decisions.

The Court agreed with Nippon, holding that whether the Guidance has been applied consistently to all applicants is relevant to whether the Court should defer to the agency's decision. The Court also held that internal, non-public agency documents such as grant application decisions may be a relevant factor in determining the deference afforded to the agency.

In addition, the Court held that Nippon's discovery requests were not unduly burdensome or overly broad because they were specifically limited to the 168 open-loop biomass applicants. The Court, however, denied Nippon's document request for communications between third-party applicants and Treasury, explaining that this request was unreasonably cumulative or duplicative. The Court stated that the information Nippon was seeking could be obtained through third-party applications and award letters from Treasury. Therefore, the Court granted Nippon's motion to compel in part.

Read Judge Wheeler's full opinion [here](#).