

Open-Loop Biomass Cogeneration Facility: Federal Appellate Court Addresses Challenge to Grant Payment Amount



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Austin Reed

The United States Court of Appeals for the Federal Circuit (“Court”) in a November 4th modified opinion addressed an issue arising under the American Recovery and Reinvestment Act (“ARRA”). See *WestRock Va. Corp. v. United States*, 941 F.3d 1315 (Fed. Cir. 2019).

The owner of an open-loop biomass cogeneration facility challenged the amount of grant payments that the United States Treasury Department (“Treasury”) made to it under the American Recovery and Reinvestment Act (ARRA).

WestRock Virginia Corporation (“WestRock”) operates a paper mill in Covington, Virginia. In 2013, WestRock began using a cogeneration facility that burns open-loop biomass. The facility uses steam from two boilers to generate electricity and to produce paper. Thus, not all of the steam is used to generate electricity.

WestRock submitted an application to the Treasury Department for payment related to its biomass cogeneration facility pursuant to Section 1603 of the ARRA. This provision provides cash grants in lieu of tax credits to investors for certain clean energy properties.

In its application, “WestRock claimed that its qualifying property cost \$286,191,571 and requested a payment of \$85,857,471—30 percent of the total claimed qualifying cost.” This is the percentage allowed under the ARRA. However, the National Renewable Energy Laboratory determined that WestRock used only a portion of the steam produced at the facility to generate electricity.

Treasury reduced the cost of the property based on its use. It provided WestRock a grant of \$38,881,751 rather than the requested \$85,857,471.

WestRock challenged the amount of the payment in the United States Court of Federal Claims (“Claims Court”). It alleged that the Treasury could not reduce the cost of the property based on its use under section 1603 of the ARRA. The Claims Court affirmed Treasury’s grant amount.

WestRock appealed.

The Court affirmed the Claims Court decision.

According to the Court, “Section 1603(b)(2)(A) unambiguously allows Treasury, in calculating the amount of the grant specified in the statute, to reduce the basis of qualified property in proportion to its use in a qualifying activity.” Section 1603(b)(2)(A) allows for reimbursement of 30 percent of the cost of any qualified property.

The term “qualified property” is defined in section 48(a)(5)(D) as “tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment facility.” Internal Revenue Code section 45(d)(3) then defines “qualified investment facility” as “a facility using open-loop biomass to produce electricity.”

Read together, the provisions allow for reimbursement for 30 percent of only those costs associated with producing electricity. Therefore, Treasury’s reduction of the payment to WestRock was deemed correct. As a result, the Court affirmed the Claims Court’s decision.

A copy of the modified opinion can be downloaded [here](#).