

**ITEM 6**  
**INCORRECT REDUCTION CLAIM**  
**PROPOSED DECISION**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

*Integrated Waste Management*

Fiscal Years 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2010-2011

14-0007-I-11

San Bernardino Community College District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Incorrect Reduction Claim (IRC) addresses reductions by the State Controller's Office (Controller) to reimbursement claims of the San Bernardino Community College District (claimant) for fiscal years 1999-2000 through 2008-2009, and 2010-2011 (the audit period) under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims any offsetting savings from solid waste diversion that results in reduced or avoided landfill disposal fees.

Staff finds, based on the evidence in the record, that the Controller's calculation of offsetting cost savings for all years in the audit period, except for calendar years 2002 and 2003, is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

However, the Controller's finding that the claimant did not exceed the mandated diversion rate in calendar year 2002 (when the claimant diverted 37.57 percent of solid waste) is incorrect as a matter of law because the requirement to divert 50 percent of solid waste did not become operative until January 1, 2004.<sup>1</sup> To calculate the offsetting cost savings for calendar year 2002, the Controller did not allocate the diversion as it had for rest of the audit period, but instead used 100 percent of the diversion to calculate the offsetting savings. Thus, the calculation of offsetting savings for calendar year 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

For calendar year 2003, the Controller correctly found that the claimant exceeded the mandated diversion rate and therefore allocated the diversion as it had for other years. However, the

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<sup>1</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

Controller used 50 percent to calculate the allocated diversion rate, although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>2</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>3</sup> so the calculation of cost savings for calendar year 2003 is also incorrect.

Applying the Controller's formula for the calculation of cost savings to calendar years 2002 and 2003 (using the 25 percent mandated rate to calculate the allocated diversion) results in offsetting cost savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

Thus, the difference of \$22,884 has been incorrectly reduced and should be reinstated to the claimant.

#### The Integrated Waste Management Program

The test claim statutes require community college districts<sup>4</sup> to adopt and implement, in consultation with the California Integrated Waste Management Board (CIWMB, now known as CalRecycle), an integrated waste management (IWM) plan to govern the district's efforts to reduce solid waste, reuse materials, recycle recyclable materials and procure products with recycled content in all agency offices and facilities. To implement their plans, community college districts must divert from landfill disposal at least 25 percent of solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. Public Resources Code section 42925, as added by the test claim statutes, further provides that "[a]ny cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code."

On March 24, 2004, the Commission adopted the Test Claim Statement of Decision and found that the test claim statutes impose a reimbursable state mandate on community colleges, and that cost savings under Public Resources Code section 42925 did not result in a denial of the Test Claim because there was no evidence of offsetting savings that would result in no net costs to a community college district. The Parameters and Guidelines were adopted on March 30, 2005, to authorize reimbursement for the activities approved in the Statement of Decision, and did not require claimants to identify and deduct from their reimbursement claims any cost savings. After the Commission adopted the Parameters and Guidelines, the Department of Finance (Finance) and CIWMB challenged the Statement of Decision and Parameters and Guidelines, arguing that

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<sup>2</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

<sup>3</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>4</sup> The test claim statutes apply to "state agencies" but defines them to include "the California Community Colleges" (Pub. Res. Code, § 40196.3). Community college districts are the only local government to which the test claim statutes apply.

the Commission did not properly account for all the offsetting cost savings from avoided disposal costs, or offsetting revenues from the sale of recyclable materials in the Statement of Decision or Parameters and Guidelines. On May 29, 2008, the Sacramento County Superior Court partially agreed with the petitioners and directed the Commission to amend the Parameters and Guidelines to:

1. [R]equire community college districts claiming reimbursable costs of an integrated waste management plan under Public Resources Code section 42920, et seq. to identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. [R]equire community college districts claiming reimbursable costs of an integrated waste management plan under Public Resources Code section 42920, et seq. to identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>5</sup>

In accordance with this court ruling, the Commission amended the Parameters and Guidelines on September 26, 2008.

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010, and has remained so since that time.<sup>6</sup>

### **Procedural History**

The claimant filed its fiscal year 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, and 2004-2005 reimbursement claims on September 18, 2006.<sup>7</sup> The claimant filed its fiscal year 2005-2006 reimbursement claim on January 11, 2007,<sup>8</sup> its fiscal year 2006-2007 reimbursement claim on January 27, 2008,<sup>9</sup> its fiscal year 2007-2008 reimbursement claim on February 2, 2009,<sup>10</sup> its fiscal year 2008-2009 reimbursement claim on February 2, 2010,<sup>11</sup> and its fiscal year 2010-2011 reimbursement claim on January 11, 2013.<sup>12</sup> The Controller notified the

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<sup>5</sup> Exhibit B, Controller's Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>6</sup> See Government Code section 17581.5(c)(9).

<sup>7</sup> Exhibit A, IRC, pages 283, 287, 291, 295, 299, and 303. Exhibit B, Controller's Comments on the IRC, page 19.

<sup>8</sup> Exhibit A, IRC, page 308; Exhibit B, Controller's Comments on the IRC, page 19.

<sup>9</sup> Exhibit A, IRC, page 313. Exhibit B, Controller's Comments on the IRC, page 19.

<sup>10</sup> Exhibit A, IRC, page 318. According to the State Controller, this claim was filed on February 10, 2009. See Exhibit B, Controller's Comments on the IRC, page 19.

<sup>11</sup> Exhibit A, IRC, page 322.

<sup>12</sup> Exhibit A, IRC, page 326.

claimant of the pending audit adjustment on June 13, 2014,<sup>13</sup> and issued the Final Audit Report on June 23, 2014.<sup>14</sup> The claimant filed the IRC on June 9, 2015.<sup>15</sup> The Controller filed comments on the IRC on July 10, 2015.<sup>16</sup> The claimant did not file rebuttal comments. Commission staff issued the Draft Proposed Decision on February 16, 2018.<sup>17</sup> The Controller filed comments on the Draft Proposed Decision on March 1, 2018.<sup>18</sup> The claimant did not file comments on the Draft Proposed Decision.

### **Commission Responsibilities**

Government Code section 17561(d) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs if the Controller determines that the claim is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>19</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>20</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to

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<sup>13</sup> Exhibit B, Controller's Comments on the IRC, pages 20, 91-92.

<sup>14</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>15</sup> Exhibit A, IRC, page 1.

<sup>16</sup> Exhibit B, Controller's Comments on the IRC, page 1.

<sup>17</sup> Exhibit C, Draft Proposed Decision.

<sup>18</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>19</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>20</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>21</sup>

The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>22</sup> In addition, section 1185.1(f)(3) and 1185.2(d) and (e) of the Commission's regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>23</sup>

### **Claims**

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Whether the Controller's reductions of costs claimed based on unreported cost savings resulting from implementation of the IWM plan are correct.	<p>Pursuant to the ruling and writ issued in <i>State of California v. Commission on State Mandates</i>, (Super. Ct., Sacramento County, 2008, No. 07CS00355), the amended Parameters and Guidelines require claimants to identify and offset from their claims, cost savings realized as a result of implementing their IWM plans, and apply the cost savings to fund plan implementation and administration costs.</p> <p>The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, claimants can reduce or avoid landfill fees and realize cost savings. As indicated in the</p>	<p><i>Partially Incorrect</i> – The Controller correctly presumed, absent any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each year in the audit period. The claimant has not filed any evidence to rebut the statutory presumption of cost savings. Thus, the Controller's finding that the claimant realized cost savings is correct as a matter of law.</p> <p>In addition, the Controller's reduction of costs claimed for all years in the audit period</p>

<sup>21</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984; *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>22</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>23</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

	<p>court's ruling, cost savings may be calculated from the solid waste disposal reduction that community colleges are required to annually report to CIWMB. There is a rebuttable statutory presumption of cost savings. To rebut the presumption, the claimant has the burden to show that cost savings were not realized.</p> <p>The claimant diverted more solid waste than required by law for each year in the audit period. However, the Controller's cost savings formula "allocated" the diversion by dividing the mandated solid waste diversion rate, either 25% or 50%, by the actual diversion rate as reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted multiplied by the avoided landfill disposal fee (based on the statewide average fee). This formula avoids penalizing the claimant for diverting more solid waste than the state-mandated percentage.<sup>24</sup></p> <p>The Controller found that the claimant did not achieve the mandated diversion rate for calendar year 2002, although the requirement to divert 50% of solid waste did not become operative until</p>	<p>except for calendar years 2002 and 2003 is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. However, the Controller's finding that the claimant did not exceed the required diversion rate in calendar year 2002 is incorrect as a matter of law. The claimant diverted 37.57% of solid waste in calendar year 2002, when the required diversion rate was 25%. The requirement to divert 50% of solid waste did not become operative until January 1, 2004.<sup>29</sup> In addition, the Controller did not allocate the 2002 diversion as it had for rest of the audit period. Instead, the Controller used 100% of the diversion to calculate the offsetting savings, so the calculation of offsetting savings for calendar year 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.</p> <p>For calendar year 2003, the Controller found that the claimant exceeded the mandated diversion rate but the Controller used a 50% rate to calculate the allocated diversion rate, although the test claim statutes required only 25% diversion in calendar year 2003.<sup>30</sup> Thus, the calculation of</p>
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<sup>24</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>29</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>30</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

	<p>January 1, 2004.<sup>25</sup> Instead of allocating the diversion rate for 2002, the Controller used 100% of the tonnage diverted to calculate the offsetting cost savings.</p> <p>For calendar year 2003, the Controller found that the claimant exceeded the mandated diversion rate and therefore allocated the diversion, but the Controller used a 50% rate to calculate the allocated diversion rate, instead of the applicable 25% mandated diversion rate.<sup>26</sup> The requirement to divert 50% of solid waste did not become operative until January 1, 2004.<sup>27</sup></p> <p>The Controller admits that the mandated diversion rate is 25% for 2002 and 2003.<sup>28</sup></p>	<p>cost savings for calendar year 2003 is also incorrect.</p> <p>Applying the Controller's formula for the calculation of cost savings (using the 25% mandated rate to calculate the allocated diversion) to calendar years 2002 and 2003, results in offsetting cost savings of:</p> <ul style="list-style-type: none"> <li>• \$14,167 for 2002 (25% divided by 37.57%, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and</li> <li>• \$15,761 for 2003 (25% divided by 56.37%, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.</li> </ul> <p>The difference of \$22,884 has been incorrectly reduced and should be reinstated to the claimant.</p>
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### **Staff Analysis**

#### **The Controller's Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for Calendar Years 2002 and 2003 Is Incorrect as a Matter of Law and Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

The test claim statutes require community college districts to divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid

<sup>25</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>26</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

<sup>27</sup> Public Resources Code sections 42921(b); Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>28</sup> Exhibit B, Controller's Comments on the IRC, page 20.

waste by January 1, 2004.<sup>31</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>32</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion that community colleges are required to annually report to CIWMB.<sup>33</sup>

Staff finds that the Controller correctly presumed, consistent with the test claim statutes and the court’s interpretation of those statutes, and without evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted. The record shows that the claimant diverted solid waste each year during the audit period and achieved cost savings from the avoided landfill fee per ton of waste diverted.<sup>34</sup>

Staff also finds, based on the evidence in the record, that the Controller’s calculation of offsetting cost savings for all fiscal years in the audit period, except for calendar years 2002 and 2003, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. The claimant exceeded the mandated diversion rate in all years of the audit period.<sup>35</sup>

Because the claimant exceeded the mandate and diverted more solid waste than required by law, the Controller’s cost savings formula “allocated” the diversion by dividing the percentage of solid waste required to be diverted, either 25 or 50 percent, by the actual percentage of solid waste diverted, as reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted, as annually reported by the claimant to CIWMB, multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>36</sup> The formula allocates cost savings based on the mandated rates of diversion, and avoids penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>37</sup>

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<sup>31</sup> Public Resources Code section 42921(b).

<sup>32</sup> Public Resources Code section 42925(a).

<sup>33</sup> Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>34</sup> Exhibit B, Controller’s Comments on the IRC, pages 34-70 (Annual Reports) and 89.

<sup>35</sup> Exhibit B, Controller’s Comments on the IRC, page 89.

<sup>36</sup> Exhibit A, IRC, pages 35-36 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>37</sup> Exhibit B, Controller’s Comments on the IRC, page 20.



In 2002, the claimant achieved a 37.57 percent diversion rate.<sup>38</sup> Although the mandated diversion rate in 2002 was 25 percent, the Controller used 50 percent and mistakenly found that the claimant did not exceed the mandated diversion rate.<sup>39</sup> Therefore, the Controller's finding that the claimant did not divert the mandated rate in calendar year 2002 is incorrect as a matter of law. To calculate the offsetting cost savings for calendar year 2002, the Controller did not allocate the diversion as it had for rest of the audit period. Instead, the Controller used 100 percent of the diversion to calculate the offsetting savings,<sup>40</sup> so the calculation of offsetting savings for calendar year 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

For calendar year 2003, the Controller correctly found that the claimant exceeded the mandated diversion rate. However, the Controller used a 50 percent rate to calculate the allocated diversion rate, although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>41</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>42</sup> so the calculation of cost savings for calendar year 2003 is also incorrect as a matter of law.

Applying the Controller's calculation of cost savings to calendar years 2002 and 2003 (using the mandated 25 percent rate to calculate the allocated diversion) results in offsetting savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

Therefore, staff finds that the difference of \$22,884 has been incorrectly reduced.

### **Conclusion**

Staff finds, based on the evidence in the record, that the Controller's calculation of offsetting cost savings for all years in the audit period except calendar years 2002 and 2003 (the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004) is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

Staff also finds that the law and the evidence in the record support offsetting cost savings for calendar years 2002 and 2003 of \$29,928, rather than \$52,812. Therefore, the difference of \$22,884 has been incorrectly reduced and should be reinstated to the claimant.

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<sup>38</sup> Exhibit B, Controller's Comments on the IRC, pages 40 (2002 Report). The claimant reported 37.6 percent diversion.

<sup>39</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>40</sup> Exhibit B, Controller's Comments on the IRC, page 89.

<sup>41</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

<sup>42</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

**Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to partially approve the IRC and request, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$22,884 to the claimant. Staff further recommends that the Commission authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
ON:**

Public Resources Code Sections 40148,  
40196.3, 42920-42928; Public Contract Code  
Sections 12167 and 12167.1; Statutes 1992,  
Chapter 1116 (AB 3521); Statutes 1999,  
Chapter 764 (AB 75); State Agency Model  
Integrated Waste Management Plan  
(February 2000)

Fiscal Years 1999-2000, 2000-2001, 2001-  
2002, 2002-2003, 2003-2004, 2004-2005,  
2005-2006, 2006-2007, 2007-2008, 2008-  
2009, and 2010-2011

San Bernardino Community College District,  
Claimant

Case No.: 14-0007-I-11

*Integrated Waste Management*

DECISION PURSUANT TO  
GOVERNMENT CODE SECTION  
17500 ET SEQ.; CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, DIVISION 2,  
CHAPTER 2.5, ARTICLE 7

*(Adopted May 25, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on May 25, 2018. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the IRC by a vote of [vote count will be included in the adopted Decision] as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	

## **Summary of the Findings**

This IRC addresses reductions made by the State Controller's Office (Controller) to reimbursement claims of the San Bernardino Community College District (claimant) for fiscal years 1999-2000 through 2008-2009, and fiscal year 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste.<sup>43</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid waste by January 1, 2004.<sup>44</sup> The test claim statutes also provide that "Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs . . ."<sup>45</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>46</sup>

The claimant diverted solid waste, exceeding the mandated diversion rate (25 or 50 percent) in all years of the audit period. Thus, the Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted. The Commission finds, based on the evidence in the record, that the Controller's calculation of offsetting cost savings for all years in the audit period, except calendar years 2002 and 2003, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. Because the claimant diverted more solid waste than required by law, the Controller derived a cost savings formula that "allocated" the diversion by dividing the mandated solid waste diversion rate, either 25 or 50 percent, by the actual diversion rate, as reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted, as annually reported by the claimant to CIWMB, multiplied by the avoided landfill disposal fee (based on the statewide

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<sup>43</sup> Public Resources Code section 42920(b).

<sup>44</sup> Public Resources Code section 40124.

<sup>45</sup> Public Resources Code section 42925(a).

<sup>46</sup> Exhibit B, Controller's Late Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

average fee).<sup>47</sup> The formula allocates cost savings based on the mandated rates of diversion, and was intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>48</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these years is correct.

However, the Controller's reduction of costs claimed for calendar years 2002 and 2003, is incorrect as a matter of law and arbitrary, capricious, and entirely lacking in evidentiary support.

During calendar year 2002, the claimant achieved a 37.57 percent diversion rate.<sup>49</sup> Although the mandated diversion rate for 2002 was 25 percent, the Controller mistakenly found that the claimant did not exceed the "50 percent" mandated diversion rate. The mandate to divert at least 50 percent of all solid waste was not operative until January 1, 2004.<sup>50</sup> Therefore, the Controller's finding that the claimant did not divert the mandated rate in calendar year 2002 is incorrect as a matter of law. To calculate the offsetting cost savings for calendar year 2002, the Controller did not allocate the diversion as it had for rest of the audit period, but instead used 100 percent of the diversion to calculate the offsetting savings.<sup>51</sup> Thus, the calculation of offsetting savings for calendar year 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

For calendar year 2003, the Controller correctly found that the claimant exceeded the mandated diversion rate but used a 50 percent rate to calculate the allocated diversion rate, although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>52</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>53</sup> so the calculation of cost savings for calendar year 2003 is incorrect as a matter of law.

Applying the Controller's calculation of cost savings to calendar years 2002 and 2003 (using the mandated 25 percent rate to calculate the allocated diversion) results in offsetting savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

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<sup>47</sup> Exhibit A, IRC, pages 35-36 (Final Audit Report); Exhibit B, Controller's Comments on the IRC, page 20.

<sup>48</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>49</sup> Exhibit B, Controller's Comments on the IRC, pages 39, 42, 86.

<sup>50</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>51</sup> Exhibit B, Controller's Comments on the IRC, page 89.

<sup>52</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

<sup>53</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

Therefore, the Commission finds that the difference of \$22,884 (\$52,812 - \$29,928) has been incorrectly reduced. Accordingly, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$22,884 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- 09/18/2006 The claimant filed its 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005 reimbursement claims.<sup>54</sup>
- 01/11/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>55</sup>
- 01/27/2008 The claimant filed its 2006-2007 reimbursement claim.<sup>56</sup>
- 02/02/2009 The claimant filed its 2007-2008 reimbursement claim.<sup>57</sup>
- 02/02/2010 The claimant filed its 2008-2009 reimbursement claim.<sup>58</sup>
- 01/11/2013 The claimant filed its 2010-2011 reimbursement claim.<sup>59</sup>
- 06/13/2014 The Controller notified the claimant of the pending audit adjustment.<sup>60</sup>
- 06/23/2014 The Controller issued the Final Audit Report.<sup>61</sup>
- 06/09/2015 The claimant filed this IRC.<sup>62</sup>
- 07/10/2015 The Controller filed comments on the IRC.<sup>63</sup>
- 02/16/2018 Commission staff issued the Draft Proposed Decision.<sup>64</sup>
- 03/01/2018 The Controller filed comments on the Draft Proposed Decision.<sup>65</sup>

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<sup>54</sup>Exhibit A, IRC, pages 283, 287, 291, 295, 299, and 303. Exhibit B, Controller's Comments on the IRC, page 19.

<sup>55</sup> Exhibit A, IRC, page 308; Exhibit B, Controller's Comments on the IRC, page 19.

<sup>56</sup> Exhibit A, IRC, page 308; Exhibit B, Controller's Comments on the IRC, page 19.

<sup>57</sup> Exhibit A, IRC, page 318. According to the State Controller, this claim was filed on February 10, 2009. See Exhibit B, Controller's Comments on the IRC, page 19.

<sup>58</sup> Exhibit A, IRC, page 322.

<sup>59</sup> Exhibit A, IRC, page 326.

<sup>60</sup> Exhibit B, Controller's Comments on the IRC, pages 20, 91-92.

<sup>61</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>62</sup> Exhibit A, IRC, page 1.

<sup>63</sup> Exhibit B, Controller's Comments on the IRC, page 1.

<sup>64</sup> Exhibit C, Draft Proposed Decision.

<sup>65</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>66</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>67</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>68</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>69</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>70</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>71</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college’s IWM plan be deposited in CIWMB’s Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>72</sup>

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<sup>66</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>67</sup> Public Resources Code section 42920(b).

<sup>68</sup> Public Resources Code section 40124.

<sup>69</sup> Public Resources Code section 42920(b)(3).

<sup>70</sup> Public Resources Code section 42926.

<sup>71</sup> Public Resources Code section 42924(b).

<sup>72</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub.

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

A. One-Time Activities (*Reimbursable starting January 1, 2000*)

1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.

B. Ongoing Activities (*Reimbursable starting January 1, 2000*)

1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
  - a. state agency or large state facility information form;
  - b. state agency list of facilities;
  - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
  - d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

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Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Comments on the IRC, pages 88-89 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).



2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)
1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
    - a. Notify the Board in writing, detailing the reasons for its inability to comply.
    - b. Request of the Board an alternative to the January 1, 2002 deadline.
    - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
    - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
    - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the

existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.

2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
    - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
    - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
    - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>73</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing

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<sup>73</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>74</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>75</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did

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<sup>74</sup> Exhibit A, IRC, page 43-46 (Parameters and Guidelines, adopted March 30, 2005).

<sup>75</sup> Exhibit A, IRC, page 43 (Parameters and Guidelines, adopted March 30, 2005).

not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>76</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>77</sup>

Instead, the court recognized that community colleges are “*likely* to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>78</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of

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<sup>76</sup> Exhibit A, IRC, pages 48 (Parameters and Guidelines, adopted March 30, 2005).

<sup>77</sup> Exhibit B, Controller's Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

<sup>78</sup> Exhibit B, Controller's Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>79</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>80</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans

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<sup>79</sup> Public Resources Code sections 40124 & 40192. Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)).

<sup>80</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)). Emphasis added.

in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>81</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>82</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>83</sup>

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<sup>81</sup> Exhibit B, Controller's Comments on the IRC, pages 84-85 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)).

<sup>82</sup> Exhibit B, Controller's Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>83</sup> Exhibit A, IRC page 61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in strikeout and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>84</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>85</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the

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<sup>84</sup> Exhibit A, IRC, pages 48, 60-61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>85</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

**D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>86</sup>

**E. The Integrated Waste Management Program Made Optional**

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>87</sup>

**F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 1999-2000 through 2008-2009, and fiscal year 2010-2011. The claimant did not claim program costs for fiscal year 2009-2010.<sup>88</sup> Of the \$382,484 claimed during the audit period, the Controller found that \$77,792 is allowable (\$86,436 minus a \$8,644 penalty for filing late claims) and \$304,692 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>89</sup>

The Controller found that the claimant realized total offsetting savings of \$1,997,947 from implementation of its IWM plan. But because the audit adjustment exceeded the costs claimed for some fiscal years, the Controller found that \$77,792 is allowable.<sup>90</sup>

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<sup>86</sup> Exhibit E, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>87</sup> See Government Code section 17581.5.

<sup>88</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>89</sup> Exhibit A, IRC, pages 16-17, 27-29 (Final Audit Report). Exhibit B, Controller's Comments on the IRC, pages 7 and 27.

<sup>90</sup> Exhibit A, IRC, pages 17, 25-38 (Final Audit Report).



The Controller's audit finding is based on the court's ruling, which states, "the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,"<sup>91</sup> the resulting amendment to the Parameters and Guidelines, and the claimant's annual reports to CIWMB.

The Controller determined that the claimant diverted more solid waste than the amount mandated by the test claim statute each year of the audit period, except for calendar year 2002, when the Controller found that the claimant diverted solid waste, but not to the mandated diversion rate.<sup>92</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the Controller found that the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the mandated diversion rate (either 25 or 50 percent) by the actual diversion rate (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>93</sup>

$$\begin{array}{ccccc} & \text{Allocated Diversion \%} & & & \\ & \text{Maximum} & & & \text{Avoided} \\ & \text{Allowable} & & & \text{Landfill} \\ \text{Offsetting} & = & \frac{\text{Diversion \%}}{\text{Actual}} & \times & \text{Disposal Fee} \\ \text{Savings} & & \text{Diversion \%} & \times & \text{(per Ton)} \\ \text{Realized} & & & \times & \\ & & \text{Tonnage} & & \\ & & \text{Diverted} & & \end{array}$$

The Controller provided an example of how the formula works. For calendar year 2006, the claimant reported diversion of 7,481.1 tons of solid waste, and disposal of 1,342.5 tons generated.<sup>94</sup> Diverting 7,481.1 tons out of the 8,823.1 tons of waste generated results in a diversion rate of 84.8 percent (exceeding the 50 percent required).<sup>95</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>96</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (84.8 percent), which equals 58.97 percent. The 58.97 allocated diversion

<sup>91</sup> Exhibit B, Controller's Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>92</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report); Exhibit B, Controller's Comments on the IRC, page 89.

<sup>93</sup> Exhibit A, IRC, pages 35 (Final Audit Report).

<sup>94</sup> Exhibit B, Controller's Comments on the IRC, page 54 (2007 Report).

<sup>95</sup> Exhibit B, Controller's Comments on the IRC, pages 20, 89 (Controller's calculation of offsetting savings).

<sup>96</sup> Exhibit B, Controller's Comments on the IRC, page 20.

rate is then multiplied by the 7,481.1 tons diverted that year, which equals 4,411.6 tons of diverted solid waste, instead of the 7,481.1 tons actually diverted. The allocated 4,411.6 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2006 was \$46, resulting in “offsetting cost savings” for calendar year 2006 of \$202,934.<sup>97</sup>

For calendar year 2002, the Controller found that the claimant did not exceed the mandated diversion rate (which the Controller found to be 50 percent), so the Controller did not allocate the diversion of solid waste to the mandated rate. Instead, the Controller multiplied 100 percent of the claimant’s diversion by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>98</sup>

For calendar year 2003, the Controller found that the claimant exceeded the mandated diversion rate (which the Controller found to be 50 percent) and therefore allocated the diversion as it had for other years using a 50 percent rate to calculate the allocated diversion rate.

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on “per-capita disposal.” Consequently, the Controller used the claimant’s reported 2007 percentage of tons diverted to calculate the offsetting savings for fiscal years 2007-2008, 2008-2009, and 2010-2011.<sup>99</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>100</sup>

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<sup>97</sup> Exhibit B, Controller’s Comments on the IRC, pages 20, 89 (Controller’s calculations of offsetting savings). Page 20 of the Controller’s Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar year 2006, the district reported to CalRecycle that it diverted 7,481.1 tons of solid waste and disposed of 1,342.0 tons, which results in an overall diversion percentage of 84.8% [**Tab 4, page 19**]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to divert only 4,411.55 tons (8,823.1 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 4,411.55 tons of diverted solid waste rather than a total of 7,481.1 tons diverted.

Using this formula results in cost savings for calendar year 2006 of \$202,931 (8,823.1 tons generated x 50 percent = 4411.55 tons x \$46 = \$202,931). Slight differences are due to rounding.

<sup>98</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 89.

<sup>99</sup> Exhibit A, IRC, page 36 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, pages 20-21, 89.

<sup>100</sup> Exhibit A, IRC, page 36 (Final Audit Report).

### III. Positions of the Parties

#### A. San Bernardino Community College District

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced.

The claimant first alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>101</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>102</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller’s calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller’s formula assumes facts not in evidence, such as applying the 2007 diversion rate to subsequent years without evidence in the record, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>103</sup>

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<sup>101</sup> Exhibit A, IRC, page 9-11.

<sup>102</sup> Exhibit A, IRC, pages 13. Emphasis in original.

<sup>103</sup> Exhibit A, IRC, pages 13-16.

The claimant contends that application of the formula is incorrect, alleging that it “did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed.”<sup>104</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 27 other claimants under the *Integrated Waste Management* program, the application of the Controller’s formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent of costs claimed.<sup>105</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review because the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings “because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>106</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. State Controller’s Office**

The Controller maintains that the audit findings are correct and that the claimant realized total offsetting savings of \$1,997,947 from implementation of its IWM plan, but “because the offsetting savings adjustment exceeded claimed costs, we applied only \$296,048 against claimed costs.”<sup>107</sup>

Regarding the claimant’s statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. Nor does the claimant state that it disposed of its solid waste at any location other than a landfill or used other means to dispose of its waste than to contract with a commercial waste hauler, so the Controller concludes that the claimant’s comments relating to alternatives for the disposal of solid waste are irrelevant.<sup>108</sup>

The Controller cites statements in some of the claimant’s annual reports and claim filings regarding claimant’s diversion from a landfill, as well as reports of tonnage disposed of annually.<sup>109</sup> According to the Controller, the evidence reviewed by it “supports that the district normally disposes of its waste at a landfill.”<sup>110</sup> The Controller states:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for

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<sup>104</sup> Exhibit A, IRC, page 17.

<sup>105</sup> Exhibit A, IRC, pages 18-19.

<sup>106</sup> Exhibit A, IRC, pages 20-21.

<sup>107</sup> Exhibit B, Controller’s Comments on the IRC, pages 12, 16, and 23.

<sup>108</sup> Exhibit B, Controller’s Comments on the IRC, page 17.

<sup>109</sup> Exhibit B, Controller’s Comments on the IRC, page 17.

<sup>110</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

no cost. San Bernardino Valley College is located in San Bernardino, California. An internet search for landfill fees revealed that San Bernardino County, which operates the Mid-Valley Landfill in Rialto, California (12 miles from the SBVC), currently charges \$59.94 per ton to dispose of solid waste [Tab 6]. Therefore, the higher rate of diversion results in less trash to be disposed of at a landfill, creating cost savings to the district.<sup>111</sup>

The Controller also argues that the claimant realized offsetting cost savings by implementing its IWM plan because the claimant reported diversion of the following amounts of solid waste due to implementation of its IWM plan:

405.5 tons in calendar year 2000 [Tab 4, page 1 ], 382.2 tons in calendar year 2001 [Tab 4, page 4), 588.6 tons in calendar year 2002 [Tab 4, page 7], 964.9 tons in calendar year 2003 [Tab 4, page 10), 488.7 tons in calendar year 2004 [Tab 4, page 13), 6,189.5 tons in calendar year 2005 [Tab 4, page 16), 7,481.1 tons in calendar year 2006 [Tab 4, page 19], and 20,205.1 tons in calendar year 2007 [Tab 4, page 22) . . . .<sup>112</sup>

According to the Controller: “The savings is supported when the tonnage diverted is multiplied by the cost to dispose of one ton of solid waste at the landfill (e.g., \$59.94 per ton at the Mid-Valley Landfill in Rialto, California).”<sup>113</sup>

The Controller agrees that the claimant did not remit cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, but asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>114</sup>

In response to the claimant’s argument that the Controller’s formula is a standard of general application that is an underground regulation, the Controller asserts that it used a “court approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this “court-identified” approach provides a reasonable methodology to identify the required offset.”<sup>115</sup>

The Controller also states that it “allocated” the offsetting savings every year of the audit period except calendar year 2002 to avoid penalizing the claimant for diverting more than the minimum rate of diversion required.<sup>116</sup> According to the Controller:

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<sup>111</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>112</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>113</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>114</sup> Exhibit B, Controller’s Comments on the IRC, pages 18-19.

<sup>115</sup> Exhibit B, Controller’s Comments on the IRC, page 19.

<sup>116</sup> Exhibit B, Controller’s Comments on the IRC, page 20.

As there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>117</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their tonnage or percentage diverted, but they are still required to divert 50 percent of their solid waste.<sup>118</sup>

Defending its use of the claimant's 2007 reported diversion rate to calculate offsetting savings for subsequent years, the Controller calls the 2007 report a "fair representation" of the 2008 through 2010 diversion rate because the Controller found that the "district's annual per-capita disposal rate for both the employee and student populations to be well below the target rate," so the district is meeting its requirement to divert 50% of its solid waste.<sup>119</sup> The Controller also cites statements in the claimant's 2008 and 2009 annual reports that indicate the claimant's waste diversion programs were firmly in place and operating. According to the Controller, "it is entirely possible that the offsetting savings calculations we determined for FY 2008-09 and FY 2010-11 (which are based on the 2007 tonnage amounts) may even be understated."<sup>120</sup>

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller cites a statement in the claimant's 2010 report that the claimant does not compost on site or haul compostable material because it is of "relatively light volume."<sup>121</sup> The Controller states:

[A]s a result of this mandated program, the district is claiming nearly \$200,000 in salaries and benefits for its grounds caretakers to "divert solid waste from landfill disposal or transformation facilities- composting" [Tab 13]. We are uncertain why the district is claiming such large costs for activities it states it does not perform. Regardless, it seems reasonable that such offsetting savings incurred as a result of composting, no matter how minimal, be recognized and appropriately offset against direct composting costs that the district incurred and claimed as part of implementing its IWM plan.<sup>122</sup>

The Controller also states that the district's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>123</sup>

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<sup>117</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>118</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>119</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>120</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>121</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>122</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>123</sup> Exhibit B, Controller's Comments on the IRC, page 22.

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on a private survey of a large percentage of landfills across California. The Controller also cites its internet search for landfill fees that revealed:

[T]he Mid-Valley Landfill, in Rialto, California, currently charges \$59.94 per ton to dispose of solid waste [Tab 6]. Therefore, we believe that the \$36.83 to \$56 "statewide average disposal fee" used to calculate the offsetting savings realized by the district is reasonable. The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>124</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in "both a reduction of solid waste going to a landfill and the associated cost of having the waste hauled there. The reduction of landfill costs incurred creates offsetting savings that the district is required to identify in its mandated cost claims."<sup>125</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>126</sup> The Controller argues that "the district did not identify, and we did not find, any statute or provision limiting offsetting savings solely to solid waste diversion activities included in the district's IWM claims."<sup>127</sup> The Controller cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that "it is reasonable that offsetting savings realized from implementing the plan be offset against direct costs to implement the plan." The Controller also asserts that the claimant's reference to other IWM audits is not relevant to the current issue.<sup>128</sup>

The Controller also disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites Government Code section 17561(d)(2) that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant's "mandated cost claims exceeded the proper amount based on the reimbursable costs allowable

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<sup>124</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>125</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>126</sup> Public Resources Code section 42925. Emphasis added in Controller's comments.

<sup>127</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>128</sup> Exhibit B, Controller's Comments on the IRC, page 24.

per statutory language and the program's parameters and guidelines."<sup>129</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program, and that it confirmed that the statewide average fee for disposal is "'in-line' with the actual disposal fee charged by the Mid-Valley Landfill in Rialto, California (which is only 12 miles away from the district)."<sup>130</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion that the reductions for all years in the audit period were correct except for calendar years 2002 and 2003. The Controller also agreed to reinstate \$22,884 to the claimant for calendar years 2002 and 2003, "the reduction of which the Commission concluded was incorrect as a matter of law."<sup>131</sup>

#### **IV. Discussion**

Government Code section 17561(d) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs if the Controller determines that the claim is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>132</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>133</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to

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<sup>129</sup> Exhibit B, Controller's Comments on the IRC, pages 26-27.

<sup>130</sup> Exhibit B, Controller's Comments on the IRC, page 27.

<sup>131</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>132</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>133</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.



the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>134</sup> Under this standard, the courts have found that:

When reviewing the exercise of discretion, “[t]he scope of review is limited, out of deference to the agency’s authority and presumed expertise: ‘The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]’” ... “In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . .” [Citations.] When making that inquiry, the “ ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ ”<sup>135</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>136</sup> In addition, sections 1185.1(f)(3), 1185.2(d) and (e) of the Commission’s regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.<sup>137</sup>

**A. The Controller’s Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for Calendar Years 2002 and 2003 Based on an Incorrect Diversion Rate Is Incorrect as a Matter of Law, and the Controller’s Failure to Allocate the Rate in 2002 is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.”

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the

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<sup>134</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>135</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>136</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>137</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>138</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>139</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan

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<sup>138</sup> Public Resources Code sections 40124 and 40192(b). Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)).

<sup>139</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)). Emphasis added.

implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>140</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>141</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>142</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court’s ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court’s ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court’s ruling and require in Section IV. that “[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.”<sup>143</sup> Section VIII. requires that “[r]educed or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost

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<sup>140</sup> Exhibit B, Controller’s Comments on the IRC, pages 84-85 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>141</sup> Exhibit B, Controller’s Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>142</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>143</sup> Exhibit A, IRC, page 56 (Parameters and Guidelines).

savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1.”<sup>144</sup> The court’s decision and the amended Parameters and Guidelines are binding.<sup>145</sup>

2. During the audit period, the claimant exceeded the mandated solid waste diversion rate, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller’s finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>146</sup>

The record shows that during the audit period, the claimant complied with the mandate and diverted more solid waste than the state-mandated percentage.<sup>147</sup> The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>148</sup> The claimant reported to CIWMB that 27.5 percent of its waste was diverted in calendar year 2000,<sup>149</sup> 30.8 percent diversion in 2001,<sup>150</sup> 37.6 percent in 2002,<sup>151</sup> and 56.4 percent in 2003.<sup>152</sup> These diversions exceed the mandated diversion requirement of 25 percent. The claimant’s annual reports to CIWMB for calendar years 2004 through 2007 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, ranging from 53.12 percent to 93.49 percent of the waste generated.<sup>153</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>154</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. So if the district’s per-capita

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<sup>144</sup> Exhibit A, IRC, page 61 (Parameters and Guidelines).

<sup>145</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>146</sup> Exhibit A, IRC, page 9.

<sup>147</sup> Exhibit B, Controller’s Comments on the IRC, page 89. The Controller found that the claimant did not divert the mandated percentage in calendar year 2002, but as discussed below, that finding is incorrect.

<sup>148</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>149</sup> Exhibit B, Controller’s Comments on the IRC, page 34 (2000 Report).

<sup>150</sup> Exhibit B, Controller’s Comments on the IRC, page 37 (2001 Report).

<sup>151</sup> Exhibit B, Controller’s Comments on the IRC, page 40 (2002 Report).

<sup>152</sup> Exhibit B, Controller’s Comments on the IRC, page 43 (2003 Report).

<sup>153</sup> Exhibit B, Controller’s Comments on the IRC, pages 43-57 (2003-2007 Reports) and 89.

<sup>154</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

disposal rate is less than the target, it means that the district is meeting the requirement to divert 50 percent of its solid waste.<sup>155</sup>

The claimant, in its report for 2008, 2009, and 2010, reported annual per capita disposal rates for both the employee and student populations to be at or below the target rates, thereby satisfying the requirement to divert 50 percent of its solid waste.<sup>156</sup> The claimant's annual reports also indicate it had waste reduction programs in place. For example, the 2008 report states: "All offices have continued to regularly recycle paper, plastic, aluminum, cardboard, etc. and use on-line forms and electronic processing (e-mail, purchasing, etc.)" and states that the district did not implement new programs or discontinue programs in 2008.<sup>157</sup> The 2009 report states, in response to a question about changes to the college's diversion program: "The most significant change was the implementation of construction debris recycling, as noted above. The College has also hosted several e-waste collections during the year. No recycling effort has been abandoned or reduced throughout the past year."<sup>158</sup> And according to the 2010 report: "No recycling or waste diversion programs have been eliminated during the course of the past year. The college continues to sponsor local e-waste events for the surrounding community and works closely with construction contractors to ensure the greatest possible volume of construction waste material is diverted from landfills."<sup>159</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The 2001 report notes: "Less material is going to the landfill due to recycling."<sup>160</sup> And the 2002 report states: "with the implementation of the recycling program, our waste stream has decreased to the landfills."<sup>161</sup> The 2010 report states that tree and shrubbery from pruning and food waste "are the only waste materials that are not diverted from landfills at this time" and that the "college continues to sponsor local e-waste events for the surrounding community and works closely with construction contractors to ensure the greatest possible volume of construction waste material is diverted from landfills."<sup>162</sup> And the district's claims also indicate landfill use, as costs were claimed for "diverting solid waste from landfill

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<sup>155</sup> Exhibit B, Controller's Comments on the IRC, pages 98-106 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>156</sup> Exhibit B, Controller's Comments on the IRC, pages 59 (2008 Report, showing an employee population target of 60.0, and 5.8 was achieved; and a student population target of 1.7, and 0.18 was achieved); 62 (2009 Report, showing an employee population target of 60.0, and 7.3 was achieved; and a student population target of 1.7, and 0.14 was achieved); 67 (2010 Report, showing an employee population target of 60.0, and 9.7 was achieved; and a student population target of 1.7 and 0.17 was achieved).

<sup>157</sup> Exhibit B, Controller's Comments on the IRC, page 59 (2008 Report).

<sup>158</sup> Exhibit B, Controller's Comments on the IRC, page 63 (2009 Report).

<sup>159</sup> Exhibit B, Controller's Comments on the IRC, page 67-68 (2010 Report).

<sup>160</sup> Exhibit B, Controller's Comments on the IRC, page 38 (2001 Report).

<sup>161</sup> Exhibit B, Controller's Comments on the IRC, page 41 (2002 Report).

<sup>162</sup> Exhibit B, Controller's Comments on the IRC, page 67-68 (2010 Report).

disposal ... - recycling” and for “diverting solid waste from landfill disposal ... - composting.”<sup>163</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>164</sup>

The claimant’s website acknowledges cost savings from waste diversion programs, as it states: “SBVC’s [San Bernardino Valley College’s] efforts at recycling save thousands of dollars per year. . . .”<sup>165</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>166</sup> The claimant has the burden of proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller’s Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>167</sup> The Parameters and Guidelines, as amended pursuant to the court’s

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<sup>163</sup> Exhibit A, IRC, pages 285 (1999-2000 claim), 289 (2000-2001 claim), 293 (2001-2002 claim), 297 (2002-2003 claim), 301 (2003-2004 claim), 305 (2004-2005 claim), 310 (2005-2006 claim), 315 (2006-2007 claim), 320 (2007-2008 claim, which mentioned composting only, not recycling), 324 (2008-2009 claim), 328 (2010-2011 claim, which mentioned composting only).

<sup>164</sup> Exhibit B, Controller’s Comments on the IRC, pages 22-23, 115-143.

<sup>165</sup> Exhibit B, Controller’s Comments on the IRC, page 72.

<sup>166</sup> Government Code section 17559, which requires that the Commission’s decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>167</sup> Evidence Code section 500, which states: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that “the general principle of Evidence Code 500 is that a party who seeks a court’s action in his favor bears the burden of persuasion thereon.” This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article

writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings.”<sup>168</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

The Commission finds that since the claimant has not filed any evidence to rebut the statutory presumption of cost savings, the Controller’s finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period except calendar years 2002 and 2003, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that for every year during the audit period (except for calendar year 2002 as discussed below), the claimant diverted more solid waste than the amount mandated by the test claim statute.<sup>169</sup> For years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the mandated solid waste diversion rate (either 25 percent or 50 percent) by the actual rate diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee

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XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining “costs mandated by the state”], 17560(a) [“A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year.”]; 17561 [providing that the issuance of the Controller’s claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to “verify the actual amount of the mandated costs.”]; 17558.7(a) [“If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission.”]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>168</sup> Exhibit A, IRC, page 61 (Amended Parameters and Guidelines). Emphasis added.

<sup>169</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, page 89.

(based on the statewide average fee) to calculate the offsetting savings realized.<sup>170</sup>

$$\text{Offsetting Savings Realized} = \frac{\text{Maximum Allowable Diversion \%}}{\text{Actual Diversion \%}} \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>171</sup>

The formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>172</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>173</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to reflect the mandated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>174</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM

<sup>170</sup> Exhibit A, IRC, page 35 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>171</sup> Exhibit B, Controller’s Comments on the IRC, pages 20.

<sup>172</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>173</sup> Exhibit A, IRC page 61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>174</sup> Exhibit A, IRC, page 13.



plan.<sup>175</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state's account as required by the test claim statutes, and the claimant's failure to comply with the law does not make the Controller's calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: "[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs."<sup>176</sup>

The claimant next asserts that the Controller's formula is an underground regulation.<sup>177</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>178</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because "[t]he District did not claim landfill costs, so there are none to be offset."<sup>179</sup> The claimant's interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>180</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of

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<sup>175</sup> Exhibit B, Controller's Comments on the IRC, pages 13, 18.

<sup>176</sup> Exhibit B, Controller's Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>177</sup> Exhibit A, IRC, page 14.

<sup>178</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>179</sup> Exhibit A, IRC, page 17.

<sup>180</sup> Exhibit A, IRC, page 57 (Parameters and Guidelines).

IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>181</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>182</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2007 applies to subsequent years.<sup>183</sup> The claimant also questions the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>184</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the 2007 data is “a fair representation of the 2008 through 2010 diversion information because the district’s recycling processes have already been established and committed to.”<sup>185</sup> As discussed above, the data and the narrative in the claimant’s reports for 2008, 2009, and 2010 reveal that the claimant’s annual per capita disposal rate for both the employee and student populations were below the target rate.<sup>186</sup> Overall, the evidence indicates that the claimant satisfied the requirement to divert 50 percent or more of its solid waste during 2008, 2009, and 2010.<sup>187</sup>

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<sup>181</sup> Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>182</sup> Public Resources Code section 40124. Exhibit B, Controller’s Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>183</sup> Exhibit A, IRC, page 15.

<sup>184</sup> Exhibit A, IRC, pages 15-16.

<sup>185</sup> Exhibit B, Controller’s Comments on the IRC, page 21.

<sup>186</sup> Exhibit B, Controller’s Comments on the IRC, pages 59 (2008 Report, showing an employee population target of 60.0, and 5.8 was achieved; and a student population target of 1.7, and 0.18 was achieved); 62 (2009 Report, showing an employee population target of 60.0, and 7.3 was achieved; and a student population target of 1.7, and 0.14 was achieved); 67 (2010 Report, showing an employee population target of 60.0, and 9.7 was achieved; and a student population target of 1.7 and 0.17 was achieved).

<sup>187</sup> Exhibit B, Controller’s Comments on the IRC, page 59 (2008 report), stating “All offices have continued to regularly recycle paper, plastic, aluminum, cardboard, etc. and use on-line forms and electronic processing (e-mail, purchasing, etc.)” and states that the district did not implement new programs or discontinue programs in 2008.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on a private survey of a large percentage of landfills across California.<sup>188</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>189</sup> In addition, the Controller states:

The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>190</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>191</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>192</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except calendar years 2002 and 2003 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The reduction of costs claimed for calendar years 2002 and 2003 based on an incorrect mandated diversion rate is incorrect as a matter of law, and the failure to allocate the rate in 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

In calendar year 2002, the claimant achieved a diversion rate of 37.6 percent.<sup>193</sup> Although the mandated diversion rate for 2002 was 25 percent, the Controller used 50 percent and mistakenly found that the claimant did not exceed the mandated diversion rate. Based on this finding, the Controller did not allocate the diversion to reflect the mandate, but used 100 percent of the reported diversion to calculate offsetting savings. This resulted in an audit reduction of \$21,290

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<sup>188</sup> Exhibit B, Controller's Comments on the IRC, pages 22-23, 115-141.

<sup>189</sup> Exhibit A, IRC, page 36.

<sup>190</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>191</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>192</sup> Exhibit A, IRC, pages 17-18.

<sup>193</sup> Exhibit B, Controller's Comments on the IRC, page 40 (2002 Annual Report). The Controller did not round this figure and calculated it at 37.57 percent. See page 89.

for 2002 (588.6 tons of waste diverted in 2002, multiplied by the avoided statewide average disposal fee of \$36.17).<sup>194</sup>

In calendar year 2003, the claimant achieved a diversion rate of 56.4 percent.<sup>195</sup> The Controller correctly found that the claimant exceeded the mandated diversion rate and therefore allocated the diversion as it had for other years. However, the Controller used a 50 percent mandated rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>196</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004.<sup>197</sup>

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>198</sup> Thus, in calendar years 2002 and 2003, community college districts were mandated to achieve diversion rates of only 25 percent.

The claimant's 2002 report to CIWMB shows it achieved 37.6 percent diversion, and its 2003 report shows it achieved 56.4 percent diversion,<sup>199</sup> thereby exceeding the mandated diversion rate of 25 percent in both years. The Controller admits that, "[a]s there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute."<sup>200</sup> Therefore, the Controller's finding that the claimant's diversion of solid waste did not achieve the mandated diversion rate in calendar year 2002 is incorrect as a matter of law. Moreover, the Controller's calculation of offsetting savings for 2002, which did not reduce cost savings by allocating the diversion to reflect the mandate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, or entirely lacking in evidentiary support.

Additionally, the Controller's calculation of cost savings for calendar year 2003, using a 50 percent diversion rate instead of the mandated 25 percent diversion rate, is also incorrect as a matter of law.<sup>201</sup> As discussed above, the Controller's formula for offsetting cost savings for years in which the claimant exceeded the diversion mandate, which allocates the diversion based

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<sup>194</sup> Exhibit A, IRC, page 33, footnote 2. Exhibit B, Controller's Comments on the IRC, page 89.

<sup>195</sup> Exhibit B, Controller's Comments on the IRC, page 43 (2003 Annual Report). The Controller did not round this figure and calculated it at 56.37 percent. See page 89.

<sup>196</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>197</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 93 (Parameters and Guidelines).

<sup>198</sup> Exhibit A, IRC, page 93 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>199</sup> Exhibit B, Controller's Comments on the IRC, pages 40 (2002 Report) 43 (2003 Report), and 89.

<sup>200</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>201</sup> Exhibit B, Controller's Comments on the IRC, page 89.

on the mandated rate, is consistent with the test claim statutes and the court's decision on this program.

Applying the Controller's cost savings formula to calendar years 2002 and 2003 (using the mandated 25 percent rate to calculate the allocated diversion), results in offsetting savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

Therefore, the Commission finds that the difference of \$22,884 has been incorrectly reduced.

Accordingly, the Commission finds that the reduction of costs claimed for calendar years 2002 and 2003 based on an incorrect mandated diversion rate, is incorrect as a matter of law, and the failure to allocate the rate for 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

## **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller's reduction of costs claimed for all years in the audit period except calendar years 2002 and 2003 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller's reduction of costs claimed for calendar years 2002 and 2003, based on the application of an incorrect mandated diversion rate, is incorrect as a matter of law, and the failure to allocate the rate for 2002 is arbitrary, capricious, and entirely lacking in evidentiary support. The law and the record support offsetting cost savings for these years of \$29,928 rather than \$52,812. Therefore, the difference of \$22,884 has been incorrectly reduced and should be reinstated to claimant.

Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$22,884 to the claimant.