

**ITEM 4**  
**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, 2003-2004, 2004-2005, 2005-2006,  
2006-2007, 2007-2008, 2008-2009, and 2009-2010

13-0007-I-02

Sierra Joint Community College District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Incorrect Reduction Claim (IRC) addresses the State Controller's Office's (Controller's) reductions to reimbursement claims of the Sierra Joint Community College District (claimant) for fiscal years 1999-2000, 2000-2001, and 2003-2004 through 2009-2010 under the *Integrated Waste Management* program, 00-TC-07. The reductions were made because the claimant did not identify and deduct from its reimbursement claims offsetting savings resulting from the claimant's diversion of solid waste and the associated reduction or avoidance of costs for landfill disposal fees.

Staff finds that the Controller's reduction of costs claimed for fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law, and is arbitrary, capricious, or entirely lacking in evidentiary support. The Controller found that the claimant did not achieve the mandated "50 percent" diversion for the first half of fiscal year 2003-2004 and therefore did not allocate the diversion percentage to reflect the mandate, but instead used 100 percent of the diversion to calculate offsetting cost savings. The claimant, during that time period, was only mandated to divert 25 percent of solid waste, and the claimant achieved a diversion level of 45.59 percent, exceeding the mandate. Under the Controller's formula, the Controller should have deducted avoided costs based on the allocated diversion rate (defined as the percent diverted divided by percent required to be diverted), as it did for all other fiscal years in the audit period.

Applying the Controller's cost savings formula for years when the claimant exceeds the mandate, to the first half of fiscal year 2003-2004, results in a finding of offsetting costs savings of \$4,120

(25 percent mandated diversion rate divided by 45.59 percent actual diversion rate, multiplied by 204 tons diverted, multiplied by the avoided statewide average landfill disposal fee of \$36.83) rather than the \$7,513 calculated by the Controller. Accordingly, staff finds that \$3,393 has been incorrectly offset and should be reinstated to the claimant.

Therefore, staff recommends that the Commission on State Mandates (Commission) partially approve this IRC and request that the Controller reinstate \$3,393 to the claimant.

#### The Integrated Waste Management Program

The test claim statutes require community college districts<sup>1</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 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 the CIWMB challenged the Statement of Decision and Parameters and Guidelines, arguing that 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

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<sup>1</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.

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>2</sup>

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

### **Procedural History**

The claimant signed its 1999-2000, 2000-2001, 2003-2004, and 2004-2005 reimbursement claims on September 28, 2005.<sup>3</sup> The claimant signed its 2005-2006 reimbursement claim on January 9, 2007,<sup>4</sup> its 2006-2007 reimbursement claim on January 9, 2008,<sup>5</sup> its 2007-2008 reimbursement claim on December 5, 2008,<sup>6</sup> its 2008-2009 reimbursement claim on February 8, 2011,<sup>7</sup> and its 2009-2010 reimbursement claim on February 8, 2011.<sup>8</sup> As of August 4, 2013, no payments had been made to the claimant on these reimbursement claims.<sup>9</sup> The Controller issued the final audit report on July 22, 2013.<sup>10</sup> The claimant filed this IRC on June 19, 2014.<sup>11</sup> The Controller filed late comments on the IRC on October 30, 2015.<sup>12</sup> Commission staff issued the Draft Proposed Decision on May 19, 2017.<sup>13</sup> The Controller filed

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<sup>2</sup> Exhibit B, Controller's Late Comments on the IRC, page 30 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>3</sup> Exhibit A, IRC, pages 205, 214, 224, and 234.

<sup>4</sup> Exhibit A, IRC, page 244.

<sup>5</sup> Exhibit A, IRC, page 251.

<sup>6</sup> Exhibit A, IRC, page 260.

<sup>7</sup> Exhibit A, IRC, page 269.

<sup>8</sup> Exhibit A, IRC, page 279.

<sup>9</sup> Exhibit A, IRC, pages 5, 289-297.

<sup>10</sup> Exhibit A, IRC, page 24 (Final Audit Report).

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

<sup>12</sup> Exhibit B, Controller's Late Comments on the IRC. Note that Government Code section 17553(d) states: "the Controller shall have no more than 90 days after the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the Commission." However, in this instance, due to the backlog of IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and Proposed Decision.

<sup>13</sup> Exhibit C, Draft Proposed Decision.

comments on the Draft Proposed Decision on June 6, 2017.<sup>14</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 that the Controller determines 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.<sup>15</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 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>16</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 the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>17</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>18</sup> In addition, section 1185.1(f)(3) and 1185.2(c) 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>19</sup>

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<sup>14</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>15</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>16</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.

<sup>17</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>18</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>19</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

## Claims

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

Issue	Description	Staff Recommendation
The Controller's reduction of costs claimed based on unreported cost savings resulting from implementation of the IWM plan.	<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, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, 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 reduce and divert solid waste through the IWM program, claimants can reduce or avoid landfill fees and realize cost savings. As indicated in the court's ruling, the amount of the cost savings may be determined from calculations of annual solid waste disposal reduction or diversion 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 of proof and must</p>	<p><i>Partially Incorrect</i> – The Controller correctly presumed, absent any evidence to the contrary, that the percentage of waste required to be diverted resulted in offsetting savings equal to the avoided landfill fee per ton of waste diverted. The avoided landfill disposal fee was based on the statewide average disposal fee provided by the 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 reduction of costs claimed based on the statewide average disposal fee is correct as a matter of law.</p> <p>However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support.</p> <p>The Controller applied the wrong mandated diversion rate (i.e., 50% when the mandate was 25% in 2003) when calculating the offsetting savings for the first half of fiscal year 2003-2004, and this is incorrect as a matter of law. Claimant was only required by</p>

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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>file evidence to show that cost savings were not realized.</p> <p>For fiscal years 1999-2000, 2000-2001, the <i>second</i> half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, the claimant exceeded the mandate and diverted more solid waste than required by law. However, the Controller made an auditing decision to use a cost savings formula that “allocated” the diversion percentage by dividing the percentage of solid waste required to be diverted, either 25% or 50%, by the actual percentage of solid waste diverted as reported by the claimant to CIWMB to prevent penalizing the claimant for diverting more solid waste than the amount mandated by the state. The resulting quotient is then multiplied by the tons of solid waste diverted multiplied by the avoided landfill disposal fee (based on the statewide average fee).</p> <p>Additionally, for the first half of fiscal year 2003-2004, the Controller found that the claimant did not achieve the mandated “50 percent” diversion rate and therefore did not allocate the diversion percentage to reflect the mandate, but instead used 100% of the tonnage diverted by the claimant to calculate offsetting</p>	<p>law to divert 25% of solid waste during this period, and claimant achieved a diversion level of 45.59%, exceeding the mandate.</p> <p>Moreover, though the Controller now asserts that using a 100% of the tonnage diverted is correct because there is no evidence that the claimant prorated or allocated the direct costs claimed to perform the mandate,<sup>22</sup> that was not the basis for the reduction in the audit and the time to complete the audit or give new reasons for reductions is long past. The auditor did not make a finding in the audit report that any of the direct costs claimed were for diversion costs in excess of the mandated diversion rate. Additionally, there is no rationale given for treating the first half of fiscal year 2003-2004 any differently than the other reimbursement claims and hence this differential treatment is arbitrary, capricious, and entirely lacking in evidentiary support.</p> <p>Applying the Controller’s cost savings formula to the first half of fiscal year 2003-2004 results in a finding of offsetting costs savings of \$4,120 (25% mandated diversion rate divided by 45.59% actual diversion rate, multiplied by 204 tons diverted, multiplied by the avoided statewide average landfill disposal fee of \$36.83),</p>
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<sup>22</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision, pages 1-2.

	cost savings of \$7,513. <sup>20</sup> The Controller admits that mandated diversion rate is 25%, but now contends for the first time that calculating offsetting savings for the first half of fiscal year 2003-2004 using a 100% of the tonnage diverted is correct because there is no evidence that the claimant prorated or allocated the direct costs claimed to perform the mandate. <sup>21</sup>	rather than \$7,513, and the difference of \$3,393 has been incorrectly reduced and should be reinstated to the claimant.
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### **Staff Analysis**

**The Controller's Reduction of Costs Is Generally Correct as a Matter of Law, However, the Reduction of Costs for the First Half of Fiscal Year 2003-2004 Based on the Incorrect Mandated Diversion Rate, Is Incorrect as a Matter of Law and Is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

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

The IWM program requires community college districts to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities. To implement their IWM plans, community college 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. Public Resources Code section 42925(a), 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.”

The Test Claim Statement of Decision and Parameters and Guidelines were challenged by Finance and CIWMB on the ground that the Commission failed to identify cost savings from the program from reduced or avoided landfill disposal fees.<sup>23</sup> The court granted the petition for writ of mandate, finding 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

<sup>20</sup> Exhibit A, IRC, page 31, footnote 2 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>21</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision, pages 1-2.

<sup>23</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 58-68.

costs are reduced or avoided.” 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>24</sup> The writ directed the Commission to amend the Parameters and Guidelines to require claimants 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 apply the cost savings to fund plan implementation and administration costs.<sup>25</sup>

The test claim statutes, therefore, presume that by complying with the mandate to reduce and 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 the CIWMB.<sup>26</sup> The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized. 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. The claimant has the burden to show that any reduction made by the Controller is incorrect.<sup>27</sup>

- B. During the audit period, the claimant exceeded the mandated diversion rate for solid waste, but has filed no evidence to rebut the presumption that cost savings, based on avoided landfill costs, were realized.

In this case, the claimant argues that no cost savings were realized.<sup>28</sup> However, based on the claimant’s annual reports to the CIWMB showing that the claimant diverted more solid waste than the state mandated every year,<sup>29</sup> 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 percentage of waste required to be diverted results in offsetting cost savings that are equal to the avoided landfill fee per ton of waste diverted.

- C. For fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, the Controller’s calculation of cost savings is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

For fiscal years 1999-2000, 2000-2001, the *second* half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, the claimant exceeded the mandate and diverted more solid

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<sup>24</sup> Exhibit B, Controller’s Late Comments on the IRC, page 64. Emphasis added.

<sup>25</sup> Exhibit B, Controller’s Late Comments on the IRC, page 30 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>26</sup> Exhibit B, Controller’s Late Comments on the IRC, page 64.

<sup>27</sup> Evidence Code section 500; Government Code sections 17514, 17551, 17558.7, 17560.

<sup>28</sup> Exhibit A, IRC, page 9.

<sup>29</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 33-54.



waste than required by law. Thus, instead of using 100 percent of the diversion percentage actually achieved, the Controller's cost savings formula "allocated" the diversion percentage 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 is 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>30</sup> The formula works to allocate offsetting cost savings based on the mandated levels of diversion, and is intended to prevent penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>31</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 fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

D. The Controller's finding that the claimant's diversion of solid waste for the first half of fiscal year 2003-2004 did not achieve the mandated diversion percentage, and its recalculation of cost savings for that time period using 100 percent of diversion reported by the claimant, rather than the allocated diversion percentage used for all other fiscal years in the audit period, is incorrect as a matter of law and is arbitrary, capricious, and entirely lacking in evidentiary support.

For the first half of fiscal year 2003-2004, the Controller found that the claimant did not achieve the mandated "50 percent" diversion and therefore did not allocate the diversion percentage to reflect the mandate, but instead used 100 percent of the tonnage diverted by the claimant to calculate offsetting cost savings of \$7,513. Claimant was only required by law to divert 25 percent of solid waste during this period, and claimant achieved a diversion level of 45.59 percent, exceeding the mandate. Thus, the Controller's calculation of offsetting cost savings for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

The Controller admits that "as there is no state mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2000 through 2003 or 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute."<sup>32</sup>

But in comments on the Draft Proposed Decision, the Controller now for the first time argues that calculating offsetting savings for the first half of fiscal year 2003-2004, using 100 percent of the actual diversion rate achieved by the claimant of 45.59 percent, rather than an allocated rate, is correct because there is no evidence that the claimant prorated or allocated the direct

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<sup>30</sup> Exhibit A, IRC, pages 33-35; Exhibit B, Controller's Late Comments on the IRC, pages 19 and 20.

<sup>31</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>32</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

costs claimed to perform the mandate.<sup>33</sup> However, the deadline to complete the audit or give new reasons for reductions has long past.

Additionally, the Controller's position is not supported by the Parameters and Guidelines or the record. Although the Controller is correct that there is no evidence in the record that the claimant prorated or allocated the direct costs claimed for the first half of fiscal year 2003-2004, there is no evidence that the claimant did so for any other years in the audit period, nor is there a specific requirement in the Parameters and Guidelines to prorate. The Parameters and Guidelines require claimants to report in their reimbursement claims all 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, to claim the net increased costs.<sup>34</sup> It is presumed that the reimbursement claim, submitted under penalty of perjury, claimed only those direct costs mandated by the state absent any finding by the Controller in the audit to the contrary. And here, there is no indication in the audit report that direct costs were over claimed nor was over claiming of direct costs the reason given for the reduction. There is no evidence in the record, nor does the Controller specify any reason, to conclude that the calculation of offsetting savings for the first half of fiscal year 2003-2004 should be treated differently than the other fiscal years in the audit period. Thus, the Controller's calculation of cost savings for the first half of fiscal year 2003-2004 is arbitrary, capricious, and entirely lacking in evidentiary support.

Applying the Controller's formula for calculation of cost savings (for years when the claimant exceeds the mandate) to the first half of fiscal year 2003-2004, results in a finding of offsetting costs savings of \$4,120 (25% mandated diversion rate divided by 45.59% actual diversion rate, multiplied by 204 tons diverted, multiplied by the avoided statewide average landfill disposal fee of \$36.83), rather than \$7,513, and the difference of \$3,393 has been incorrectly reduced.

### **Conclusion**

Staff finds that the Controller's reduction of costs claimed for fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

Staff further finds that the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support. The law and the record support offsetting cost savings for the first half of fiscal year 2003-2004 of \$4,120, rather than \$7,513, and the difference of \$3,393 has been incorrectly reduced and should be reinstated to claimant.

### **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 \$3,393 to the claimant. Staff further

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<sup>33</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, pages 1-2.

<sup>34</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

recommends that the Commission authorize staff to make any technical, non-substantive changes to 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, 2003-  
2004, 2004-2005, 2005-2006, 2006-2007,  
2007-2008, 2008-2009, and 2009-2010

Sierra Joint Community College District,  
Claimant

Case No.: 13-0007-I-02

*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 July 28, 2017)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on July 28, 2017. [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, Vice Chairperson	
Mark Hariri, Representative of the State Treasurer	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	

## **Summary of the Findings**

This IRC addresses the State Controller's Office's (Controller's) reductions to reimbursement claims of the Sierra Joint Community College District (claimant) for fiscal years 1999-2000, 2000-2001, and 2003-2004 through 2009-2010 under the *Integrated Waste Management* program, 00-TC-07. The reductions were made because the claimant did not identify and deduct from its claims offsetting savings from its diversion of solid waste and the associated reduced or avoided costs of landfill disposal fees. The Commission finds that the audit reductions are partially incorrect.

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 cost savings, resulting from the diversion of waste from landfills, were realized by the claimant during the audit period. Therefore, the finding of cost savings and the associated reduction of costs claimed is correct as a matter of law.

The Commission further finds, based on the evidence in the record, that the Controller's calculation of offsetting cost savings for fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010 is not arbitrary, capricious, or entirely lacking evidentiary support. In these fiscal years, the claimant exceeded the mandate and diverted more solid waste than required by law. Thus, instead of using 100 percent of the diversion percentage actually achieved, the Controller's cost savings formula "allocated" the diversion percentage 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 California Integrated Waste Management Board (CIWMB). The resulting quotient is 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>35</sup> The formula allocates cost savings based on the mandated levels of diversion, and is intended to prevent penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>36</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 fiscal years is correct.

However, the Controller's reduction of costs claimed for the *first* half of fiscal year 2003-2004 is incorrect as a matter of law and is arbitrary, capricious, and entirely lacking in evidentiary support. The Controller found that the claimant did not achieve the mandated "50 percent" diversion for the first half of fiscal year 2003-2004, when the mandated diversion rate for all of 2003 was in fact 25 percent, which the claimant exceeded.<sup>37</sup> As a result of applying the wrong mandated diversion rate, the Controller used 100 percent of the tonnage diverted by the claimant

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<sup>35</sup> Exhibit A, IRC, pages 33-35; Exhibit B, Controller's Late Comments on the IRC, pages 19 and 20.

<sup>36</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>37</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

to calculate offsetting cost savings, resulting in a reduction of \$7,513 (204 tons of diverted waste multiplied by the avoided statewide average landfill disposal fee of \$36.83).<sup>38</sup>

The Controller admits that “as there is no state mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2000 through 2003 or 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute.”<sup>39</sup> However, in comments on the Draft Proposed Decision, the Controller now argues for the first time that calculating offsetting savings for the first half of fiscal year 2003-2004 at \$7,513, using 100 percent of the actual diversion rate achieved by the claimant of 45.59 percent, rather than an allocated rate, is correct because there is no evidence that the claimant prorated or allocated the direct costs claimed to perform the mandate.<sup>40</sup> However, the deadline to complete the audit or give new reasons for reductions has long past.

Additionally, the Controller’s position is not supported by the Parameters and Guidelines or the record. Although the Controller is correct that there is no evidence that the claimant prorated or allocated the direct costs claimed for the first half of fiscal year 2003-2004, there is no evidence that the claimant did so for any other years in the audit period. The Parameters and Guidelines require claimants to report in their reimbursement claims all 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, to claim the net increased costs.<sup>41</sup> It is presumed that the reimbursement claim, submitted under penalty of perjury, claimed only those direct costs mandated by the state, absent any finding by the Controller in the audit to the contrary. And here, there is no indication in the audit report that direct costs were over claimed, nor was over claiming of direct costs a reason given for the reduction in the audit report. In this case, the claimant failed to report cost savings, despite evidence in the record that it diverted solid waste; and for all fiscal years in the audit *except* the first half of fiscal year 2003-2004, the Controller’s offsetting savings formula allocated the diversion percentage based on the mandated percentage to prevent penalizing the claimant for exceeding the diversion requirement.<sup>42</sup> There is no evidence in the record, nor does the Controller specify any reason, to conclude that the calculation of offsetting savings for the first half of fiscal year 2003-2004 should be treated differently than the other fiscal years in the audit period.

Applying the Controller’s formula for the calculation of cost savings (for years when the claimant exceeds the mandate) to the first half of fiscal year 2003-2004, results in offsetting cost savings of \$4,120 (25 percent mandated diversion rate divided by 45.59 percent actual diversion rate, multiplied by 204 tons diverted, multiplied by the avoided statewide average landfill

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<sup>38</sup> Exhibit A, IRC, page 31, footnote 2 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>39</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>40</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>41</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>42</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

disposal fee of \$36.83),<sup>43</sup> rather than the \$7,513 calculated by the Controller, and the difference of \$3,393 has been incorrectly reduced. Accordingly, the Commission finds that the reduction of \$7,513 for the first half of fiscal year 2004-2004 is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support.

Therefore, 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 \$3,393 to the claimant.

## **COMMISSION FINDINGS**

### **I. Chronology**

09/28/2005 The claimant signed its 1999-2000, 2000-2001, 2003-2004, and 2004-2005 reimbursement claims.<sup>44</sup>

01/09/2007 The claimant signed its 2005-2006 reimbursement claim.<sup>45</sup>

01/09/2008 The claimant signed its 2006-2007 reimbursement claim.<sup>46</sup>

12/05/2008 The claimant signed its 2007-2008 reimbursement claim.<sup>47</sup>

02/08/2011 The claimant signed its 2008-2009 reimbursement claim.<sup>48</sup>

02/08/2011 The claimant signed its 2009-2010 reimbursement claim.<sup>49</sup>

05/10/2013 The claimant was notified of the audit.<sup>50</sup>

07/22/2013 The Controller issued the Final Audit Report.<sup>51</sup>

06/19/2014 The claimant filed this IRC.<sup>52</sup>

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<sup>43</sup> Exhibit B, Controller's Late Comments on the IRC, pages 37 and 71.

<sup>44</sup> Exhibit A, IRC, pages 205, 214, 224, and 234. Though these reimbursement claims were filed in 2005, as of August 4, 2013, the Controller had not yet issued any payment on them and therefore the audit was timely initiated in May 2013, when the claimant was notified of the audit. (Exhibit B, p. 73).

<sup>45</sup> Exhibit A, IRC, page 244.

<sup>46</sup> Exhibit A, IRC, page 251.

<sup>47</sup> Exhibit A, IRC, page 260.

<sup>48</sup> Exhibit A, IRC, page 269.

<sup>49</sup> Exhibit A, IRC, page 279.

<sup>50</sup> Exhibit B, Controller's Late Comments on the IRC, page 73 (email from the Controller to the claimant).

<sup>51</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>52</sup> Exhibit A, IRC.

10/30/2015 The Controller filed late comments on the IRC.<sup>53</sup>  
05/19/2017 Commission staff issued the Draft Proposed Decision.<sup>54</sup>  
06/06/2017 The Controller filed comments on the Draft Proposed Decision.<sup>55</sup>

## **II. Background**

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

The test claim statutes require community college districts<sup>56</sup> to adopt and implement, in consultation with the California Integrated Waste Management Board (CIWMB), 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>57</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>58</sup>

The 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>59</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>60</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

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<sup>53</sup> Exhibit B, Controller’s Late Comments on the IRC. Note that Government Code section 17553(d) states: “the Controller shall have no more than 90 days after the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the Commission.” However, in this instance, due to the backlog of IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and Proposed Decision.

<sup>54</sup> Exhibit C, Draft Proposed Decision.

<sup>55</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>56</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>57</sup> Public Resources Code section 42920(b).

<sup>58</sup> Public Resources Code section 40124.

<sup>59</sup> Public Resources Code section 42920(b)(3).

<sup>60</sup> Public Resources Code section 42926.



requirements.<sup>61</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>62</sup>

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

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<sup>61</sup> Public Resources Code section 42924(b).

<sup>62</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. 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 Late Comments on the IRC, page 105 (*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)).

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.

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>63</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 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

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<sup>63</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.

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.)

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>64</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 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>65</sup>

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

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and the CIWMB filed a petition for a 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 the 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>66</sup>

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<sup>64</sup> Exhibit A, IRC, page 41 (Parameters and Guidelines, adopted March 30, 2005).

<sup>65</sup> Exhibit A, IRC, page 41-47 (Parameters and Guidelines, adopted March 30, 2005).

<sup>66</sup> Exhibit B, Controller's Late Comments on the IRC, page 63 (Ruling on Submitted Matter).

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>67</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 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>68</sup> The court explained that:

[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>69</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

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<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 63 (Ruling on Submitted Matter). Emphasis added.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 63-64 (Ruling on Submitted Matter).

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 64 (Ruling on Submitted Matter). Emphasis added.

expenditure by the agencies and colleges for the purpose of offsetting IWM plan 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>70</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 integrated waste management 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>71</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>72</sup>

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<sup>70</sup> Exhibit B, Controller's Late Comments on the IRC, pages 65-66 (Ruling on Submitted Matter).

<sup>71</sup> Exhibit B, Controller's Late Comments on the IRC, page 30 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>72</sup> Exhibit A, IRC, page 59 (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>73</sup>

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

The 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>74</sup> As the court found:

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

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<sup>73</sup> Exhibit A, IRC, pages 58-59 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>74</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.



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 in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>75</sup>

The 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 the 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 the 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 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 the CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

The 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 the 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 the 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

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<sup>75</sup> Exhibit B, Controller's Late Comments on the IRC, pages 65-66 (Ruling on Submitted Matter).

community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>76</sup>

### E. The Controller's Audit

The Controller audited the reimbursement claims for the 1999-2000, 2000- 2001, and 2003-2004 through 2009-2010 fiscal years (the audit period). Of the \$238,419 claimed for the mandated program, the Controller found that \$98,784 is allowable and \$139,635 is unallowable because the claimant did not report offsetting savings of \$171,209 related to implementation of its IWM plan.<sup>77</sup>

The Controller's audit finding is based on the court's ruling, which states that "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>78</sup> and the resulting amendment to the Parameters and Guidelines.

The Controller determined that for every year except the first half of fiscal year 2003-2004,<sup>79</sup> the claimant diverted more solid waste than the amount mandated by the test claim statute.<sup>80</sup> Therefore, for those years when the claimant exceeded the mandate, the Controller "allocated" the diversion percentage based on the mandated level and used the following formula to calculate offsetting cost savings:

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

This formula divides the percentage of solid waste required to be diverted (the Controller used 25 percent for fiscal years 1999-2000 and 2000-2001 and 50 percent for fiscal years 2003-2004, through 2010-2011) by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The resulting quotient is then multiplied by the tons of solid waste diverted (as

<sup>76</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>77</sup> Because the audit adjustment exceeded the amount claimed in three fiscal years (2007 – 2010) an excess of \$31,574 was subtracted from the offset amount, leaving a net audit adjustment of \$139,635. Exhibit A, IRC, pages 16-17, 24, and 29 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, page 26.

<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, page 64 (Ruling on Submitted Matter).

<sup>79</sup> The Controller calculated halves of fiscal years because reports to the CIWMB were based on the calendar year. See Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>80</sup> Exhibit A, IRC, pages 33-34. Exhibit B, Controller's Late Comments on the IRC, page 71.

annually reported by the claimant to the CIWMB), multiplied by the avoided landfill disposal fee (based on the statewide average fee). The Controller states that “[t]his calculation determines the cost that the district did not incur for solid waste disposal as a result of implementing its IWM plan.”<sup>81</sup>

The Controller provided an example of how this formula works. In calendar year 2007, the claimant reported that it diverted 591.3 tons of solid waste and disposed of 389.8 tons, which totals 981.1 tons of solid waste generated for that year. Diverting 591.3 tons out of the 981.1 tons of total waste generated results in a diversion rate of 60.3 percent (more than the 50 percent required).<sup>82</sup> The Controller did not want to penalize the claimant for diverting more solid waste than the amount mandated<sup>83</sup> and thus, instead of using 100 percent of the amount actually diverted, the Controller allocated the diversion percentage by dividing the mandated diversion percentage (50 percent) by the actual percent diverted (60.27 percent), which equals 82.96 percent. The allocated diversion percentage of 82.96 percent is then multiplied by the 591.3 tons diverted that year, which equals 490.5 tons of diverted solid waste, instead of the 591.3 tons actually diverted. The allocated 490.5 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2007 was \$48, for “offsetting cost savings” for calendar year 2007 of \$23,546.<sup>84</sup> The audit report states that the claimant did not provide documentation supporting a different disposal fee.<sup>85</sup>

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<sup>81</sup> Exhibit A, IRC, pages 33-34 (Final Audit Report).

<sup>82</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19-20, 71 (Controller’s calculations of offsetting savings for the audit period).

<sup>83</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>84</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19, 71 (Controller’s calculations of offsetting savings for the audit period). The formula used for the calculation is described differently on page 19 of the Controller’s Late Comments on the IRC than in the audit report, but the result is the same. The Controller’s Late Comments on the IRC state 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, as follows:

For example, in calendar year 2007, the district reported to CalRecycle that it diverted 591.3 tons of solid waste and disposed of 389.8 tons, which results in an overall diversion percentage of 60.3% **[Tab 4, page 13]**. 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 490.55 tons (981.1 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 490.55 tons of diverted solid waste rather than a total of 591.3 tons diverted.

Using this formula also results in cost savings for calendar year 2007 of \$23,546 (981.1 tons generated x 50 percent = 490.55 tons x \$48 = \$23,546).

<sup>85</sup> Exhibit A, IRC, page 34 (Final Audit Report). Exhibit B, Controller’s Late Comments on the IRC, page 19.

For the first half of fiscal year 2003-2004, the Controller found that the claimant did not achieve the mandated percentage of diversion and therefore, the Controller did not allocate the diversion percentage, but used 100 percent of the diversion reported by the claimant to calculate offsetting savings.<sup>86</sup>

In 2008, the CIWMB stopped requiring community college districts to report the actual amount of tonnage diverted (CIWMB changed focus to "per-capita disposal" instead of a "diversion percentage"). Consequently, the Controller used the claimant's reported 2007 diversion percentage to calculate the offsetting savings for the last half of fiscal year 2007-2008, as well as for fiscal years 2008-2009 and 2009-2010. According to the Controller, the claimant did not provide documentation supporting a different diversion percentage.<sup>87</sup>

The Controller calculated total offsetting savings for the audit period at \$171,209,<sup>88</sup> but because the adjustment exceeded the amount claimed for three fiscal years (2007- 2008 through 2009-2010) an excess of \$31,574 was subtracted from the offset amount, leaving a net audit adjustment of \$139,635.<sup>89</sup>

### **III. Positions of the Parties**

#### **A. Sierra Joint Community College District**

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

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>90</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:

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<sup>86</sup> Exhibit A, IRC, page 31, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>87</sup> Exhibit A, IRC, page 34 (Final Audit Report).

<sup>88</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>89</sup> Exhibit A, IRC, pages 16-17, 24, and 29 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, page 26.

<sup>90</sup> Exhibit A, IRC, page 11.

The 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>91</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 same percentage of waste diverted in 2007 to all 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 the 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>92</sup>

Claimant also argues that application of the formula is incorrect. Since no landfill costs were claimed, none can be offset, so the offsets are not properly matched to relevant costs. Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. Claimant contends, using audit results for 23 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.<sup>93</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that 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>94</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 offsetting savings were correctly deducted from the costs claimed. The Controller notes that the claimant does not

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<sup>91</sup> Exhibit A, IRC, page 13. Emphasis in original.

<sup>92</sup> Exhibit A, IRC, pages 14-16.

<sup>93</sup> Exhibit A, IRC, pages 16-18.

<sup>94</sup> Exhibit A, IRC, pages 20-21.

indicate how undiverted solid waste would be disposed of if not at a landfill. In addition, the claimant does not state that it disposed of its solid waste at any location other than a landfill or used any other means to dispose of its waste rather than to contract with a commercial waste hauler.<sup>95</sup>

The Controller concludes that the claimant's comments relating to alternatives for the disposal of solid waste are irrelevant. The Controller cites the claimant's annual reports of tonnage disposed for each year of the audit period, and argues that the claimant "does not indicate in these annual reports that it used any other methodology to dispose of solid waste."<sup>96</sup> The Controller also cites the narrative in some of the claimant's annual reports that indicates that the claimant disposed of waste in a landfill.<sup>97</sup> According to the Controller:

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 no cost. Sierra Joint Community College is located in Rocklin, California. An internet search for landfill fees revealed that the Western Placer Waste Management Authority in Lincoln, California (12 miles from Sierra Joint Community College), currently charges \$69.00 per ton to dispose of solid waste [citation omitted]. Thus, the higher rate of diversion results in less trash that is disposed at a landfill, which creates cost savings for the district.<sup>98</sup>

As to the claimant not remitting cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, the Controller 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>99</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 responds that the calculation is 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>100</sup>

The Controller also states that it "allocated" the offsetting savings to avoid penalizing the claimant for diverting more than the minimum percentage of diversion required. According to the Controller:

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<sup>95</sup> Exhibit B, Controller's Late Comments on the IRC, page 16.

<sup>96</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>97</sup> Exhibit B, Controller's Late Comments on the IRC, pages 16-17.

<sup>98</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>99</sup> Exhibit B, Controller's Late Comments on the IRC, pages 17-18.

<sup>100</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

As there is no State mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2002 through 2003 or 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>101</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, the 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.

Defending its use of the claimant's 2007 reported diversion to calculate claimant's offsets for 2007-2008 through 2009-2010, the Controller calls the 2007 report a "fair representation" of 2008 -2010 "because the district's recycling processes have already been established and committed to." The Controller notes that the claimant's reported per-capita disposal rate is well below the target rate for 2008, 2009, and 2010, so "the district is meeting its requirement to divert 50% of its solid waste."<sup>102</sup> The Controller also cites the claimant's 2008 report that states: "There has been less waste disposed of in 2008. We have been more proactive in increasing awareness of what materials can be recycled and therefore not placed in our solid waste stream. Our cardboard, metals and wood pallet recycling increased in 2008."<sup>103</sup> Based on these claimant statements, the Controller states that its savings calculations for 2007-2008 through 2009-2010 may be understated.<sup>104</sup>

The Controller also responded to 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). Noting that it was not until 2010 (the last year of the audit period) that claimant reported that it was composting grass clippings, and that none of the narratives in the annual reports for 2000 through 2009 mention composting performed by the claimant, the Controller concludes that composted material was not a significant amount of the tonnage diverted. The Controller also states that claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>105</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by the CIWMB, is included in the record, and is based on private surveys of a large percentage of landfills across California. In addition, claimant "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>106</sup>

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<sup>101</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>102</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>103</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20 and 48.

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>106</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

In response to the claimant's argument that it "did not claim landfill costs, so there are none to be offset," the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste, so none would be claimable. Rather, the claimant's costs to divert solid waste from disposal are reimbursable, which according to the Controller, results in both a reduction of solid waste going to a landfill in compliance with its IWM plan, and the associated costs of having the waste hauled there, which are required to offset reimbursement claims.<sup>107</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 that "cost savings realized as a result of the IWM plan are to fund plan *implementation and administration costs*." The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also 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 from implementing the plan be offset against direct costs to implement the plan. The Controller also asserts, in response to claimant's reference to other IWM audits, that other audits are irrelevant to the current issue.<sup>108</sup>

The Controller also disagrees with claimant's assertion that the Controller used the wrong standard of review because it did conclude that the claims were excessive. As to the burden of proof, the Controller states that it used data from the claimant's annual reports from implementing its IWM program.<sup>109</sup>

In comments on the Draft Proposed Decision, the Controller agrees with the part of the analysis upholding the reductions, but disagrees that the Controller's reduction of costs for the first half of fiscal year 2003-2004 is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support. For that time period, the Controller found that the claimant did not achieve the mandated "50 percent" diversion. Therefore, the Controller did not allocate the actual diversion percentage by the mandated diversion percentage as it did for the other fiscal years in the audit, but used 100 percent of the diversion percentage to calculate offsetting savings, which resulted in a reduction of \$7,513. The Controller states:

For the first half of FY 2003-2004, we agree that the district diverted 45.59% of its solid waste, which is above the mandated level of 25%. However, there is no evidence in its FY 2003-2004 mandated cost claim that the district pro-rated the direct costs to claim only 54.84% (25% ÷ 45.59%) of the total diversion costs incurred. In fact, on its FY 2003-2004 Form IWM-2, the district reported time for "diverting solid waste from landfill disposal or transformation facilities - source reduction/recycling/composting" (Exhibit D, page 230). No proration or allocation was noted. Based on the information provided in the claim, we believe the district claimed 100% of the direct cost incurred to perform the mandated activities. Therefore, we believe the correlated offsetting savings

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<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, pages 22-23.

<sup>109</sup> Exhibit B, Controller's Late Comments on the IRC, pages 25-26.



should also be calculated at 100% of the actual diversion rate of 45.59%, totaling \$7,513.<sup>110</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 that the Controller determines 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>111</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 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>112</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 the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>113</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

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<sup>110</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, pages 1-2.

<sup>111</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>112</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.

<sup>113</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.

connection between those factors, the choice made, and the purposes of the enabling statute.” [Citation.]’ ”<sup>114</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>115</sup> In addition, sections 1185.1(f)(3) and 1185.2(c) 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>116</sup>

**The Controller’s Reduction of Costs Is Generally Correct as a Matter of Law, However, the Reduction of Costs for the First Half of Fiscal Year 2003-2004, Based on the Incorrect Mandated Diversion Rate, Is Incorrect as a Matter of Law, and Is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

- A. The test claim statutes define cost savings as avoided landfill fees and, thus, presume that by complying with the mandate to reduce and 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 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, 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 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>117</sup> The court explained that:

[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

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<sup>114</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>115</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>116</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.

<sup>117</sup> Exhibit B, Controller’s Late Comments on the IRC, page 63 (Ruling on Submitted Matter).

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>118</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 in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>119</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>120</sup> As the court held, “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. . . .”<sup>121</sup>

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<sup>118</sup> Exhibit B, Controller’s Late Comments on the IRC, page 64 (Ruling on Submitted Matter). Emphasis added.

<sup>119</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 65-66 (Ruling on Submitted Matter).

<sup>120</sup> Exhibit B, Controller’s Late Comments on the IRC, page 63 (Ruling on Submitted Matter).

<sup>121</sup> Exhibit B, Controller’s Late Comments on the IRC, page 64 (Ruling on Submitted Matter). Emphasis added.

The statutes, therefore, presume that by complying with the mandate to reduce and 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 the 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, to claim 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>122</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 savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1."<sup>123</sup> The court's decision and the amended Parameters and Guidelines are binding.<sup>124</sup>

B. During the audit period, the claimant exceeded the mandated diversion rate for solid waste, but has filed no evidence to rebut the presumption that cost savings, based on avoided landfill costs, were realized.

In this case, the claimant reported no cost savings in its reimbursement claims and asserts that no cost savings were realized, but does not explain why.<sup>125</sup>

The record shows that the claimant complied with the mandate and diverted more solid waste during the audit period than the amount mandated by the state. 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 divert at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>126</sup> The claimant's annual reports to the CIWMB for calendar years 2000, 2001, and 2003 report diversion percentages from 28.62 percent to 45.59 percent of the total tonnage of waste generated, which exceeds the mandated diversion requirement of 25 percent.<sup>127</sup> The

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<sup>122</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>123</sup> Exhibit A, IRC, page 59 (Parameters and Guidelines).

<sup>124</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>125</sup> Exhibit A, IRC, page 7.

<sup>126</sup> Exhibit A, IRC, pages 51 and 55 (Parameters and Guidelines, section IV.(B)(5)); Public Resources Code sections 42921 and 42922(i).

<sup>127</sup> Exhibit B, Controller's Late Comments on the IRC, pages 33-37 and 71.

claimant's annual reports to the CIWMB for calendar years 2004 through 2007 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, and range from 53.98 percent to 60.27 percent of the total tonnage of waste generated.<sup>128</sup>

In 2008, the CIWMB stopped requiring community college districts to report the actual amount and percentage of tonnage diverted, and instead required community colleges to report the "per-capita disposal" of waste as a result of 2008 legislation.<sup>129</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. Thus, if the district's per-capita 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>130</sup>

In this case, the reports for 2008, 2009, and 2010 show that the claimant's annual per capita disposal rate for both the employee and student populations to be equivalent to, or below the target rate and thus, the claimant satisfied the requirement to divert 50 percent of its solid waste during these years.<sup>131</sup> In addition, the claimant's 2008, 2009, and 2010 reports continue to show that the claimant had solid waste reduction programs in place, such as the following programs reported in 2008:

Business Source Reduction, Material Exchange, CRV beverage containers, cardboard, glass, newspaper, mixed office paper, scrap metal, collection at special events, grasscycling, commercial pickup of compostable yard wastes, tires, white/brown goods, wood waste, concrete/asphalt demolition, oil rendering and utilizing the Placer County MRF [material recovery facility]. We also continue to collect and recycle electronic wastes, batteries, CFL's/light tubes and mercury containing bulbs/switches. Newly implemented were collection of all plastics PETE 1-7, pressed board, non CRV glass and tin cans at the Nevada County Campus.<sup>132</sup>

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<sup>128</sup> Exhibit B, Controller's Late Comments on the IRC, pages 38-54 and 71.

<sup>129</sup> Statutes 2008, chapter 343 (SB 1016).

<sup>130</sup> Exhibit B, Controller's Late Comments on the IRC, page 79 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>131</sup> Exhibit B, Controller's Late Comments on the IRC, pages 47 (2008 report, showing an employee population target of 2.00, and 1.40 was achieved; and a student population target of .10, which the claimant met); 49 (2009 report, showing an employee population target of 2.00, and .90 was achieved; and a student population target of .10, which the claimant met); and 52-53 (2010 report, showing an employee population target of 2.00, and 1.30 was achieved; and a student population target of .10, and .09 was achieved).

<sup>132</sup> Exhibit B, Controller's Late Comments on the IRC, pages 48; 51 (2009 report); and 54 (2010 report).

The 2008 report also states: “The District has continued to work towards creating a sustainable environment and looks for opportunities to divert more of it’s [sic] solid wastes from the landfill. . . .”<sup>133</sup>

The record also shows that the tonnage of solid waste that was not diverted was disposed at a landfill. The annual reports filed by the claimant with the CIWMB during the audit period identify the total tonnage of waste disposed and the use of a disposal waste hauler.<sup>134</sup> Moreover, there are statements in the claimant’s 2001, 2003, 2004, 2005, and 2006 annual reports regarding decreased landfill disposal, indicating that the claimant used a landfill.<sup>135</sup> The avoided landfill disposal fee was based on the statewide average disposal fee provided by the CIWMB for each fiscal year in the audit period, since the claimant did not provide any information about the landfill fees it was charged.<sup>136</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 without any evidence to the contrary, that the percentage of waste diverted results in offsetting savings in an amount equal to the avoided landfill fee per ton of waste 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>137</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>138</sup> The Parameters and Guidelines, as amended pursuant to the court’s

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<sup>133</sup> Exhibit B, Controller’s Late Comments on the IRC, page 48.

<sup>134</sup> The 2000 report to CIWMB states: “We will continue to work closely with our local waste haulers to further reduce our solid wastes.” See Exhibit B, Controller’s Late Comments on the IRC, page 34. The 2009 and 2010 reports state, in response to the question regarding how the annual tons disposed was calculated: “The tonnage number was received from our waste hauler.” See Exhibit B, Controller’s Late Comments on the IRC, pages 50 and 53.

<sup>135</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36, 38, 40, 42, and 44.

<sup>136</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 22, 91-103, 115-119.

<sup>137</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>138</sup> Evidence Code section 500, which states the following: “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*

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>139</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.

An example of when cost savings may not have been realized is the claimant’s costs to divert waste through a material recovery facility (MRF). The record shows that beginning in 2000, the claimant reported that:

All solid waste generated in Placer County is processed at the Nor tech Material Recovery Facility (MRF) at Lincoln. At this facility, the Districts solid wastes are again processed to recover additional recyclable materials prior to being landfilled. As a customer and participant, the District shall accept the additional 16% credit for recycling through the MRF.<sup>140</sup>

A MRF is a “permitted solid waste facility where solid wastes or recyclable materials are sorted or separated, by hand or by use of machinery, for the purposes of recycling or composting.”<sup>141</sup>

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*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 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>139</sup> Exhibit A, IRC, page 95. Emphasis added.

<sup>140</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 33-34.

<sup>141</sup> California Code of Regulations, title 14, section 18720(a)(36). Another definition of MRF (in and limited to Pub. Res. Code, § 50000(a)(4)) is “a transfer station that is designed to, and, as a

Information in a CalRecycle report on landfill tipping fees indicates a *higher cost* to dispose of waste at a MRF (\$61 statewide average per ton) than in a landfill (\$45 per ton), probably due to higher costs to process and transport waste at a MRF.<sup>142</sup>

Although the claimant's annual reports identify tonnage diverted to the MRF in calendar years 2003, 2004, 2005, 2006 and 2007,<sup>143</sup> the claimant did not identify any costs incurred to divert waste to the MRF (which is expressly allowed as a reimbursable cost under Section IV.(B)(5) of

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condition of its permit, shall, recover for reuse or recycling at least 15 percent of the total volume of material received by the facility." MRF is also defined as "An intermediate processing facility that accepts source-separated recyclables from an initial collector and processes them for wholesale distribution. The recyclable material is accumulated for shipment to brokers or recycled content manufacturers, or for export out of state." See California Department of Resources Recycling and Recovery, "Landfill Tipping Fees in California" February 2015, page 44.

<sup>142</sup> Exhibit E, California Department of Resources Recycling and Recovery, "Landfill Tipping Fees in California" February 2015, pages 12-13. MRFs and transfer stations were treated together in the survey. According to the report (page 14):

Transfer stations charge a median fee of \$61 per ton for MSW [municipal solid waste], which is \$16 more per ton than the median that landfills charge for MSW. This higher fee may be a result of transportation costs as well as tipping fees incurred by the transfer station for final disposal at the landfill. The range of transfer station tipping fees, from \$0 to \$178, is higher than all other facility types surveyed. The maximum of the transfer station tipping fee data set is \$50 higher than any other facility. This suggests that transfer stations have additional costs that lead to higher tipping fees.

The report also states:

Most landfills have more than one tipping fee. They usually have a publicly posted fee for individuals or businesses "self-hauling" waste, but they also negotiate rates with solid waste haulers, cities, counties, and other facility operators. This is an important distinction because in California, only about 20 percent of disposal is self-hauled waste. The other 80 percent of disposal is transported to landfills by solid waste haulers and thus would be more likely to be subject to negotiated disposal rates. . . . Disposal tipping fees in California are as complex and varied as the state itself. Tipping fees vary due to the unique circumstances at each landfill, such as location, owner, size, proximity to other landfills, and other operational factors.

The range for tipping fees in the report was \$0 to \$125 per ton, with a \$45 per ton median. (*Id.*, page 3).

<sup>143</sup> Exhibit B, Controller's Late Comments on the IRC, pages 38, 40, 42, 44, and 46.



the Parameters and Guidelines);<sup>144</sup> nor has claimant identified any costs avoided if it had disposed of the waste in a landfill instead of a MRF.

Accordingly, the Commission finds that the claimant has not filed any evidence to rebut the statutory presumption of cost savings. Therefore, the Controller’s presumption of cost savings is correct as a matter of law.

- C. For fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010, the Controller’s calculation of cost savings is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller determined that for every year of the audit period except the first half of fiscal year 2003-2004, the claimant diverted more solid waste than the amount mandated by the test claim statute. Therefore, for those years where the claimant exceeded the mandate, the Controller allocated the actual diversion percentage based on the mandated diversion percentage to calculate offsetting savings. Instead of using 100 percent of the amount actually diverted, the Controller allocates the diversion rate, taking the percentage of solid waste required to be diverted (either 25 percent or 50 percent) divided by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The resulting quotient is then multiplied by the tons of solid waste diverted (as annually reported by the claimant to the CIWMB), multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>145</sup>

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

The formula, for these years, works to allocate or reduce cost savings based on the mandated levels, and is intended to prevent penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>146</sup>

The claimant raises several arguments to assert that the Controller’s calculation of cost savings is incorrect. These arguments, however, are not supported by the law or evidence in the record.

<sup>144</sup> Exhibit A, IRC, pages 223 – 258 (reimbursement claims). See also page 91. The Parameters and Guidelines authorize reimbursement 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.” Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922 (i).)”

<sup>145</sup> Exhibit A, IRC, pages 33-35; Exhibit B, Controller’s Late Comments on the IRC, pages 19 and 20.

<sup>146</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

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 \$2000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>147</sup> Because the Controller agrees that the claimant did not remit to the state any savings realized from the implementation of the IWM plan, this fact is undisputed.<sup>148</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, based on the evidence in the record, the claimant should have deposited the cost savings into the state's account as required by the test claim statutes, but failed to do so. 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 determined, "[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>149</sup>

The claimant next asserts that the Controller's formula is an underground regulation.<sup>150</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 indicated 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 adjudication are not regulations.<sup>151</sup>

The claimant also contends 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>152</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>153</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 ....

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<sup>147</sup> Exhibit A, IRC, page 13.

<sup>148</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>149</sup> Exhibit B, Controller's Late Comments on the IRC, page 63 (Ruling on Submitted Matter).

<sup>150</sup> Exhibit A, IRC, page 14.

<sup>151</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>152</sup> Exhibit A, IRC, page 17.

<sup>153</sup> Exhibit A, IRC, page 55 (Parameters and Guidelines).

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 IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>154</sup>

The court also noted that diversion “means activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>155</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 percentage achieved in 2007 applies equally to subsequent years, 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>156</sup> However, the Controller’s assumption is in fact supported by evidence in the record. The Controller applied the diversion percentage achieved in 2007 to subsequent years because the CIWMB stopped requiring community college districts to report the actual amount and percentage of tonnage diverted in 2008. As the Controller notes, the claimant’s diversion program was well-established by 2007, and the claimant’s reports of subsequent years reflect increased diversion. For example, the 2008 report notes that:

There has been *less waste disposed of* in 2008. We have been more proactive in increasing awareness of what materials can be recycled and therefore not placed in our solid waste stream. . . . [And in describing new programs for 2008] . . . we were able to obtain new collection containers for our Nevada County campus and we are able to comingle a lot of our recyclable materials. Also, *the types of materials acceptable for recycling was increased* at that campus.<sup>157</sup>

Likewise, the 2009 report states: “We have added many more recycling containers to help increase the recycled materials,”<sup>158</sup> and “*There was a decrease in the per capita disposal.*”<sup>159</sup> Additionally, the 2010 report states, in response to a question about changes in waste reduction programs during the report year: “We are *now composting the grass clippings.*”<sup>160</sup> Thus, there is evidence in the record that for 2008-2010 claimant exceeded the diversion rates recorded in 2007.

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<sup>154</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 63-64 (Ruling on Submitted Matter).

<sup>155</sup> Exhibit B, Controller’s Late Comments on the IRC, page 63 (Ruling on Submitted Matter).

<sup>156</sup> Exhibit A, IRC, pages 15-16.

<sup>157</sup> Exhibit B, Controller’s Late Comments on the IRC, page 48, emphasis added.

<sup>158</sup> Exhibit B, Controller’s Late Comments on the IRC, page 50.

<sup>159</sup> Exhibit B, Controller’s Late Comments on the IRC, page 51, emphasis added.

<sup>160</sup> Exhibit B, Controller’s Late Comments on the IRC, page 53, emphasis added.

The Controller obtained the statewide average cost for landfill disposal fees from the CIWMB, which was based on private surveys of a large percentage of landfills across California.<sup>161</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>162</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>163</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, but adequately considered all relevant factors.<sup>164</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 costs allowed by the Controller in those cases vary and are arbitrary.<sup>165</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 fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

- D. The Controller's finding that the claimant's diversion of solid waste for the first half of fiscal year 2003-2004 did not achieve the mandated diversion percentage, and its recalculation of cost savings for that time period using 100 percent of diversion reported by the claimant, rather than the allocated diversion percentage used for all other fiscal years in the audit period, is incorrect as a matter of law and is arbitrary, capricious, and entirely lacking in evidentiary support.

The Controller found that the claimant did not achieve the mandated "50 percent" diversion in the first half of fiscal year 2003-2004. Therefore, the Controller did not allocate the diversion percentage to reflect the mandate, but used 100 percent of the diversion reported by the claimant to calculate offsetting savings, which resulted in a reduction of \$7,513 for this time period (204

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<sup>161</sup> Exhibit B, Controller's Late Comments on the IRC, page 21-22.

<sup>162</sup> Exhibit A, IRC, page 34.

<sup>163</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>164</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>165</sup> Exhibit A, IRC, pages 17-18.

tons of diverted waste multiplied by the avoided statewide average landfill disposal fee of \$36.83).<sup>166</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>167</sup> Thus, from July 1, 2003, through December 31, 2003, community college districts were mandated to achieve diversion levels of only 25 percent. The Controller's comments admit that "as there is no state mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2000 through 2003 or 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute."<sup>168</sup>

However, the Controller's calculation of cost savings incorrectly applied a 50 percent diversion level to July 1, 2003, through December 31, 2003, instead of the mandated 25 percent diversion level.<sup>169</sup> The claimant's 2003 report to the CIWMB shows a diversion percentage of 45.6 percent, and the Controller's calculation for July 1, 2003, through December 31, 2003 shows "the actual diversion percentage" of 45.59 percent.<sup>170</sup> This percentage not only achieves, but *exceeds* the mandated diversion level of 25 percent. Therefore, the Controller's finding that the claimant's diversion of solid waste for the first half of fiscal year 2003-2004 did not achieve the mandated diversion percentage is incorrect as a matter of law.

Moreover, the Controller's calculation of offsetting savings, which did not reduce cost savings by allocating the diversion percentage to reflect the mandate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support.

In comments on the Draft Proposed Decision, the Controller disagrees with this finding and argues, for the first time, that:

For the first half of FY 2003-2004, we agree that the district diverted 45.59% of its solid waste, which is above the mandated level of 25%. However, there is no evidence in its FY 2003-2004 mandated cost claim that the district pro-rated the direct costs to claim only 54.84% (25% ÷ 45.59%) of the total diversion costs incurred. In fact, on its FY 2003-2004 Form IWM-2, the district reported time for "diverting solid waste from landfill disposal or transformation facilities - source reduction /recycling /composting" (Exhibit D, page 230). No proration or allocation was noted. Based on the information provided in the claim, we believe the district claimed 100% of the direct cost incurred to perform the

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<sup>166</sup> Exhibit A, IRC, page 31, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>167</sup> Exhibit A, IRC, page 91 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>168</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>169</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>170</sup> Exhibit B, Controller's Late Comments on the IRC, pages 37 and 71.

mandated activities. Therefore, we believe the correlated offsetting savings should also be calculated at 100% of the actual diversion rate of 45.59%, totaling \$7,513.<sup>171</sup>

However, the deadline to complete the audit or give new reasons for reductions has long past.

Additionally, the Controller's position is not supported by the Parameters and Guidelines or the record. Although the Controller is correct that there is no evidence that the claimant prorated or allocated the direct costs claimed for the first half of fiscal year 2003-2004, there is no evidence that the claimant did so for any other years in the audit period.<sup>172</sup> Nor is there a specific requirement in the Parameters and Guidelines to prorate. The Parameters and Guidelines require claimants to report in their reimbursement claims all 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, to claim the net increased costs.<sup>173</sup> It is presumed that the reimbursement claim, filed under penalty of perjury, claimed only those direct costs mandated by the state, absent any finding by the Controller in the audit to the contrary. And here, there is no indication in the audit report that direct costs were over claimed, nor was over claiming of direct costs the reason given for the reduction. There is no evidence in the record to conclude that the calculation of offsetting savings for the first half of fiscal year 2003-2004 should be treated differently than the other fiscal years in the audit period.

Therefore, applying the Controller's formula for the calculation of cost savings (for years when the claimant exceeds the mandate) to the first half of fiscal year 2003-2004, results in a finding of offsetting costs savings of \$4,120, rather than \$7,513 (25 percent divided by 45.59 percent, multiplied by 204 tons diverted, multiplied by the avoided statewide average landfill disposal fee of \$36.83). Thus, the difference of \$3,393 has been incorrectly reduced.<sup>174</sup>

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<sup>171</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, pages 1-2.

<sup>172</sup> For all of fiscal year 2003-2004, the claimant claimed costs for "Development of Policies and Procedures (\$47.69) Staff Training (\$333.83), Completion and Submission of Plan to the Board (\$286.14), Designation of Waste Reduction and Recycling Coordinator (\$2,336.81), Diversion and Maintenance of Approved Level of Reduction (\$14,431.43), Accounting System (\$619.97), Annual Recycled Material Reports (\$524.59) and Indirect Costs (\$6,276.85) for a total of \$24,857.31, with no indication that these amounts were prorated. Claimant did not subtract offsetting savings from its claims. Exhibit A, IRC, page 225, (Reimbursement Claim for 2003-2004). The other reimbursement claims were similarly prepared. Exhibit A, IRC, pages 205-212 (Reimbursement Claim for 1999-2000), 214-222 (Reimbursement Claim for 2000-2001), 234-242 (Reimbursement Claim for 2004-2005), 244-249 (Reimbursement Claim for 2005-2006), 251-258 (Reimbursement Claim for 2006-2007), 260-267 (Reimbursement Claim for 2007-2008), 269-277 (Reimbursement Claim for 2008-2009), 279-287 (Reimbursement Claim for 2009-2010).

<sup>173</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>174</sup> Exhibit B, Controller's Late Comments on the IRC, pages 37 and 71.

Accordingly, the Commission finds that the reduction of costs for the first half of fiscal year 2004-2004 based on a 45.59 percent, rather than a 25 percent, diversion rate is incorrect as a matter of law, and 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 fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2009-2010 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 the first half of fiscal year 2003-2004 based on a 45.59 percent, rather than a 25 percent, diversion rate is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support. The law and the record support offsetting cost savings for the first half of fiscal year 2003-2004 of \$4,120, rather than \$7,513, and that the difference of \$3,393 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 \$3,393 to the claimant.