

**ITEM 3**  
**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, 2009-2010, and 2010-2011

14-0007-I-05

State Center Community College District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Incorrect Reduction Claim (IRC) addresses reductions by the State Controller's Office's (Controller) to reimbursement claims of the State Center Community College District (claimant) for fiscal years 1999-2000, 2000-2001, and 2003-2004 through 2010-2011 under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting savings resulting from the diversion of solid waste and the associated reduced landfill disposal fees.

Staff finds that 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 required to be diverted. The avoided landfill disposal fee was calculated by the Controller based on the statewide average disposal fee provided by the California Integrated Waste Management Board (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 is correct as a matter of law.

Staff 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 2010-2011, is correct as a matter of law and is not arbitrary, capricious, or without 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, and entirely lacking in evidentiary support. For this time period, the Controller calculated cost savings based on a 50 percent diversion rate, although only 25 percent diversion was mandated by the state. Thus, the Controller's interpretation of the mandate was incorrect as a matter of law. The claimant's colleges exceeded the mandated 25 percent diversion rate in the first half of fiscal year 2003-2004. Therefore, the Controller should have used the same formula for the first half of fiscal

year 2003-2004 as it did for all other years when the claimant exceeded the mandate. Applying the Controller's formula (for years when the claimant exceeded the diversion mandate) to the first half of fiscal year 2003-2004, using the 25 percent diversion requirement to allocate the diversion rate, results in offsetting costs savings of:

- \$7,166 for Reedley College (25 percent divided by 26.11 percent, multiplied by 203.2 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$7,484 calculated by the Controller using a 100 percent diversion rate; and
- \$3,039 for Fresno City College (FCC) (25 percent divided by 53.59 percent, multiplied by 176.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$6,079 calculated by the Controller using a 50 percent diversion rate.

Thus, the difference between the calculated reduction (\$13,563) and the amount that should have been reduced (\$10,205) is \$3,358, which 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 \$3,358 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 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 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

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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.

Decision or Parameters and Guidelines. On May 29, 2008, the Sacramento County Superior Court partially agreed with the petitioners and directed the Commission to amend the Parameters and Guidelines to:

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

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

This program was made optional by statutes of 2010, chapter 724 (AB1610), section 34, effective October 19, 2010, and has remained so since that time.<sup>3</sup>

### **Procedural History**

On October 6, 2005, the claimant filed its 1999-2000, 2000-2001, and 2003-2004 reimbursement claims.<sup>4</sup> On March 30, 2009, the claimant filed its 2004-2005, 2005-2006, 2006-2007, and 2007-2008 reimbursement claims.<sup>5</sup> On December 14, 2009, the claimant filed its 2008-2009 reimbursement claim.<sup>6</sup> On December 13, 2010, the claimant filed its 2009-2010 reimbursement claim.<sup>7</sup> On February 7, 2012, the claimant filed its reimbursement claim for July 1, 2010 to

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<sup>2</sup> Exhibit B, Controller's Late Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>3</sup> See Government Code section 17581.5.

<sup>4</sup> Exhibit A, IRC, pages 209, 215 and 220. Though these reimbursement claims were filed in 2005, there is no evidence in the record that the Controller has issued payment, and thus, the audit was timely initiated on August 1, 2013, when the claimant was notified of the audit. (Exhibit B, pp. 95-97).

<sup>5</sup> Exhibit A, IRC, pages 227, 234, 239 and 246.

<sup>6</sup> Exhibit A, IRC, page 252.

<sup>7</sup> Exhibit A, IRC, page 258.

October 7, 2010.<sup>8</sup> On August 1, 2013, the claimant was notified of the audit via email from the Controller.<sup>9</sup> The Controller issued the Final Audit Report on August 30, 2013.<sup>10</sup>

The claimant filed this IRC on July 14, 2014.<sup>11</sup> The Controller filed late comments on the IRC on November 25, 2015.<sup>12</sup> The claimant did not file rebuttal comments. Commission staff issued the Draft Proposed Decision on August 25, 2017.<sup>13</sup> The Controller filed comments on the Draft Proposed Decision on September 1, 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 if the Controller determines that the claim is excessive or unreasonable.

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

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>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 and not

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<sup>8</sup> Exhibit A, IRC, page 265. This claim states it is for "7/1/10 to 10/7/10."

<sup>9</sup> Exhibit B, Controller's Late Comments on the IRC, pages 95-97.

<sup>10</sup> Exhibit A, IRC, page 25.

<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.

<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.

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>

### **Claims**

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

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Whether the Controller’s reduction of costs claimed based on unreported cost savings resulting from implementation of the IWM plan is correct.	Pursuant to the ruling and writ issued in <i>State of California v. Commission on State Mandates</i> , (Super. Ct. Sacramento County, 2008, No. 07CS00355), the amended Parameters and Guidelines require claimants to identify and offset from their claims, cost savings realized as a result of implementing their IWM plans, and apply the cost savings to fund plan implementation and administration costs.	<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 required to be diverted. The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each year in the audit period. The claimant has not filed any evidence to rebut the statutory presumption of cost savings.

<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 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>The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, claimants can reduce or avoid landfill fees and realize cost savings. As indicated in the court's ruling, the cost savings may be calculated from the 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 to show that cost savings were not realized.</p> <p>During the audit period, FCC exceeded the mandate and diverted more solid waste than required by law (and also at Reedley College except calendar year 2000). For years when the claimant exceeded the diversion requirement, 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%, by the actual percentage diverted, as reported to CIWMB, to avoid penalizing the claimant for diverting more solid waste than the state-mandated amount. The resulting quotient is then multiplied by the tons of solid</p>	<p>Thus, the Controller's reduction of costs claimed is correct as a matter of law.</p> <p>In calendar year 2000, Reedley College achieved a 24.57 diversion rate, although 25 percent was required, so the Controller did not allocate the diversion rate but used 100 percent of the diversion to calculate offsetting savings for the second half of fiscal year 1999-2000 and the first half of fiscal year 2000-2001.<sup>22</sup> This audit decision complies with the Parameters and Guidelines and the Superior Court decision.<sup>23</sup> Thus, the decision to use a 100 percent diversion rate to calculate Reedley College's cost savings for calendar year 2000 is correct.</p> <p>However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 at both colleges is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support. The Controller applied a 50% diversion rate to calculate offsetting savings for this period, although the mandate was 25% in 2003. And although Reedley College achieved 26.11% diversion (exceeding the required 25%) during this period, the Controller did not allocate</p>
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<sup>22</sup> Exhibit A, IRC, page 35, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>23</sup> Exhibit B, Controller's Late Comments on the IRC, pages 79-89 (Ruling on Submitted Matter).

	<p>waste diverted multiplied by the avoided landfill disposal fee (based on the statewide average fee). For calendar year 2000 when Reedley College did not exceed the diversion requirement, the Controller did not allocate the diversion rate, but used 100 percent of the claimant's diversion to calculate offsetting costs.</p> <p>For the first half of fiscal year 2003-2004, the Controller used a 50% rate to allocate cost savings, although 25% was mandated during this period. The Controller also found that Reedley College did not achieve the mandated "50%" diversion rate for the first half of 2003-2004, so the diversion percentage for Reedley was not allocated. Instead, the Controller used 100% of the tonnage diverted to calculate the offsetting cost savings.<sup>20</sup> The Controller admits that mandated diversion rate is 25% for the first half of fiscal year 2003-2004.<sup>21</sup></p>	<p>Reedley's cost savings, which 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 offsetting cost savings of:</p> <ul style="list-style-type: none"> <li>• \$7,166 for Reedley College (25% divided by 26.11%, multiplied by 203.2 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$7,484, and;</li> <li>• \$3,039 for FCC (25% divided by 53.59%, multiplied by 176.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$6,079.</li> </ul> <p>Therefore, the difference between the calculated reduction and the amount that should have been reduced is \$3,358, which should be reinstated to the claimant.</p> <p>In comments on the Draft Proposed Decision, the Controller agreed with the conclusion and agreed to reinstate to the claimant \$3,358 for the first half of fiscal year 2003-2004.<sup>24</sup></p>
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<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 B, Controller's Late Comments on the IRC, page 21.

<sup>24</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, page 1.

## **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.**

The Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period.

Staff 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 2010-2011 is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. During the audit period, the claimant exceeded the mandated diversion rate in all years except calendar year 2000.<sup>25</sup>

In years when the claimant diverted more solid waste than the amount mandated by the test claim statutes, the Controller's cost savings formula "allocated" the diversion by dividing the percentage of solid waste required to be diverted, either 25 or 50 percent, by the actual percentage of solid waste diverted, as annually reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted, multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>26</sup> The formula allocates cost savings based on the mandated rates of diversion, and was intended to prevent penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>27</sup>

In calendar year 2000, Reedley College achieved a 24.57 diversion rate, which was less than the 25 percent required, so the Controller did not allocate the diversion rate, but multiplied 100 percent of the solid waste diverted by the avoided landfill disposal fee.<sup>28</sup>

These formulas are consistent with the statutory presumption of cost savings and correctly presume, without any evidence to the contrary, that the percentage of waste required to be diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted. In years when the claimant exceeded the mandated diversion rates, the Controller's formula limits the offset to the mandated levels.

However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 for both colleges 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, Reedley College achieved an actual diversion rate of 26.11 percent. The Controller found that Reedley College did not achieve the mandated "50 percent" diversion rate, although only 25 percent diversion was

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<sup>25</sup> The Controller found that Fresno City College exceeded the mandate in all years in the audit period, but that Reedley College did not exceed the mandate in calendar years 2000 and 2003. See Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>26</sup> Exhibit A, IRC, pages 33-35 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>27</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21.

<sup>28</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.



mandated in the first half of fiscal year 2003-2004. Thus, for this period at Reedley College, the Controller did not allocate the diversion percentage to calculate cost savings, but used 100 percent of the reported diversion to calculate offsetting savings.<sup>29</sup> In addition, FCC achieved an actual diversion rate of 53.59 percent in the first half of fiscal year 2003-2004.<sup>30</sup> The Controller allocated the diversion rate for FCC, as it had done for the other fiscal years because the claimant exceeded the mandate, but used a 50 percent rate to calculate the allocated diversion rate, when the test claim statutes mandated only 25 percent diversion in calendar year 2003.<sup>31</sup> The requirement to divert 50 percent of all solid waste did not become operative until January 1, 2004.<sup>32</sup> Therefore, the Controller's calculation of cost savings, which applied a 50 percent diversion rate to the period from July 1, 2003, through December 31, 2003, for both colleges, instead of the mandated 25 percent diversion rate, is incorrect as a matter of law. In addition, the Controller's calculation, which did not reduce cost savings by allocating the diversion percentage to the 25 percent mandated diversion rate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support. Applying the Controller's cost savings formula to the first half of fiscal year 2003-2004 for both colleges within the claimant's district, using the 25 percent diversion requirement, results in offsetting costs savings of:

- \$7,166 for Reedley College (25 percent divided by 26.11 percent, multiplied by 203.2 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$7,484 calculated by the Controller using a 100 percent diversion rate of the solid waste diverted; and
- \$3,039 for FCC (25 percent divided by 53.59 percent, multiplied by 176.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$6,079 calculated by the Controller using a 50 percent diversion rate.

Therefore, the difference between the calculated reduction (\$13,563) and the amount that should have been reduced (\$10,205) is \$3,358, which has been incorrectly reduced.

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion and agreed to reinstate to the claimant \$3,358 for the first half of fiscal year 2003-2004.<sup>33</sup>

### **Conclusion**

Staff finds, based on the evidence in the record, 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 2010-2011, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>29</sup> Exhibit A, IRC, page 35, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>30</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>31</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>32</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 95 (Parameters and Guidelines).

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

However, the 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 evidence in the record support offsetting cost savings for the first half of fiscal year 2003-2004 of \$10,205, rather than \$13,563. Therefore, the difference of \$3,358 has been incorrectly reduced and should be reinstated to the 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 \$3,358 to the claimant. Staff further 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, 2009-2010 and 2010-  
2011

State Center Community College District,  
Claimant

Case No.: 14-0007-I-05

*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 December 1, 2017)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on December 1, 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 reductions made by the State Controller's Office (Controller) to reimbursement claims of the State Center Community College District (claimant) for fiscal years 1999-2000, 2000-2001, and 2003-2004 through 2010-2011 under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant (in the two colleges within the district: Reedley College and Fresno City College (FCC)) did not identify and deduct from its reimbursement claims offsetting cost 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 correct.

During the audit period, the claimant diverted solid waste, as required by the test claim statutes, and exceeded the mandated diversion rate in all years except calendar year 2000. The Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted.

The Commission 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 2010-2011 is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. During the audit period, the claimant exceeded the mandated diversion rate in all years except calendar year 2000.<sup>34</sup> Instead of using 100 percent of the diversion percentage achieved in years when the claimant diverted more solid waste than the amount mandated by the test claim statutes, the Controller's cost savings formula "allocated" the diversion by dividing the percentage of solid waste required to be diverted, either 25 or 50 percent, by the actual percentage of solid waste diverted, as reported by the claimant to California Integrated Waste Management Board (CIWMB). The resulting quotient was then multiplied by the tons of solid waste diverted, as annually reported by the claimant to CIWMB, multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>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.

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<sup>34</sup> The Controller found that Fresno City College exceeded the mandate in all years in the audit period, but that Reedley College did not exceed the mandate in calendar years 2000 and 2003. In years that Reedley College did not exceed the mandated (25 or 50 percent) diversion level, the Controller did not allocate the diversion rate, but used 100 percent of the tonnage diverted to calculate offsetting savings. See Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>35</sup> Exhibit A, IRC, pages 33-35 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>36</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21.

In calendar year 2000, the claimant's Reedley College achieved a 24.57 diversion rate, which was less than the 25 percent required, so the Controller did not allocate the diversion rate, but multiplied 100 percent of the solid waste diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee).

These formulas are consistent with the statutory presumption of cost savings and correctly presume, without any evidence to the contrary, that the percentage of waste diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted. In years when the claimant exceeded the mandated diversion rates, the Controller's formula limits the offset to the mandated levels.<sup>37</sup>

However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 for both colleges 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, Reedley College achieved an actual diversion rate of 26.11 percent. The Controller found that Reedley College did not achieve the mandated "50 percent" diversion rate, although only 25 percent diversion was mandated in the first half of fiscal year 2003-2004. Thus, for this period at Reedley College, the Controller did not allocate the diversion percentage to calculate cost savings, but used 100 percent of the reported diversion to calculate offsetting savings.<sup>38</sup> In addition, FCC achieved an actual diversion rate of 53.59 percent in the first half of fiscal year 2003-2004.<sup>39</sup> The Controller allocated the diversion rate for FCC, as it had done for the other fiscal years because the claimant exceeded the mandate, but used a 50 percent rate to calculate the allocated diversion rate, when the test claim statutes mandated only 25 percent diversion in calendar year 2003.<sup>40</sup> The requirement to divert 50 percent of all solid waste did not become operative until January 1, 2004.<sup>41</sup> Therefore, the Controller's calculation of cost savings, which applied a 50 percent diversion rate to the period from July 1, 2003, through December 31, 2003, for both colleges, instead of the mandated 25 percent diversion rate, is incorrect as a matter of law. In addition, the Controller's calculation, which did not reduce cost savings by allocating the diversion percentage to the 25 percent mandated diversion rate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support. Applying the Controller's formula to the first half of fiscal year 2003-2004 for both colleges within the claimant's district, using the 25 percent diversion requirement, results in offsetting costs savings of:

- \$7,166 for Reedley College (25 percent divided by 26.11 percent, multiplied by 203.2 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than

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<sup>37</sup> Exhibit A, IRC, page 35, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>38</sup> Exhibit A, IRC, page 35, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>39</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>40</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>41</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 95 (Parameters and Guidelines).

\$7,484 calculated by the Controller using a 100 percent diversion rate of the solid waste diverted; and

- \$3,039 for FCC (25 percent divided by 53.59 percent, multiplied by 176.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$6,079 calculated by the Controller using a 50 percent diversion rate.

Thus, the Commission finds that the law and the record support offsetting savings for the first half of fiscal year 2003-2004 of \$10,205 rather than \$13,563, and the difference of \$3,358 has been incorrectly reduced.<sup>42</sup>

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 \$3,358 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- |            |   |
|------------|---|
| 10/06/2005 | The claimant filed its 1999-2000, 2000-2001, and 2003-2004 reimbursement claims. <sup>43</sup>            |
| 03/30/2009 | The claimant filed its 2004-2005, 2005-2006, 2006-2007, and 2007-2008 reimbursement claims. <sup>44</sup> |
| 12/14/2009 | The claimant filed its 2008-2009 reimbursement claim. <sup>45</sup>                                       |
| 12/13/2010 | The claimant filed its 2009-2010 reimbursement claim. <sup>46</sup>                                       |
| 02/07/2012 | The claimant filed its reimbursement claim for July 1, 2010 to October 7, 2010. <sup>47</sup>             |
| 08/01/2013 | The claimant was notified of the audit. <sup>48</sup>   |
| 08/30/2013 | The Controller issued the Final Audit Report. <sup>49</sup>   |

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<sup>42</sup> Exhibit B, Controller's Late Comments on the IRC, pages 37 (FCC 2003 Annual Report), 60 (Reedley 2003 Annual Report) and 92-93.

<sup>43</sup> Exhibit A, IRC, pages 209, 215 and 220. Although these reimbursement claims were filed in 2005, the final audit report states that the state made no payment to the claimant (Exhibit A, IRC, p. 25), which the claimant admits (Exhibit A, IRC, p. 5). Thus, the audit was timely initiated on August 1, 2013 when the claimant was notified of the audit (Exhibit B, Controller's Late Comments on the IRC, pp. 95-97).

<sup>44</sup> Exhibit A, IRC, pages 227, 234, 239 and 246.

<sup>45</sup> Exhibit A, IRC, page 252.

<sup>46</sup> Exhibit A, IRC, page 258.

<sup>47</sup> Exhibit A, IRC, page 265. This claim states it is for "7/1/10 to 10/7/10."

<sup>48</sup> Exhibit B, Controller's Late Comments on the IRC, pages 95-97.

<sup>49</sup> Exhibit A, IRC, page 25.

07/14/2014 The claimant filed this IRC.<sup>50</sup>  
11/25/2015 The Controller filed late comments on the IRC.<sup>51</sup>  
08/25/2017 Commission staff issued the Draft Proposed Decision.<sup>52</sup>  
09/01/2017 The Controller filed comments on the Draft Proposed Decision.<sup>53</sup>

## **II. Background**

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

The test claim statutes require community college districts<sup>54</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>55</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>56</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>57</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>58</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>50</sup> Exhibit A, IRC.

<sup>51</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>52</sup> Exhibit C, Draft Proposed Decision.

<sup>53</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>54</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>55</sup> Public Resources Code section 42920(b).

<sup>56</sup> Public Resources Code section 40124.

<sup>57</sup> Public Resources Code section 42920(b)(3).

<sup>58</sup> Public Resources Code section 42926.

requirements.<sup>59</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>60</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>59</sup> Public Resources Code section 42924(b).

<sup>60</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>61</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>61</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>62</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>63</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 CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

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

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>64</sup>

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<sup>62</sup> Exhibit A, IRC, page 45 (Parameters and Guidelines, adopted March 30, 2005).

<sup>63</sup> Exhibit A, IRC, page 41-51 (Parameters and Guidelines, adopted March 30, 2005).

<sup>64</sup> Exhibit B, Controller's Late Comments on the IRC, page 84 (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>65</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>66</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)(l) of Public Resources Code section 42926.<sup>67</sup>

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

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

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<sup>65</sup> Exhibit B, Controller’s Late Comments on the IRC, page 84 (Ruling on Submitted Matter). Emphasis added.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 84-85 (Ruling on Submitted Matter).

<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 85 (Ruling on Submitted Matter). Emphasis added.

implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>68</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>69</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>70</sup>

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

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<sup>68</sup> Exhibit B, Controller's Late Comments on the IRC, pages 86-87 (Ruling on Submitted Matter).

<sup>69</sup> Exhibit B, Controller's Late Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>70</sup> Exhibit A, IRC, page 63 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

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>71</sup>

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

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>72</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 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,

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<sup>71</sup> Exhibit A, IRC, pages 62-63 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>72</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

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>73</sup>

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

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

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>74</sup>

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<sup>73</sup> Exhibit B, Controller's Late Comments on the IRC, pages 86-87 (Ruling on Submitted Matter).

<sup>74</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.



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

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010, and has remained so since that time.<sup>75</sup>

### **F. *The Controller's Audit***

The Controller audited the reimbursement claims for the 1999-2000, 2000-2001, and 2003-2004 through 2010-2011 fiscal years (the audit period). Of the total of \$436,519 claimed for these fiscal years, the Controller found that \$140,311 is allowable and \$296,208 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>76</sup> The Controller did not audit the claims for 2001-2002 and 2002-2003 because, according to the Controller, the statute of limitations to initiate the audit had expired before the Controller began the review.<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)(1) of Public Resources Code section 42926,"<sup>78</sup> the resulting amendment to the Parameters and Guidelines, and the claimant's annual reports to CIWMB.<sup>79</sup>

During the audit period, the claimant operated two campuses: FCC and Reedley College, each of which submitted annual reports to CIWMB.<sup>80</sup> The Controller determined, based on the annual reports, that FCC diverted more solid waste than the amount mandated by the test claim statute each year of the audit period.<sup>81</sup> The Controller also found that Reedley College diverted more solid waste than the mandated amount in all years except 2000 and 2003, when the tons of solid waste diverted did not reach the mandated levels.<sup>82</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

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<sup>75</sup> See Government Code section 17581.5.

<sup>76</sup> Exhibit A, IRC, pages 25, 35 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 7 and 28.

<sup>77</sup> Exhibit A, IRC, page 25 (Final Audit Report).

<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, page 85 (Ruling on Submitted Matter).

<sup>79</sup> Exhibit B, Controller's Late Comments on the IRC, pages 35-77.

<sup>80</sup> Exhibit B, Controller's Late Comments on the IRC, pages 35-55 (FCC Annual Reports) 56-77 (Reedley College Annual Reports).

<sup>81</sup> Exhibit B, Controller's Late Comments on the IRC, page 92.

<sup>82</sup> Exhibit A, IRC, page 35, fn. 2 (final audit report); Exhibit B, Controller's Late Comments on the IRC, page 93.

For the years the claimant *exceeded* the diversion mandate of 25 or 50 percent, the Controller calculated cost savings by allocating the diversion achieved to reflect the state mandate and used the following formula:<sup>83</sup>

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

This allocated diversion rate is the percentage of solid waste required to be diverted (25 or 50 percent) divided by the actual percentage of solid waste diverted (as annually reported by the claimant to CIWMB). 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).<sup>84</sup>

The Controller provided an example of how this formula works. For calendar year 2007, FCC reported that it diverted 346.2 tons of solid waste and disposed of 326.8 tons, which totals 673 tons of solid waste generated for that year. Diverting 346.2 tons out of the 673 tons of waste generated results in a diversion rate of 51.44 percent (more than the 50 percent required).<sup>85</sup> The Controller did not want to penalize the claimant for diverting more solid waste than the amount mandated,<sup>86</sup> so the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (51.44 percent), which equals 97.2 percent. The allocated diversion rate of 97.2 percent is then multiplied by the 346.2 tons diverted that year, which equals 336.5 tons of diverted solid waste, instead of the 346.2 tons actually diverted. The allocated 336.5 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2007 was \$48, resulting in “offsetting cost savings” for calendar year 2007 of \$16,152.<sup>87</sup>

<sup>83</sup> Exhibit A, IRC, pages 37-38 (final audit report); Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>84</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 92-93.

<sup>85</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 21, 92 (Controller’s calculations of offsetting savings for Fresno City College).

<sup>86</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>87</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 21, 93 (Controller’s calculations of offsetting savings). Page 21 of the Controller’s Late Comments on the IRC describe the calculation differently than the formula in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar year 2007, the Fresno City College reported to CalRecycle that it diverted 346.1 tons of solid waste and disposed of 326.8 tons, which results in an overall diversion percentage of 51.4% [Tab 4, page 12]. Because the district was required to divert 50% for that year to meet the mandated

To calculate cost savings when the claimant did *not* reach the mandated diversion rate, the Controller multiplied 100 percent of the solid waste diverted by the avoided landfill disposal fee (based on the statewide average fee). For example, from January 1, 2000, until June 30, 2000, Reedley College generated 793.90 tons of waste, and diverted 195.10 tons, achieving 24.57 percent diversion. The state mandated a 25 percent diversion rate during this time period. The Controller calculated offsetting cost savings by multiplying *all* of the solid waste diverted (195.10 tons) times the avoided landfill disposal fee (\$36.39), for a total offset of \$7,100.<sup>88</sup> In 2000, FCC reported that its annual report had not been finalized, yet costs were claimed for diversion activities for both 1999-2000 and 2000-2001.<sup>89</sup> Since the Controller did not have the 2000 annual report data, the 2001 diversion percentage was used to calculate the offsetting savings for 1999-2000 and 2000-2001.<sup>90</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant's reported 2007 percentage of tons diverted to calculate the offsetting savings for the last half of fiscal year 2007-2008, as well as for fiscal years 2008-2009, 2009-2010 and 2010-2011.<sup>91</sup>

According to the Controller, the claimant did not provide any documentation to support the use of different diversion rates or different disposal fees to calculate offsetting cost savings.<sup>92</sup>

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

#### **A. State Center 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. The claimant argues that:

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requirements and comply with the Public Resources Code, it needed to divert only 336.5 tons (673.0 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 336.5 tons of diverted solid waste rather than a total of 346.2 tons diverted.

Using this formula also results in cost savings for calendar year 2007 of \$16,152 (673.0 tons generated x 50 percent = 336.5 tons x \$48 = \$16,152).

<sup>88</sup> Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>89</sup> Exhibit B, Controller's Late Comments on the IRC, page 34 (FCC 2000 Report). Exhibit A, IRC, pages 209-218 (1999-2000 and 2000-2001 Claims for Payment).

<sup>90</sup> Exhibit A, IRC, page 38 (Final Audit Report).

<sup>91</sup> Exhibit A, IRC, page 38 (Final Audit Report).

<sup>92</sup> Exhibit A, IRC, pages 38, 39 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 23.

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>93</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:

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>94</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. According to the claimant, 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 applying the reported 2001 diversion percentage at FCC to calculate offsetting savings for 1999-2000 and 2000-2001 because the school's annual report had not been finalized, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>95</sup>

The claimant also asserts 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. The claimant contends, using audit results for 23 other claimants under the *Integrated Waste Management* program, the application of the Controller's

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<sup>93</sup> Exhibit A, IRC, page 11.

<sup>94</sup> Exhibit A, IRC, page 13. Emphasis in original.

<sup>95</sup> Exhibit A, IRC, pages 14-16.

formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>96</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>97</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. The Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. 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>98</sup>

The Controller concludes that the claimant’s comments relating to alternatives for the disposal of solid waste are irrelevant and cites the claimant’s reports of tonnage disposed, stating that the claimant “does not indicate in these annual reports that it used any other methodology to dispose of solid waste.”<sup>99</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>100</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.”<sup>101</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, and that the evidence supports the claimant’s realization of cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>102</sup>

In response to the claimant’s argument that the Controller’s formula is a standard of general application that is an underground regulation, the Controller asserts that 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

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<sup>96</sup> Exhibit A, IRC, pages 16-18.

<sup>97</sup> Exhibit A, IRC, page 21.

<sup>98</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16-17.

<sup>99</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>100</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>101</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>102</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 18-19.

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>103</sup>

The Controller further explains that for years in which the claimant exceeded the mandated levels (25 or 50 percent) of diversion, the Controller “allocated” the offsetting savings to avoid penalizing the claimant for diverting more than the minimum percentage. According to the Controller:

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>104</sup>

The Controller defended its use of the 2001 data to calculate FCC’s diversion rates for fiscal years 1999-2000 and 2000-2001, stating that the Controller confirmed that FCC performed diversion activities in 2000, but the 2000 diversion information was not available because FCC’s annual report had not been finalized.<sup>105</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required community college districts to report their tonnage or percentage diverted, but they are still required to divert 50 percent of their solid waste. Thus, the Controller asserts that the 2007 annual report is a “fair representation” of 2008 -2011 “because the district’s recycling processes have already been established and committed to.”<sup>106</sup> 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 met its requirement to divert 50% of its solid waste.”<sup>107</sup> The Controller also cites Reedley College’s 2008 report that states: “In the source reduction area the use of electronic media also shows growth, this was identified in the addition of forms and catalogs now available on our website,” and “One of our Industrial Trades Programs now reports their recycling of tractor and farm equipment metals.”<sup>108</sup> Based on these claimant statements, the Controller states that its savings calculations for 2007-2008 through 2010-2011, could be understated.<sup>109</sup>

The Controller also responds to the claimant’s argument against the assumption that all tonnage diverted would have been disposed in a landfill, and observes that none of the claimant’s annual reports during the audit period mention that any of its waste was composted. The Controller also states that the claimant’s reference to paint or hazardous waste disposal is irrelevant because

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<sup>103</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>104</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>105</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>106</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>107</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>108</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 22 and 71 (2008 Annual Report).

<sup>109</sup> Exhibit B, Controller’s Late Comments on the IRC, page 22.

hazardous waste is not included in the diversion amounts the claimant reported, and are not included in the Controller's offsetting savings calculation.<sup>110</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on private surveys of a large percentage of landfills across California. In addition, the 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>111</sup>

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>112</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>113</sup> The Controller argues that offsetting savings apply 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 that the claimant's reference to other IWM audits is irrelevant to the current issue.<sup>114</sup>

The Controller also disagrees with the claimant's assertion that the Controller used the wrong standard of review. The Controller states that Government Code section 17561(d)(2) authorizes the Controller to audit the district's records to verify actual mandate-related costs, *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the amount claimed did not take into account any cost savings as required by the test claim statutes. 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>115</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion that the audit reductions for fiscal years 1999-2000, 2000-2001, the second half of 2003-2004, and 2004-2005 through 2010-2011 are correct as a matter of law. The Controller also agreed to reinstate to

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<sup>110</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>111</sup> Exhibit B, Controller's Late Comments on the IRC, page 23.

<sup>112</sup> Exhibit B, Controller's Late Comments on the IRC, page 23.

<sup>113</sup> Public Resources Code section 42925. Emphasis added.

<sup>114</sup> Exhibit B, Controller's Late Comments on the IRC, pages 23-24.

<sup>115</sup> Exhibit B, Controller's Late Comments on the IRC, pages 26-28.

the claimant \$3,358 for the first half of fiscal year 2003-2004, which the Draft Proposed Decision concluded was incorrectly reduced as a matter of law.<sup>116</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>117</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>118</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>119</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>116</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, page 1.

<sup>117</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>118</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>119</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>120</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>121</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>122</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 presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides 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 is “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>123</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

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<sup>120</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>121</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>122</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>123</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 84-85 (Ruling on Submitted Matter).

costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>124</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>125</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>126</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>127</sup>

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<sup>124</sup> Exhibit B, Controller’s Late Comments on the IRC, page 85 (Ruling on Submitted Matter). Emphasis added.

<sup>125</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 86-87 (Ruling on Submitted Matter).

<sup>126</sup> Exhibit B, Controller’s Late Comments on the IRC, page 84 (Ruling on Submitted Matter).

<sup>127</sup> Exhibit B, Controller’s Late Comments on the IRC, page 85 (Ruling on Submitted Matter). Emphasis added.

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

The Parameters and Guidelines are consistent with the court's ruling and require in Section IV. that "[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate."<sup>128</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>129</sup> The court's decision and the amended Parameters and Guidelines are binding.<sup>130</sup>

B. During the audit period, the claimant diverted solid waste as required by the test claim statutes, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller's finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant reported no cost savings in its reimbursement claims and asserts that no cost savings were realized, but does not explain why.<sup>131</sup>

The record shows that the claimant diverted more solid waste than required by the test claim statutes except in calendar year 2000 at Reedley College.<sup>132</sup> The test claim statute 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

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<sup>128</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>129</sup> Exhibit A, IRC, page 63 (Parameters and Guidelines).

<sup>130</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>131</sup> Exhibit A, IRC, page 9.

<sup>132</sup> Reedley College diverted 24.57 percent of its waste in 2000, just under the state requirement was 25 percent. Exhibit B, Controller's Late Comments on the IRC, pages 56 (Reedley College 2000 Annual Report) and 93.

transformation facilities by January 1, 2004.<sup>133</sup> The claimant's annual reports to CIWMB for calendar years 2000, 2001, and 2003 report diversion of 53.39 percent of the total tonnage of waste generated by FCC, which exceeds the mandated diversion requirement of 25 percent.<sup>134</sup> Reedley College achieved a diversion rate of 24.57 percent in calendar year 2000, just below the 25 percent required by the test claim statute.<sup>135</sup> Reedley College reported diversion of 25.02 to 26.11 percent for calendar years 2001 and 2003.<sup>136</sup> FCC's annual reports to CIWMB for calendar years 2004 through 2007 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, and range from 50.7 to 55.23 percent of the total tonnage of waste generated.<sup>137</sup> Similarly, the claimant's Reedley College annual reports to CIWMB for calendar years 2004 through 2007 range from 67.69 to 69.65 percent of waste diverted.<sup>138</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>139</sup> As a result, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. So if the district's per-capita 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>140</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 equal to or less than the target rate (except the FCC 2009 report, showing a student population target of 0.10, and 0.14 was achieved; however the employee population target was 1.8, and 1.3 was achieved). Thus, the claimant satisfied the requirement to divert 50 percent of its solid waste during these years.<sup>141</sup>

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<sup>133</sup> Public Resources Code section 42921; Exhibit A, IRC, pages 55 and 59 (Parameters and Guidelines, section IV.(B)(5)).

<sup>134</sup> Exhibit B, Controller's Late Comments on the IRC, pages 34-38 and 92. FCC did not report diversion for 2000 because it had not finalized its 2000 report.

<sup>135</sup> Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>136</sup> Exhibit B, Controller's Late Comments on the IRC, pages 58-61 and 92.

<sup>137</sup> Exhibit B, Controller's Late Comments on the IRC, pages 39-46 and 92.

<sup>138</sup> Exhibit B, Controller's Late Comments on the IRC, pages 62-69 and 92.

<sup>139</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>140</sup> Exhibit B, Controller's Late Comments on the IRC, pages 101-109 ("Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.)

<sup>141</sup> Exhibit B, Controller's Late Comments on the IRC, pages 47 (FCC 2008 report, showing an employee population target of 1.8, and 1.8 was achieved; and a student population target of 0.10, and 0.08 was achieved); 50 (FCC 2009 report, showing an employee population target of 1.8, and 1.3 was achieved; and a student population target of 0.10, and 0.14 was achieved); and 53 (FCC 2010 report, showing an employee population target of 1.8, and 0.80 was achieved; and a student population target of 0.10, and 0.09 was achieved), 70 (Reedley College 2008 report, showing an employee population target of 14.2, and 8.8 was achieved; and a student population target of 0.4, and 0.26 was achieved); 72 (Reedley College 2009 report, showing an employee

In addition, the claimant's 2008, 2009, and 2010 reports continue to show that the claimant had solid waste reduction programs in place. In its 2008 report, FCC listed the following programs: Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Office Paper (white), Office Paper (mixed), Scrap Metal, Xeriscaping/grasscycling, White/brown Goods, Scrap Metal, Wood Waste, and as "planned for expansion" Food Waste Composting.<sup>142</sup> In its 2009 report, FCC stated "There are no major types of waste material that we are not diverting"<sup>143</sup> and "The amount of tonnage may be up this year due to the increase of construction and clean-up we have to do."<sup>144</sup> The 2009 report also listed Food Waste Composting as an existing program, whereas in 2008 it was listed as a program that FCC planned or was expanding.<sup>145</sup> The FCC 2010 report also states that "We do not have any major types of waste materials that we are not diverting."<sup>146</sup>

Similarly, the Reedley College 2008 report states, "We now utilize a secure area that allows this processing [for recyclables] to take place without disruption. One of our Industrial Trades Programs now reports their recycling of tractor and farm equipments [sic] metals." It also states, "In the source reduction area the use of electronic media also shows growth, this was identified in the addition of forms and catalogs available on our website" and "Recycling, the participation of the campus student body in our program continues to increased [sic] by the number and type of containers used."<sup>147</sup> Also, "Salvage Yards" was listed as a program that is planned or expanding.<sup>148</sup> The Reedley College 2009 report states:

Our Food Services Department is currently eliminating plastic and paper plates and replacing them with reusable plates. • Though out [sic] our campus we have started a program that all food containers will be disposed in designated receptacles. This will greatly decrease the cross contamination of recyclable trash in the same areas.<sup>149</sup>

According to the Reedley College 2010 report, "The current program has increased its effectiveness by allowing the combining of all office and classroom recyclables in to one

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population target of 14.2, and 8.8 was achieved; and a student population target of 0.40, and 0.26 was achieved); 75 (Reedley College 2010 report, showing an employee population target of 14.2, and 9.7 was achieved; and a student population target of 0.40, and 0.27 was achieved).

<sup>142</sup> Exhibit B, Controller's Late Comments on the IRC, page 49.

<sup>143</sup> Exhibit B, Controller's Late Comments on the IRC, page 51.

<sup>144</sup> Exhibit B, Controller's Late Comments on the IRC, page 52.

<sup>145</sup> Exhibit B, Controller's Late Comments on the IRC, pages 52 and 49.

<sup>146</sup> Exhibit B, Controller's Late Comments on the IRC, page 54.

<sup>147</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>148</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>149</sup> Exhibit B, Controller's Late Comments on the IRC, page 73.

collection container. . . . Along with this we have greatly decreased the use of plastic trash bags and labor involved in the removing and reinstalling them.”<sup>150</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 CIWMB during the audit period identify the total tonnage of waste disposed and the use of a waste hauler.<sup>151</sup> Moreover, there are statements in the Reedley College<sup>152</sup> and FCC annual reports<sup>153</sup> pertaining to decreased landfill disposal, indicating that the claimant used a landfill to some extent. The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>154</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the percentage of waste diverted results in offsetting savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>155</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>156</sup> The Parameters and Guidelines, as amended pursuant to the court’s

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<sup>150</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76.

<sup>151</sup> For example, the FCC 2001 report states, “Our refuge [sic] hauler provides us with data for our Annual Report” See Exhibit B, Controller’s Late Comments on the IRC, page 36. Similar statements were made in the FCC 2003 report (p. 38) the FCC 2004 report (p. 40), the FCC 2005 report (p. 42), the FCC 2006 report (p. 44), the FCC 2007 report (p. 46), the FCC 2008 report (p. 49), the FCC 2009 report (p. 51) and the FCC 2010 report (p. 54).

<sup>152</sup> Exhibit B, Controller’s Late Comments on the IRC, page 65 (Reedley College 2005 report).

<sup>153</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 40 (FCC 2004 report), 44 (FCC 2006 report).

<sup>154</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 23, 116-138.

<sup>155</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>156</sup> Evidence Code section 500, which states: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the

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>157</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.

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

C. For fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and 2004-2005 through 2010-2011, 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 correctly determined that FCC, in all fiscal years of the audit period, diverted more solid waste than the amount mandated by the test claim statute. The Controller also correctly determined that Reedley College diverted more solid waste than mandated by the state in the second half of fiscal years 2000-2001 and 2003-2004, and in fiscal years 2004-2005 through 2010-2011.<sup>158</sup>

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claim for relief or defense that he is asserting.” See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that “the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon.” This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article 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>157</sup> Exhibit A, IRC, page 99 (Parameters and Guidelines). Emphasis added.

<sup>158</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 92-93.

For those years when the claimant exceeded the mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 or 50 percent) by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized for those years.<sup>159</sup>

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

This formula works to allocate or *reduce* cost savings to reflect the mandated rate of diversion, and is intended to prevent penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>160</sup>

For calendar year 2000, Reedley College achieved a 24.7 percent diversion rate, which the Controller correctly determined did *not* reach the 25 percent diversion rate mandated by the state. To calculate cost savings for that year, the Controller multiplied 100 percent of the solid waste diverted by the claimant for the year (390.2 tons) by the avoided landfill disposal fee (based on the statewide average fee of \$36.39), for a total offset of \$14,200.<sup>161</sup>

These formulas are consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>162</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>163</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the percentage of waste diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted. In years when the claimant exceeded the mandated diversion rates, the Controller’s formula limits the offset to reflect the mandated rate.

<sup>159</sup> Exhibit A, IRC, pages 37-38; Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>160</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 20-21.

<sup>161</sup> Exhibit B, Controller’s Late Comments on the IRC, page 93.

<sup>162</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 84-85 (Ruling on Submitted Matter). Emphasis added.

<sup>163</sup> Exhibit A, IRC, page 63 (Parameters and Guidelines).



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

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>164</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>165</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state's account as required by the test claim statutes, and the claimant's failure to comply with the law does not make the Controller's calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: "[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs."<sup>166</sup>

The claimant next asserts that the Controller's formula is an underground regulation.<sup>167</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>168</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because "[t]he District did not claim landfill costs, so there are none to be offset."<sup>169</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>170</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

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<sup>164</sup> Exhibit A, IRC, page 13.

<sup>165</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>166</sup> Exhibit B, Controller's Late Comments on the IRC, page 84 (Ruling on Submitted Matter).

<sup>167</sup> Exhibit A, IRC, page 14.

<sup>168</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>169</sup> Exhibit A, IRC, page 17.

<sup>170</sup> Exhibit A, IRC, page 59 (Parameters and Guidelines).

disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>171</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>172</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; the Controller’s use of the 2001 annual report of tonnage diverted at FCC to calculate offsetting savings for fiscal years 1999-2000 and 2000-2001; the assumption that all diverted waste would have been disposed in a landfill; and the assumption that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>173</sup>

The Controller’s assumptions, however, are supported by evidence in the record, and the claimant has filed no evidence to rebut them. The Controller applied the diversion percentage achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the claimant’s diversion program was well-established by 2007, and the claimant’s reports of subsequent years reflect continued diversion. The claimant’s reports for 2008, 2009, and 2010 show that the claimant’s annual per capita disposal rate for both the employee and student populations was below or near the target rate (the only higher disposal rate was in the FCC 2009 report, showing a student population target of 0.10, and 0.14 was achieved; however the employee population target was 1.8, and 1.3 was achieved). Overall, the evidence indicates that the claimant satisfied the requirement to divert 50 percent of its solid waste during these years.<sup>174</sup>

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<sup>171</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 84-85 (Ruling on Submitted Matter).

<sup>172</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 84 (Ruling on Submitted Matter).

<sup>173</sup> Exhibit A, IRC, pages 15-16.

<sup>174</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 47 (FCC 2008 report, showing an employee population target of 1.8, and 1.8 was achieved; and a student population target of 0.10, and 0.08 was achieved); 50 (FCC 2009 report, showing an employee population target of 1.8, and 1.3 was achieved; and a student population target of 0.10, and 0.14 was achieved); and 53 (FCC 2010 report, showing an employee population target of 1.8, and 0.80 was achieved; and a student population target of 0.10, and 0.09 was achieved), 70 (Reedley College 2008 report, showing an employee population target of 14.2, and 8.8 was achieved; and a student population target of 0.4, and 0.26 was achieved); 72 (Reedley College 2009 report, showing an employee population target of 14.2, and 8.8 was achieved; and a student population target of 0.40, and 0.26

In addition, the claimant's 2008, 2009, and 2010 reports continue to show that the claimant had solid waste reduction programs in place. In its 2008 report, FCC listed the following programs: Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Office Paper (white), Office Paper (mixed), Scrap Metal, Xeriscaping/grasscycling, White/brown Goods, Scrap Metal, Wood Waste, and as "planned for expansion" Food Waste Composting.<sup>175</sup> In its 2009 report, FCC stated "There are no major types of waste material that we are not diverting"<sup>176</sup> and "The amount of tonnage may be up this year due to the increase of construction and clean-up we have to do."<sup>177</sup> The 2009 report also listed Food Waste Composting as an existing program, whereas in 2008 it was listed as a program FCC planned to begin or expand.<sup>178</sup> The FCC 2010 report also states that "We do not have any major types of waste materials that we are not diverting."<sup>179</sup>

Similarly, the Reedley College 2008 report states, "One of our Industrial Trades Programs now reports their recycling of tractor and farm equipments [sic] metals." It also states, "In the source reduction area the use of electronic media also shows growth, this was identified in the addition of forms and catalogs available on our website" and "Recycling, the participation of the campus student body in our program continues to increased [sic] by the number and type of containers used."<sup>180</sup> Also, "Salvage Yards" was listed as a program that is planned or expanding.<sup>181</sup> The Reedley College 2009 report states, "Our Food Services Department is currently eliminating plastic and paper plates and replacing them with reusable plates. Though out [sic] our campus we have started a program that all food containers will be disposed in designated receptacles. This will greatly decrease the cross contamination of recyclable trash in the same areas."<sup>182</sup> According to the Reedley College 2010 report, "The current program has increased its effectiveness by allowing the combining of all office and classroom recyclables in to one collection container. . . . Along with this we have greatly decreased the use of plastic trash bags and labor involved in the removing and reinstalling them."<sup>183</sup> Thus, there is evidence in the record that for 2008 through 2010, the claimant met or exceeded the diversion rates reported in 2007.

Evidence in the record also supports the Controller's use of FCC's 2001 annual report of tonnage diverted to calculate offsetting savings for FCC for fiscal years 1999-2000 and 2000-2001. The

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was achieved); 75 (Reedley College 2010 report, showing an employee population target of 14.2, and 9.7 was achieved; and a student population target of 0.40, and 0.27 was achieved).

<sup>175</sup> Exhibit B, Controller's Late Comments on the IRC, page 49.

<sup>176</sup> Exhibit B, Controller's Late Comments on the IRC, page 51.

<sup>177</sup> Exhibit B, Controller's Late Comments on the IRC, page 52.

<sup>178</sup> Exhibit B, Controller's Late Comments on the IRC, pages 52 and 49.

<sup>179</sup> Exhibit B, Controller's Late Comments on the IRC, page 54.

<sup>180</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>181</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>182</sup> Exhibit B, Controller's Late Comments on the IRC, page 73.

<sup>183</sup> Exhibit B, Controller's Late Comments on the IRC, page 76.

Controller used the 2001 data because FCC's 2000 report stated "Annual Report has not been finalized."<sup>184</sup> However, the record shows that the claimant diverted solid waste in fiscal years 1999-2000 and 2000-2001. Salary and benefit costs were claimed for custodians and gardeners to perform diversion activities in fiscal years 1999-2000 and FY 2000-01.<sup>185</sup> Moreover, FCC's 2001 annual report states "we have increased recycling of beverage containers and the expansion of recycling of paper in the classrooms,"<sup>186</sup> indicating that FCC had been diverting waste prior to the 2001 annual report. And as the Controller stated in the audit report, the claimant did not provide documentation supporting a different "diversion percentage."<sup>187</sup>

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

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

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

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>192</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

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<sup>184</sup> Exhibit B, Controller's Late Comments on the IRC, page 34 (FCC 2000 Annual Report).

<sup>185</sup> Exhibit A, IRC, pages 210-213 (1999-2000 Reimbursement Claim, \$28,356 claimed), 215-218 (2000-2001 Reimbursement Claim, \$25,358 claimed). Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>186</sup> Exhibit B, Controller's Late Comments on the IRC, page 36 (FCC 2001 Annual Report).

<sup>187</sup> Exhibit A, IRC, page 38 (Audit Report).

<sup>188</sup> Exhibit B, Controller's Late Comments on the IRC, page 23.

<sup>189</sup> Exhibit A, IRC, page 39.

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

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

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

Accordingly, the Controller's calculations of cost savings for fiscal years 1999-2000, 2000-2001, the second half of fiscal year 2003-2004, and fiscal years 2004-2005 through 2010-2011, are correct as a matter of law, and are not arbitrary, capricious, or entirely lacking in evidentiary support.

D. The Controller's calculation of cost savings for the first half of fiscal year 2003-2004 for both colleges 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, Reedley College achieved an actual diversion rate of 26.11 percent. The Controller found that Reedley College did not achieve the mandated "50 percent" diversion rate in the first half of fiscal year 2003-2004, even though only 25 percent was required during calendar year 2003. Thus, the Controller did not allocate the diversion to calculate cost savings, but used 100 percent of the solid waste diverted to calculate offsetting savings.<sup>193</sup> In addition, FCC achieved an actual diversion rate of 53.59 percent in the first half of fiscal year 2003-2004.<sup>194</sup> The Controller allocated the diversion rate for FCC, as it did for the other fiscal years, because the claimant exceeded the mandate, but used a 50 percent rate to calculate the allocated diversion rate, when the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>195</sup> The requirement to divert 50 percent of all solid waste did not become operative until January 1, 2004.<sup>196</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>197</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>198</sup>

However, the Controller's calculation of cost savings, which applied a 50 percent diversion rate to the period from July 1, 2003, through December 31, 2003, instead of the mandated 25 percent diversion rate, is incorrect as a matter of law.<sup>199</sup> In this respect, the Controller's finding, that Reedley College's 26.11 percent diversion of solid waste for the first half of fiscal year 2003-2004 did not achieve the mandated diversion rate, is incorrect as a matter of law. And the

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<sup>193</sup> Exhibit A, IRC, page 35, footnote 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 93.

<sup>194</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>195</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

<sup>196</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 95 (Parameters and Guidelines).

<sup>197</sup> Exhibit A, IRC, page 95 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>198</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>199</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-93.

Controller's calculation of cost savings for FCC incorrectly applied a 50 percent diversion level to calculate the allocated diversion rate, instead of the mandated 25 percent diversion level.

Moreover, the Controller's calculation of offsetting savings for both colleges, which did not reduce cost savings by allocating the diversion rate to reflect the 25 percent mandated diversion rate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support. As indicated above, the Controller's formula for offsetting cost savings for years in which the claimant exceeded the diversion mandate, which allocates the diversion based on the mandated rate, is consistent with the test claim statutes and the court's decision on this program. That allocated rate is the percentage of solid waste required to be diverted (25 percent in the first half of fiscal year 2003-2004) 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 CIWMB), multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>200</sup>

Applying the Controller's formula (for years when the claimant exceeded the diversion mandate) to the first half of fiscal year 2003-2004, using the 25 percent diversion requirement to allocate the tons of waste diverted, results in offsetting costs savings of:

- \$7,166 for Reedley College (25 percent divided by 26.11 percent, multiplied by 203.2 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$7,484 as calculated by the Controller using a 100 percent of the solid waste diverted; and
- \$3,039 for FCC (25 percent divided by 53.59 percent, multiplied by 176.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than the \$6,079 calculated by the Controller using a 50 percent diversion rate.

Thus, the difference between the Controller's calculated reduction (\$13,563) and the amount that should have been reduced (\$10,205) is \$3,358, which has been incorrectly reduced.<sup>201</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion and agreed to reinstate to the claimant \$3,358 for the first half of fiscal year 2003-2004.<sup>202</sup>

Accordingly, the Commission finds that the reduction of costs 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.

## **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

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<sup>200</sup> Exhibit A, IRC, pages 34 - 35 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, page 77.

<sup>201</sup> Exhibit B, Controller's Late Comments on the IRC, pages 37 (FCC 2003 Annual Report), 60 (Reedley 2003 Annual Report) and 92-93.

<sup>202</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, page 1.

fiscal years 2004-2005 through 2010-2011 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 is partially 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 \$10,205, rather than \$13,563. Therefore, the difference of \$3,358 has been incorrectly reduced and should be reinstated to the 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 \$3,358 to the claimant.