



September 1, 2016

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Mr. Dustin Claussen  
City of Hayward  
777 B Street  
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Ms. Jill Kanemasu  
State Controller's Office  
Division of Accounting and Reporting  
3301 C Street, Suite 700  
Sacramento, CA 95816

*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**  
*Animal Adoption*, 11-9811-I-01  
Civil Code Sections 1834 and 1846; Food and Agriculture Code Sections  
31108, 31752, 31752.5, 31753, 32001, and 32003; As Added or Amended by  
Statutes 1998, Chapter 752 (SB 1785)  
Fiscal Years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003;  
2005-2006, 2006-2007, and 2007-2008  
City of Hayward, Claimant

Dear Mr. Rewolinski, Mr. Claussen, and Ms. Kanemasu:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

### **Written Comments**

Written comments may be filed on the Draft Proposed Decision by **September 22, 2016**. You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to [http://www.csm.ca.gov/dropbox\\_procedures.php](http://www.csm.ca.gov/dropbox_procedures.php) on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

### **Hearing**

This matter is set for hearing on **Friday, October 28, 2016**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about October 14, 2016. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,



Heather Halsey  
Executive Director

**ITEM \_\_**  
**INCORRECT REDUCTION CLAIM**  
**DRAFT PROPOSED DECISION**

Civil Code Sections 1834 and 1846;  
Food and Agriculture Code Sections 31108, 31752, 31752.5, 31753, 32001, and 32003;  
As Added or Amended by Statutes of 1998, Chapter 752 (SB 1785)

*Animal Adoption*

Fiscal Years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003,  
2005-2006, 2006-2007, and 2007-2008

11-9811-I-01

City of Hayward, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Incorrect Reduction Claim (IRC) addresses reductions made by the State Controller's Office (Controller) to reimbursement claims filed by the City of Hayward (claimant) for costs incurred during fiscal years 1998-1999 through 2007-2008, excluding fiscal years 2003-2004 and 2004-2005, under the *Animal Adoption* program.

The following issues are in dispute:

- The Controller's application of the *Purifoy* holding;<sup>1</sup>
- Reductions of space and facilities acquisition costs (Finding 2) taken in fiscal year 1998-1999 on the basis of the period of reimbursement for the increased holding period for dogs and cats, which begins only on or after July 1, 1999;
- Reductions of space and facilities acquisition costs (Finding 2) taken in fiscal years 1999-2000 and 2000-2001 on the basis of a lack of supporting documentation or incomplete animal population data;
- Reductions of care and maintenance costs (Finding 3) taken on the basis of unsupported salaries and benefits, commingled veterinary care costs, unsupported or missing animal census data, ineligible animals, and incorrectly calculated reimbursable days;
- Reductions of salaries and benefits to make animals available for adoption or owner redemption on Saturdays or weekday evenings (Finding 4), taken based on the hours that the shelter was actually open for owner redemption, the staff necessary to make animals

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<sup>1</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

available, and the correct period of reimbursement for costs associated with the increased holding period for dogs and cats;

- Adjustments to necessary and prompt veterinary care costs (Finding 8);
- Reductions of kennel equipment procurement costs taken on the basis of an asserted incorrect formula for pro rata apportionment of costs (Finding 9); and
- Adjustments to computer equipment procurement costs (Finding 9).

### The Animal Adoption Program

The *Animal Adoption* program arose from amendments to the Civil Code and Food and Agriculture Code made by Statutes 1998, chapter 752 (SB 1785<sup>2</sup>). The purpose of the test claim statute was to carry out the state policy that “*no adoptable animal* should be euthanized if it can be adopted into a suitable home” and “*no treatable animal* should be euthanized.”<sup>3</sup> Generally, the program increases the holding period to allow for the adoption and redemption of stray and abandoned dogs, cats, and other specified animals before the local agency can euthanize the animal, and requires:

- verification of the temperament of feral cats;
- posting of lost and found lists;
- maintenance of records for impounded animals; and
- that impounded animals receive “necessary and prompt veterinary care.”

On January 25, 2001, the Commission partially approved the test claim, for the increased costs in performing the following activities only:

1. Providing care and maintenance during the increased holding period for impounded dogs and cats that are ultimately euthanized. The increased holding period shall be measured by calculating the difference between three days from the day of capture and four business days from the day after impoundment, as specified below in 3 (a) and 3 (b), or six business days from the day after impoundment (Food & Agr. Code, §§ 31108, 31752);
2. Providing care and maintenance for four business days from the day after impoundment, as specified below in 3 (a) and 3 (b), or six business days from the day after impoundment, for impounded rabbits, guinea pigs, hamsters, pot-bellied pigs, birds, lizards, snakes, turtles, or tortoises legally allowed as personal property that are ultimately euthanized (Food & Agr. Code, § 31753);
3. For dogs, cats, and other specified animals held for four business days after the day of impoundment, either:

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<sup>2</sup> Sometimes referred to as the Hayden Bill.

<sup>3</sup> Civil Code section 1834.4, Penal Code section 559d, and Food and Agricultural Code section 17005 as added or amended by Statutes 1998, chapter 752.

- (a) Making the animal available for owner redemption on one weekday evening until at least 7:00 p.m., or one weekend day; or
  - (b) For those local agencies with fewer than three full-time employees or that are not open during all regular weekday business hours, establishing a procedure to enable owners to reclaim their animals by appointment at a mutually agreeable time when the agency would otherwise be closed (Food & Agr., Code §§ 31108, 31752, and 31753);
4. Verifying whether a cat is feral or tame by using a standardized protocol (Food & Agr. Code, § 31752.5);
5. Posting lost and found lists (Food & Agr. Code, § 32001);
6. Maintaining records on animals that are not medically treated by a veterinarian, but are either taken up, euthanized after the holding period, or impounded (Food & Agr. Code, § 32003); and
7. Providing “necessary and prompt veterinary care” for abandoned animals, other than injured cats and dogs given emergency treatment, that are ultimately euthanized (Civ.Code, §§ 1834 and 1846).

The Commission adopted the Parameters and Guidelines for this program on February 28, 2002. The Parameters and Guidelines, in addition to the activities identified in the Test Claim Decision, as described above, provide reimbursement for one-time activities of developing policies and procedures; training; and developing or procuring computer software for maintaining records; as well as ongoing costs for:

- Acquisition of additional space or construction of new facilities, by purchase or lease, to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals;<sup>4</sup> and
- Remodeling/renovating existing facilities to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals.<sup>5</sup>

On March 12, 2003, the Joint Legislative Audit Committee authorized an audit of the *Animal Adoption* mandate, which was completed by the Bureau of State Audits on October 15, 2003. The audit report recommended that the Legislature direct the Commission to amend the Parameters and Guidelines to correct the formula for determining the reimbursable portion of acquiring additional shelter space. In 2004, AB 2224 (Stats. 2004, ch. 313) was enacted to direct the Commission to amend the Parameters and Guidelines for the *Animal Adoption* program to:

1. Amend the formula for determining the reimbursable portion of acquiring or building additional shelter space that is larger than needed to comply with the increased holding

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<sup>4</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 3.

<sup>5</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 5.

period to specify that costs incurred to address preexisting shelter overcrowding or animal population growth are not reimbursable.

2. Clarify how the costs for care and maintenance shall be calculated.
3. Detail the documentation necessary to support reimbursement claims under this mandate, in consultation with the Bureau of State Audits and the Controller's office.

On January 26, 2006, the Commission adopted the amended Parameters and Guidelines, applicable to claims beginning July 1, 2005, in accordance with AB 2224, to require, among other things, contemporaneous source documents to show the validity of costs claimed and their relationship to the reimbursable activities. The 2006 amendment also amended the formula for determining the reimbursable portion of acquiring or building additional shelter space and clarified the definition of “average daily census” of dogs and cats, for purposes of the formula used to calculate care and maintenance costs; this amendment is clarifying only, and does not affect the methodology used to calculate actual costs for this component.<sup>6</sup>

### **Procedural History**

On September 4, 2002, the claimant’s reimbursement claims for fiscal years 1998-1999, 1999-2000, and 2000-2001 were filed with the Controller.<sup>7</sup> On August 10, 2006, claimant’s fiscal year 1998-1999 claim was first paid.<sup>8</sup> On August 3, 2006, claimant’s fiscal year 1999-2000 and 2000-2001 claims were first paid.<sup>9</sup> On May 12, 2009, the Controller notified the claimant of an entrance conference, scheduled for June 8, 2009, to audit the claimant’s *Animal Adoption* claims for fiscal years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2005-2006, 2006-2007, and 2007-2008.<sup>10</sup>

On May 6, 2011, the Controller issued the Final Audit Report.<sup>11</sup> On March 8, 2012, claimant filed the IRC.<sup>12</sup> On January 8, 2015, the Controller filed late comments on the IRC.<sup>13</sup>

On June 14, 2016, Commission staff issued the Request for Additional Information regarding the dates the claims were paid.<sup>14</sup> On June 23, 2016, the Controller responded with the requested information.<sup>15</sup>

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<sup>6</sup> Exhibit X, Amended Parameters and Guidelines, January 26, 2006.

<sup>7</sup> Exhibit D, Controller’s Response to the Request for Additional Information, page 7.

<sup>8</sup> Exhibit D, Controller’s Response to the Request for Additional Information, page 57.

<sup>9</sup> Exhibit D, Controller’s Response to the Request for Additional Information, pages 59; 61.

<sup>10</sup> Exhibit D, Controller’s Response to the Request for Additional Information, page 63.

<sup>11</sup> Exhibit A, IRC, page 2.

<sup>12</sup> Exhibit A, IRC, page 1.

<sup>13</sup> Exhibit B, Controller’s Late Comments on the IRC, page 1.

<sup>14</sup> Exhibit C, Commission Request for Additional Information, June 14, 2016.

<sup>15</sup> Exhibit D, Controller’s Response to the Request for Additional Information, June 23, 2016.

On September 1, 2016, Commission staff issued the Draft Proposed Decision.<sup>16</sup>

### **Commission Responsibilities**

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

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

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>17</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>18</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>19</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 claimant.<sup>20</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>21</sup>

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<sup>16</sup> Exhibit E, Draft Proposed Decision.

<sup>17</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>18</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>19</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>20</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>21</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil

**Claims**

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

Issue	Description	Staff Recommendation
<p>Period of limitation for audit</p>	<p>Government Code section 17558.5 requires that an audit be initiated no later than three years after the claim is filed or last amended, or, if no payment is made, the time to initiate the audit begins to run as of the date of initial payment of the claim. In either case, the audit must be completed within two years of the date commenced.</p>	<p><i>The audit was both timely initiated and timely completed</i> – Reimbursement claims for the first three years of the audit period were filed on September 4, 2002, but not paid until August 2006. The audit was initiated on either May 12 or June 8 of 2009, less than three years after the initial payment. The final audit report was completed May 6, 2011, less than two years after either of the possible audit initiation dates, based on the evidence in the record.</p>
<p>The Controller’s exclusion of “ineligible animals” when auditing allowable costs for space and facilities acquisition (Finding 2); care and maintenance (Finding 3); necessary and prompt veterinary care (Finding 8); and medical and kennel equipment procurement (Finding 9).</p>	<p>The Parameters and Guidelines authorize local agencies to claim reimbursement for the cost of care and maintenance and prompt and necessary veterinary care for impounded stray or abandoned animals that “die during the increased holding period or are ultimately euthanized.” From the population of “eligible animals,” the Controller’s exclusions may include, but are not limited to, the following:</p> <ul style="list-style-type: none"> <li>• “Ineligible other animals such as rodents, livestock, or wild animals;” and ineligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls.”</li> </ul>	<p><i>Partially Correct</i> – The Controller’s exclusion of ineligible animals is correct as a matter of law, except to the extent they were made on the following bases, which are incorrect as a matter of law and are arbitrary, capricious, or entirely lacking in evidentiary support:</p> <ul style="list-style-type: none"> <li>• The exclusion of specified “birds” and “other animals” legally allowed as personal property and, thus subject to the protection of the mandated activities.</li> <li>• The exclusion of animals deemed treatable upon arrival at the shelter and</li> </ul>

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.

	<ul style="list-style-type: none"> <li>• Animals deemed treatable upon arrival at the shelter and later euthanized during the increased holding period because they became non-rehabilitatable.</li> <li>• Animals that may have been euthanized during the holding period because of the claimant’s misinterpretation of the required holding period in conflict with the Court of Appeal’s decision in <i>Purifoy v. Howell</i> (2010) 183 Cal.App.4th 166, which held that Saturday is not a “business day” for purposes of calculating the required holding period before an animal can be adopted or euthanized.</li> </ul>	<p>later euthanized <i>during</i> the increased holding period because they became non-rehabilitatable.</p> <ul style="list-style-type: none"> <li>• Exclusions of “eligible animals” held for the required duration under <i>Purifoy</i>, based on the Controller’s recalculation of costs using an <i>average</i> number of days.</li> </ul>
<p>The remaining reductions made in Finding 2 to space and facilities acquisition costs to comply with the increased holding period based on the operative dates of the test claim statutes.</p>	<p>The Controller reduced costs for space and facilities acquisition based on the Parameters and Guidelines limiting reimbursement for costs related to the increased holding period for dogs and cats to fiscal year 1999-2000 and after. However, the Parameters and Guidelines authorized reimbursement for all other activities of the test claim statute, including construction and facilities acquisition, beginning January 1, 1999. The Controller also reduced costs for space and facilities acquisition for fiscal years 1999-2000 and 2000-2001 based on a lack of documentation to establish the number of animals for which reimbursement is required, and the Controller estimated the correct population data based on the claimant’s database information and averages of the later years of the audit period.</p>	<p><i>Partially Correct</i> – The Controller’s reduction in Finding 2 of space and facilities acquisition costs for fiscal year 1998-1999, based on excluding space and facilities acquisition costs for cats and dogs incurred prior to July 1, 1999, is inconsistent with the Parameters and Guidelines, which authorize construction and facilities acquisition costs beginning January 1, 1999 and so is incorrect as a matter of law. Except as discussed under “eligible animals,” above, reductions of costs for fiscal years 1999-2000 and 2000-2001 based on a lack of supporting documentation, are correct as a matter of law, and there is no evidence that the recalculation of costs was arbitrary, capricious, or entirely lacking in evidentiary support.</p>
<p>The remaining reductions made in</p>	<p>The Controller recalculated care and maintenance costs entirely, first</p>	<p><i>Partially Correct</i> – Except as discussed under section B. of</p>

<p>Finding 3 to care and maintenance costs based on unsupported estimated costs, unsupported or missing animal census data, reduction of eligible animals, and recalculation of reimbursable days.</p>	<p>reducing total annual costs based on unsupported or lacking documentation, adjusting animal census figures that were not supported, reducing eligible animals based on unspecified exclusions in the Parameters and Guidelines and on the Controller’s interpretation of the <i>Purifoy</i> decision which increased the average number of reimbursable days for which reimbursement is required.</p>	<p>this Decision, the Controller’s reductions in Finding 3 of total annual costs, based on unsupported estimates, or documentation provided after the reimbursement claims were filed and during the pendency of the audit, are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. However, adjustments to annual animal census figures throughout the audit period, absent explanation or analysis, are arbitrary, capricious, and entirely lacking in evidentiary support.</p>
<p>Reductions made in Finding 4 to salaries and benefits to make animals available for adoption or owner redemption on Saturdays or weekday evenings.</p>	<p>The Controller reduced salaries and benefits claimed to make animals available for adoption or owner redemption based on the period of reimbursement for the increased holding period for dogs and cats, which began July 1, 1999.</p> <p>The Controller also reduced salaries and benefits claimed to make animals available for adoption or owner redemption based on the claimant’s reporting of hours and days that the shelter was open for adoption, and based on the incremental increase in staffing required to comply with this mandate component.</p>	<p><i>Correct</i> – The reduction of salaries and benefits and related indirect costs to make animals available for adoption or redemption for fiscal year 1998-1999, in proportion to the number dogs and cats held prior to July 1, 1999, is consistent with the Parameters and Guidelines, and is correct as a matter of law. Additionally, the reductions based on the days that claimant’s shelter was open for owner redemption, and based on the staff hours that the claimant could not support as being attributable to the mandated activities, are consistent with the Parameters and Guidelines and not arbitrary, capricious, or entirely lacking in evidentiary support.</p>
<p>The remaining reductions made in Finding 8 to necessary and</p>	<p>The Controller found an understatement of necessary and prompt veterinary care costs.</p>	<p><i>No Finding</i> – The Commission does not have jurisdiction to analyze the Controller’s adjustment of costs for necessary and prompt</p>

prompt veterinary care costs.		veterinary care under Finding 8, because there is no reduction.
The remaining reductions made in Finding 9 to medical and kennel equipment procurement costs for fiscal year 2005-2006.	The Controller reduced claimant's costs for medical and kennel equipment for fiscal year 2005-2006 based on the claimant allegedly using the "wrong pro rata percentage," and recalculated using the same formula for care and maintenance costs, which is not provided for in the Parameters and Guidelines.	<i>Incorrect</i> – The Controller's reduction and recalculation of equipment procurement costs for fiscal year 2005-2006, using an average figure for reimbursable days, using a formula not provided for in the Parameters and Guidelines, and without articulating any specific flaw in the claimant's methodology, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.
The remaining reductions made in Finding 9 to computer equipment procurement costs for fiscal years 1999-2000 and 2000-2001.	The Controller found an understatement of computer equipment procurement costs.	<i>No Finding</i> – The Commission does not have jurisdiction to analyze the Controller's adjustment of costs for computer equipment under Finding 9, because there is no reduction.

**Staff Analysis**

**A. The Audit Was Both Timely Initiated and Timely Completed.**

Government Code section 17558.5, as amended effective January 1, 2003, states that a reimbursement claim for mandated costs is subject to the initiation of an audit no later than three years after the claim is filed or last amended, whichever is later.<sup>22</sup> However, the section further provides that "if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim."<sup>23</sup> The section then states that "[i]n any case, an audit shall be completed not later than two years after the date that the audit is commenced."<sup>24</sup>

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<sup>22</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

<sup>23</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

<sup>24</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

Reimbursement claims for the first three years of the audit period were filed on September 4, 2002, but not paid until August 2006.<sup>25</sup> There is no law or regulation that expressly states what event constitutes the initiation of the audit. Here, the entrance conference letter is dated May 12, 2009, and the entrance conference was scheduled to occur on June 8, 2009.<sup>26</sup> Thus, the audit was initiated on either May 12 or June 8 of 2009, less than three years after the initial payment.

The final audit report was completed May 6, 2011, less than two years after either of the possible audit initiation dates, based on the evidence in the record. Because the audit was initiated no later than June 8, 2009,<sup>27</sup> the final audit report dated May 6, 2011<sup>28</sup> constitutes timely completion within two years as required by Government Code section 17558.5.

**B. The Controller’s Exclusions of What It Deems “Ineligible Animals” Are Partially Incorrect as a Matter of Law, and Are Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support, Resulting in Some Incorrect Reductions in Findings 2 (Space and Facilities Acquisition), 3 (Care and Maintenance), 8 (Necessary and Prompt Veterinary Care), and 9 (Equipment Procurement) of the Audit Report.**

The Parameters and Guidelines for the *Animal Adoption* program authorize local agencies to claim reimbursement for the costs of care and maintenance during the increased holding period for impounded stray or abandoned animals that “die during the increased holding period or are ultimately euthanized,” based on a formula for determining actual costs. The Parameters and Guidelines also authorize reimbursement for providing necessary and prompt veterinary care as specified in the Parameters and Guidelines during the holding period for stray and abandoned animals that “die during the increased holding period or are ultimately euthanized.” Claimants are to calculate and claim their costs for these activities in part by determining the number of “stray or abandoned animals that die during the increased holding period or are ultimately euthanized.” The Controller calls this factor of the calculation “eligible animals” or “eligible animal population.”

The Controller, with regard to its audit of allowable costs for Findings 2 (Space and Facilities Acquisition), 3 (Care and Maintenance), 8 (Necessary and Prompt Veterinary Care), and 9 (Equipment Procurement), states that the following ineligible animals were excluded from the population of “eligible animals” as follows:

For FY 2000-01, we analyzed the city’s animal database information and revised the eligible number of animals from 2,075 to 1,181. As previously mentioned, the city did not provide a worksheet showing how it determined that 2,075 animals were eligible. In our analysis, we applied *the requirements of the parameters and guidelines*, and eligible animals include those that died during the increased

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<sup>25</sup> Exhibit D, Controller’s Response to the Request for Additional Information, pages 7, 57, 59, and 61.

<sup>26</sup> Exhibit D, Controller’s Response to the Request for Additional Information, page 63.

<sup>27</sup> Exhibit D, Controller’s Response to the Request for Additional Information, page 63.

<sup>28</sup> Exhibit A, IRC, page 12.

holding period plus those that were ultimately euthanized (i.e., euthanized after the required holding period). Our analysis took into account that Saturday was not to be considered as a business day, which is consistent with the Appellate Court decision in the case of *Purifoy et al v. Howell*.<sup>29</sup>

The Controller does not specify how many animals were excluded for which of the above specified reasons except to say “However, had we considered Saturday as a business day, the number of eligible animals would have only increased by 147, from 1,181 to 1,328 and allowable costs would have increased by \$12,183.”<sup>30</sup>

Therefore, 44 percent of claimed eligible animals were excluded by the Controller and only 16 percent of those excluded were excluded based on the exclusion of Saturday as a business day consistent with *Purifoy*. Therefore, we can deduce that 84 percent of “ineligible animals” excluded were excluded on the basis that they were euthanized or died before the extended holding period, were euthanized during the extended holding period, or were excluded based on the Controller’s interpretation of some unspecified provision of the Parameters and Guidelines.

In other audits on this program however, the Controller has specified that application of the requirements of the Parameters and Guidelines means:

- Dogs and cats and other animals that were owner-surrendered or previously owned (only stray animals were included in the eligible population);
- Dogs, cats, and other animals that were ultimately adopted, transferred, rescued, or redeemed (only those animals with the outcome of “died” or “euthanized” were reviewed);
- Dogs, cats, and other animals that went missing from their kennels, were stolen, or escaped;
- Dogs, cats, and other animals that were DOA [dead on arrival];
- Dogs, cats, and other animals that were euthanized as requested by owners or if euthanasia was required/requested (“Dispo Req” or “Euth Req”);
- Dogs, cats, and other animals that were euthanized for humane reasons (usually on day 1);
- Dogs, cats, and other animals that were suffering from a serious illness or severe injury (usually euthanized on day 1 or died on day 1);
- Newborn animals that need maternal care and were impounded without their mothers (usually died or were euthanized within the first few days; the excluded categories included “Unweaned” or “8 weeks unsustainable”);
- Ineligible other animals such as rodents, livestock, or wild animals;

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<sup>29</sup> Exhibit A, IRC, page 32 (Final Audit Report), emphasis added.

<sup>30</sup> Exhibit A, IRC, page 32 (Final Audit Report).

- Ineligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls;
- Dogs and cats that died in the shelter’s kennels outside of increased holding period (days 1, 2, 3, and day 7 and beyond), as per the requirements of the mandate. (Local agencies are eligible to receive reimbursement to care for dogs and cats that *died during the increased holding period* [days 4, 5, and 6]);
- “Other” animals that died in the shelters’ kennels on day 7 and beyond (after the increased holding period). (Local agencies are eligible to receive reimbursement to care for other animals that *died during the increased holding period* [days 2, 3 through 6].); and
- Dogs, cats, and other animals that were euthanized during the holding period as per the requirements of the mandate. The agencies are eligible to receive reimbursement to care for dogs and cats and other animals that were *euthanized after the holding period* (day 7 of the holding period and beyond).<sup>31</sup>

Staff cannot determine based on the audit report or record whether the Controller’s exclusions of ineligible animals are correct as a matter of law. Assuming that the exclusions in this case were for the same reasons as were specified in *Animal Adoption*, 13-9811-I-02, however, the Commission finds that these exclusions are correct as a matter of law, *except* as provided below.

1. Any reduction of costs relating to the Controller’s exclusion of specified “birds” and “other animals” “legally allowed as personal property” and thus subject to the protection of the mandated activities is incorrect as a matter of law and is arbitrary, capricious, and entirely lacking in evidentiary support.

To the extent the Controller excluded “[i]neligible other animals such as rodents, livestock, or wild animals;” and “[i]neligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls” from reimbursement, without any findings whether these animals can legally be owned as personal property, this exclusion is incorrect as a matter of law and is arbitrary, capricious and entirely lacking in evidentiary support. The test claim statute mandates the claimant to hold rabbits. Rabbits may be classified as livestock,<sup>32</sup> pets,<sup>33</sup> or wild animals<sup>34</sup> depending on the breed and the owner. However, there are no findings or evidence in the record whether the Controller’s exclusion of “livestock” or “wild animals” included rabbits that are

<sup>31</sup> See *Animal Adoption*, 13-9811-I-02, Exhibit A, IRC, pages 688-689 (pages 21 and 22 of the Audit Report).

<sup>32</sup> “Livestock” is undefined in California law, but rabbits are listed as “specialty livestock” by the United States Department of Agriculture, See <https://www.nal.usda.gov/afsic/specialty-livestock>.

<sup>33</sup> See California Penal Code section: (“Pet animals” means dogs, cats, monkeys and other primates, *rabbits*, birds, guinea pigs, hamsters, mice, snakes, iguanas, turtles, and any other species of animal sold or retained for the purpose of being kept as a household pet.) Emphasis added.

<sup>34</sup> See, e.g. 50 Code of Federal Regulations Part 17, listing the riparian brush rabbit as an endangered species.

legally allowed as pets. The test claim statute also protects and mandates the local agency to hold guinea pigs and hamsters, which are classified as “rodents.”<sup>35</sup> However, in the other audits the Controller excluded all rodents, without evidence of the type of rodents excluded or whether the rodent can legally be allowed as a pet, and it is unclear whether the same was done here.

Additionally, the test claim statute expressly requires local agencies to hold stray or abandoned “birds...legally allowed as personal property” pending adoption or redemption. The statute does not distinguish between types of birds required to be held, some of which may be poultry (e.g. chickens and ducks), pets,<sup>36</sup> or wild animals,<sup>37</sup> depending on the breed and owner. However, the Controller has generally excluded “birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls,” without identifying any law rendering these birds illegal to possess as pets or specifying the birds actually held by the claimant.

Therefore, the any reduction of costs for space and facilities acquisition (Finding 2), care and maintenance (Finding 3) necessary and prompt veterinary care (Finding 8) and Equipment Procurement (Finding 9) associated with the exclusion of “[i]neligible other animals such as rodents, livestock, or wild animals;” and “[i]neligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls,” is incorrect as a matter of law and arbitrary, capricious, and entirely lacking in evidentiary support.

2. The exclusion of animals deemed treatable upon arrival at the shelter and later euthanized *during* the increased holding period because they became non-rehabilitatable, is incorrect as a matter of law.

To the extent that the Controller excludes from reimbursement costs incurred for the care and maintenance and prompt and necessary veterinary care of all dogs, cats, and other animals that were euthanized *during* the increased holding period, this exclusion is incorrect as a matter of law. The Controller states “agencies are eligible to receive reimbursement to care for dogs and cats and other animals that were *euthanized after the holding period.*”<sup>38</sup> The Controller bases its exclusion of these animals on the plain language of the Parameters and Guidelines, which provides that local agencies are eligible to receive reimbursement for care and maintenance costs and for necessary and prompt veterinary costs only for those animals “that die during the increased holding period or are ultimately euthanized.” The Controller maintains that these costs are only eligible for reimbursement for those animals that die of natural causes during the

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<sup>35</sup> See California Code of Regulations, Title 14, section 671(c)(6)(J)(1) b. and d. *excluding* from restriction under the “*order rodentia*,” among several other rodents, “domesticated races of golden hamsters of the species *Mesocricetus auratus* and domesticated races of dwarf hamsters of the Genus *Phodopus*” and domesticated races of guinea pigs of the species *Cavia porcellus*.” Emphasis added.

<sup>36</sup> See California Penal Code section 5971(c)(1): ““Pet animals’ means dogs, cats, monkeys and other primates, rabbits, *birds*, guinea pigs, hamsters, mice, snakes, iguanas, turtles, and any other species of animal sold or retained for the purpose of being kept as a household pet.” Emphasis added.

<sup>37</sup> Title 50 Code of Federal Regulations, section 21.13.

<sup>38</sup> Exhibit A, IRC, page 32.

increased holding period or are euthanized *after* the increased holding period. Thus, the Controller argues, if an animal is euthanized during the increased holding period, then no costs for that animal are eligible for reimbursement.

The Controller's interpretation of the Parameters and Guidelines is not correct in this regard. The Parameters and Guidelines provide that local agencies are eligible to receive reimbursement for care and maintenance and prompt and necessary veterinary costs only for those animals "that die during the increased holding period or are ultimately euthanized." The plain language of the phrase "animals that die during the increased holding period or are ultimately euthanized" is vague and ambiguous because the word "die" can include both death by natural causes and death by euthanasia. And the Parameters and Guidelines and the analyses adopted for the Parameters and Guidelines do not define what it means to "die" during the holding period.

Nevertheless, the decisions do *not* limit reimbursement to animals that die of natural causes during the increased holding period. Such a limitation would be contrary to the statutory scheme. Food and Agriculture Code sections 17005 and 17006 expressly contemplate an animal's health changing over the course of impoundment and require a shelter to hold an animal which is ill or injured— but not an animal which is irremediably suffering — for the relevant holding period on the ground that the animal's health may improve. In this respect, section IV. (B)(8) of the Parameters and Guidelines allows reimbursement for the initial physical examination of a stray or abandoned animal to determine the animal's baseline health status and classification as "adoptable, treatable, or non-rehabilitatable." The Parameters and Guidelines further authorize reimbursement for the administration of a wellness vaccine to "treatable" or "adoptable" animals, veterinary care to stabilize and/or relieve the suffering of a "treatable" animal, and veterinary care intended to remedy any applicable disease, injury, or congenital or hereditary condition that adversely affects the health of a "treatable" animal until the animal becomes "adoptable." Even with veterinary care, the condition of the animal can change during the increased holding period and the animal can become non-rehabilitatable. If that occurs, the animal is not "adoptable" or "treatable" and may be euthanized under the law.

Therefore, to deny reimbursement for the costs incurred during the increased holding period for an animal that becomes non-rehabilitatable and that has to be euthanized during, but before the end of, the increased holding period conflicts with the test claim statute and the Parameters and Guidelines. Staff finds that reimbursement is required under these circumstances.

Therefore, to the extent the Controller's reduction includes costs incurred for the care and maintenance and prompt and necessary veterinary costs of dogs, cats, and other animals that became non-rehabilitatable and were euthanized during, but before the expiration of, the increased holding period, the reduction is incorrect as a matter of law.

3. The Commission and the Controller are bound by the *Purifoy* decision and, thus, the Controller's exclusion of animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is correct as a matter of law. However, the Controller's recalculation of costs using an average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of "eligible animals" held for the time required under *Purifoy*.

As indicated above, the Controller excluded dogs, cats, and other animals that were euthanized during the holding period and "took into account that Saturday was not to be considered as a

business day, which is consistent with the Appellate Court decision in the case of *Purifoy et al v. Howell*.<sup>39</sup> The Controller further states: “[t]herefore, we determined that the increased holding period for dogs and cats changed from 2 days to 3 days and the increased holding period for other animals increased from 5 days to 6 days.” Thus, pursuant to the *Purifoy* decision, the Controller excluded those animals from the number of “eligible animals that die during the holding period or are ultimately euthanized,” because they were disposed of at least one day too early.

Staff finds that the court’s interpretation of “business day” in *Purifoy* is binding, and that the Controller’s exclusion of Saturday as a business day when calculating the increased holding period is correct as a matter of law. Thus, except in the circumstances described below, the Controller’s exclusion of animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is also correct as a matter of law.

However, when auditing and recalculating the number of reimbursable days pursuant to *Purifoy*, the Controller calculated an *average* increased holding period for all dogs and cats to be three days, and the average increased holding period for all other “eligible” animals to be six days, and did not state the total number of reimbursable days for each eligible animal. Even if the increased holding period averages three days for dogs and cats, or six days for other animals, the Parameters and Guidelines do not provide for reimbursement based on an average number of days. Moreover, the Controller’s recalculation may result in the exclusion of eligible animals that are correctly held under the law, but are euthanized during the Controller’s defined “average” holding period. For example, as explained above, the Controller applied an increased holding period for dogs and cats of three days, after which the animal may be euthanized. However, if a stray or abandoned dog or cat is impounded on a Monday or Sunday, the actual increased holding period under the law is two calendar days, and not three days, and the dog or cat may be euthanized on day three (a day before the Controller’s average and, thus, as “during the holding period” as defined by the Controller). Similarly, for “other animals,” the Controller applied an increased holding period of six days. However, if a stray bird or rabbit is impounded on a Monday, the actual increased holding period under the law is four calendar days, and not six days, and the bird or rabbit may be euthanized on day five (a day before the Controller’s average and, thus, “during the holding period” as defined by the Controller).

Under these circumstances, the Controller’s recalculation and use of the average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of “eligible animals” held for the duration required by law.

**C. The Controller’s Reduction in Finding 2 Relating to Facilities Construction Costs Based on the Period of Reimbursement for the Increased Holding Period for Dogs and Cats Is Incorrect as a Matter of Law. However, the Remaining Grounds for Reduction Are Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support, Except as Provided in Section B. of this Decision.**

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<sup>39</sup> Exhibit A, IRC, page 32 (Final Audit Report).

1. The Controller's reduction of construction costs for fiscal year 1998-1999 is incorrect as a matter of law.

Claimant's fiscal year 1998-1999 reimbursement claim included \$40,633 for design and planning costs to acquire or construct sufficient space to comply with the mandated new or increased holding periods for dogs and cats, and other animals.<sup>40</sup> The Controller reduced the costs claimed by \$40,385, finding that the test claim statute and the Parameters and Guidelines only authorize reimbursement for "other animals," and not dogs and cats, for the period between January 1, 1999 and June 30, 1999.<sup>41</sup> The Controller relies on July 1, 1999, the operative date of the code sections governing the holding period for dogs and cats for this reduction.

However, the Controller's reduction for fiscal year 1998-1999 is inconsistent with the Parameters and Guidelines, and is incorrect as a matter of law. Although the Parameters and Guidelines provide that reimbursement for costs incurred for the extended holding period for cats and dogs is eligible for reimbursement on or after July 1, 1999, they also state that reimbursement for all other requirements, including the reimbursable activity of "Acquisition of Additional Space and/or Construction of New Facilities" for all animals, begins January 1, 1999, as follows:

*Beginning January 1, 1999 - Acquiring additional space by purchase or lease and/or construction of new facilities to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals specified in Statutes of 1998, Chapter 752 that die during the increased holding period or are ultimately euthanized.*<sup>42</sup>

Under Section IV. of the Parameters and Guidelines, the period of reimbursement for the activities associated with the *holding period* for dogs and cats begins July 1, 1999.

Reimbursement for all other reimbursable activities (including acquisition or construction of additional space, remodeling/renovating existing facilities, verifying whether a cat is feral or tame, lost and found lists, maintaining non-medical records, and providing necessary and prompt medical care) begins on the effective date of the 1998 test claim statute, January 1, 1999.

Accordingly, the Controller's reduction of construction costs in proportion to the total number of dogs and cats housed at the shelter during the period between January 1, 1999 and June 30, 1999 is inconsistent with the Parameters and Guidelines and is incorrect as a matter of law. Staff finds that costs should be reinstated consistently with proportionate share of actual costs required to plan, design, acquire, and/or build facilities based on the pro rata representation of all eligible animals to the total population of animals housed in the facilities during the entire holding period.

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<sup>40</sup> Exhibit A, IRC, pages 106-108.

<sup>41</sup> Exhibit A, IRC, pages 29-30.

<sup>42</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 3 [emphasis added].

2. The Controller's reduction of construction costs in fiscal years 1999-2000 and 2000-2001, based on pro rata representation of eligible animals to the total population of animals not supported by documentation, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support, except as provided in section B above.

For fiscal years 1999-2000 and 2000-2001, the Controller reduced costs on the basis of a lack of supporting documentation for the total population of animals, and exclusions from the population of eligible animals pursuant to the Parameters and Guidelines, including the interpretation of *Purifoy*, as discussed above. This resulted in reductions of \$159,544 and \$24,756 for fiscal years 1999-2000 and 2000-2001, respectively.<sup>43</sup>

The Controller explains that the claimant's database information for fiscal year 1999-2000 was incomplete, and so the Controller estimated the total population of animals and the number of animals eligible for reimbursement based on an average of the database information for the last six years of the audit.<sup>44</sup>

For fiscal year 2000-2001, the Controller states that it "extracted" the required information from the claimant's "Chameleon software system database." The Controller explains that "[i]n its claims for both fiscal years, the city did not provide worksheets showing how it computed the number of 'eligible animals' or the 'total number of animals' that is used to determine reimbursement ratios."

It is the claimant's burden to support its costs claimed, including the eligible animal and total animal population information used to calculate costs related to the increased level of service. The Parameters and Guidelines state that "all costs claimed shall be traceable to source documents (e.g., employee time records, cost allocation reports, invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, time studies, etc.) that show evidence of the validity of such costs and their relationship to this mandate."<sup>45</sup> Since the claimant did not provide source documents to validate these cost components, the Controller's reduction of costs is correct as a matter of law.

Moreover, the Controller's decision to apply an average of both eligible animals and total animal population and its calculation of these components, based on the claimant's database in later years of the audit period, is not arbitrary or capricious, since the claimant did not provide documentation to support the necessary pro rata calculation.

Based on the foregoing, except as provided in section B. of this Decision with regard to defining "eligible animals," staff finds that to the extent the Controller's reductions of construction costs are based on a lack of supporting documentation, those reductions are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>43</sup> Exhibit A, IRC, page 27.

<sup>44</sup> Exhibit A, IRC, page 32.

<sup>45</sup> Exhibit X, Adopted Parameters and Guidelines, February 28, 2002, page 15.

**D. Some of the Reductions under Finding 3 Relating to Care and Maintenance Costs During the Increased Holding Period Are Correct as a Matter of Law, But Reductions Based on Adjustments to Animal Census Data Throughout the Audit Period, Made Without any Analysis or Explanation, Are Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

1. The Controller's adjustments of total annual costs for care and maintenance are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Parameters and Guidelines provide that the first step in calculating actual costs for care and maintenance is to identify the total annual cost (including labor, materials, supplies, indirect costs, and contract services) for all dogs, cats, and other animals impounded at the facility.<sup>46</sup>

The audit report states that for all years of the audit period, the claimant claimed eighty percent of its labor costs for full-time animal care attendants as time spent on care and maintenance, and thirty percent of its labor costs incurred for the Senior Animal Care Attendant/Animal Care Attendant Supervisor position. The Controller determined that eighty percent was a reasonable figure for animal care attendants, but that the claimant did not support that the senior animal care attendant spent thirty percent of his or her time performing care and maintenance activities. Thus, all costs claimed for supervisory position were determined unallowable.<sup>47</sup>

The audit report also states that the claimant claimed costs for food based on its contract with a supplier, and claimed costs for supplies based on estimates that were not supported. However, during the audit, the claimant compiled invoices to support costs for food totaling \$23,470 (\$3,329 for FY 2005-06, \$14,127 for FY 2006-07 and \$6,014 for FY 2007-08) and supplies totaling \$183,083 (\$47,152 for FY 2005-06, \$66,933 for FY 2006-07 and \$68,997 for FY 2007-08). In addition, the Controller used an average of the amount allowable for supplies for those three years and applied that average to the remaining audit years, for which no documentation was provided. This resulted in an increase in the total annual costs for care and maintenance.<sup>48</sup>

In addition, the audit report states that for fiscal years 1999-2000 through 2002-2003, the claimant included costs of veterinary care related to initial physical examinations and wellness vaccinations in the cost calculations for care and maintenance. The Controller determined that these costs should be claimed under another cost component and removed these costs from the calculation of total annual costs for this component.<sup>49</sup>

To the extent the Controller determined allowable costs for food and other supplies in amounts greater than that originally claimed or supported in the claimant's annual reimbursement claims, there is no reduction, and the Commission does not have jurisdiction to analyze such adjustments. With respect to veterinary care costs that the Controller found were commingled

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<sup>46</sup> Exhibit X, Corrected Parameters and Guidelines, dated March 20, 2002, page 7.

<sup>47</sup> Exhibit A, IRC, page 36.

<sup>48</sup> Exhibit A, IRC, page 36.

<sup>49</sup> Exhibit A, IRC, page 37.

within care and maintenance costs, the Parameters and Guidelines authorize reimbursement separately for necessary and prompt veterinary care, and therefore the reduction to the total annual cost of care and maintenance based on commingled costs for veterinary care is consistent with the Parameters and Guidelines, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

With respect to the unsupported salaries and benefits of the Senior Animal Care Attendant position, these adjustments are consistent with the claimant's duty to claim and support its costs in accordance with the Parameters and Guidelines. The Parameters and Guidelines require, for claiming salaries and benefits:

Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed, specify the actual time devoted to each activity by each employee, and the productive hourly rate, and related fringe benefits.

Here, the Controller found that the claimant did not support that the Senior Animal Care Attendant Supervisor spent any time performing care and maintenance activities.<sup>50</sup> The claimant does not dispute that finding, and therefore the reduction is consistent with the Parameters and Guidelines, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

Based on the foregoing, staff finds that the Controller's adjustments of total annual costs for care and maintenance are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

2. Reductions based on the Controller's adjustment of animal census data without explanation or analysis is arbitrary, capricious, or entirely lacking in evidentiary support.

The second step in calculating the actual cost formula in the Parameters and Guidelines for care and maintenance is to divide the total annual cost of care and maintenance by the average yearly census of animals, calculated by multiplying the average daily census, defined as the number of all animals housed at a facility on any given day, by 365.<sup>51</sup> The adjustments made to annual animal census data are not reflected in the narrative for Finding 3, but only in Schedule 2 of the audit report, ("Summary of Care and Maintenance Costs," pages 7-10).<sup>52</sup> In addition, the Controller's Schedule 2 does not use the term "census," but instead uses "total dog and cat kennel days" and "total other 'eligible' animal kennel days."<sup>53</sup> It is unclear whether "kennel days" is calculated consistent with the Parameters and Guidelines for animal census data.

For fiscal year 2000-2001, the Controller increased "total dog and cat kennel days" from 13,922 to 57,206 and increased "other 'eligible' animal kennel days" from 1,947 to 3,583, without any

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<sup>50</sup> Exhibit A, IRC, page 36.

<sup>51</sup> Exhibit X, Parameters and Guidelines, amended January 26, 2006, page 16.

<sup>52</sup> Exhibit A, IRC, pages 21-24.

<sup>53</sup> Exhibit A, IRC, pages 21-24.

explanation or analysis.<sup>54</sup> Beginning in fiscal year 2001-2002, the Controller adjusted animal census data in each remaining year of the audit without articulating the basis of its adjustments, sometimes increasing the number of animals subject to the actual cost formula, and sometimes decreasing. Because total annual costs are *divided* by the annual census (again the Controller uses “total [dog and cat, or other ‘eligible’ animal] kennel days”), the increase of animal census figures results in a decrease in allowable costs per eligible animal per day, while the decrease in animal census results in an increase in allowable costs per eligible animal per day. However, some increases and decreases were taken in the same year, and there is no indication to what extent the animal census data actually resulted in a reduction of costs for care and maintenance, because other elements of the calculation were also adjusted.

The record contains documentation labeled “Shelter Statistics” or “Kennel Statistics,” which reflects the number and disposition of animals passing through the shelter during the fiscal year.<sup>55</sup> Furthermore, the Controller indicates in other parts of the audit report that it had access to the claimant’s animal database.<sup>56</sup> But nowhere in the audit report or the comments on the IRC does the Controller explain the adjustments made to the animal census data, beginning in fiscal year 2000-2001, for the calculation of care and maintenance costs. Therefore, any reductions based on the animal census adjustments made in each audit year, beginning in fiscal year 2000-2001, are arbitrary, capricious, and entirely lacking in evidentiary support. Furthermore, the adjustments to the animal census data made in these years without any legal or evidentiary basis taints the average animal census figures applied to fiscal years 1998-1999 and 1999-2000.

Accordingly, staff finds that reductions to care and maintenance costs claimed based on adjustments to the animal census data are arbitrary, capricious, and entirely lacking in evidentiary support.

**E. The Controller’s Reductions in Finding 4 Relating to Unallowable Salaries and Benefits for the Increased Holding Period Are Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

1. The Controller’s adjustment of salaries and benefits and related indirect costs for the increased holding period hours for fiscal years 1998-1999 through 2007-2008, based on the hours the shelter was open for owner redemption and the staff necessary to make animals available for redemption, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

For fiscal year 1998-1999 (but including only the period between January 1, 1999 and June 30, 1999) the claimant claimed 2,808 employee hours for increased holding period costs as follows: seven Animal Care Attendants, three Police Records Clerks, one Animal Control Officer, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal years 1999-2000 through 2001-2002, the claimant claimed 5,616 hours each year for seven

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<sup>54</sup> Exhibit A, IRC, page 22.

<sup>55</sup> Exhibit A, IRC, pages 258-259; 330-339; 382-384; 415-416; 425-426; 464-467 (No similar document is included for fiscal year 2007-2008, but Schedule 2 of the audit report indicates an increase in care and maintenance costs for fiscal year 2007-2008 in any case.).

<sup>56</sup> See Exhibit A, IRC, page 32 (Finding 2).

Animal Care Attendants, three Police Records Clerks, one Animal Control Officer, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal year 2002-2003, the claimant claimed 3,744 hours for seven full-time Animal Care Attendants, two part-time Animal Care Attendants, three Police Records Clerks, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal year 2005-2006, 2,912 hours for five Animal Care Attendants, two Police Records Clerks, one Senior Animal Care Attendant, one Acting Records Supervisor, and one Volunteer Coordinator, each for six hours every Saturday were claimed. And finally, for fiscal years 2006-2007 and 2007-2008, 3,432 hours for five Animal Care Attendants, four Police Records Clerks, one Senior Animal Care Attendant, one Senior Records Clerk, and one Animal Care Attendant Supervisor, each for six hours every Saturday were claimed.<sup>57</sup>

The Controller relied on the claimant's "Notice of Impoundment" and other information provided to determine that the claimant was not open every Saturday during the audit period. For fiscal years 1998-1999 through 2001-2002, claimant's shelter was open six hours every Saturday, but was not open for an extra hour on Wednesdays, as shown on a Notice of Impoundment dated October 2001. For fiscal years 2002-2003, 2005-2006, 2006-2007, and 2007-2008, claimant's shelter was closed on Sundays and Mondays, open an extra hour on Wednesdays, and six hours on most Saturdays, but the shelter was closed on the last Saturday of every month (i.e., 12 Saturdays each year).<sup>58</sup>

In addition, the Controller determined that "when the shelter is open to the public to make animals available for owner redemption, one additional Animal Care Attendant, two Police Records Clerks II, one 'floating' Police Records Clerk II...and one Senior Police Records Clerk Supervisor or Acting Records Supervisor were on duty to perform the required mandated activities."<sup>59</sup> The Controller states that this determination is based on "language in the parameters and guidelines that the reason to be open on a weekend is to make animals available for redemption..." The Controller further explains that "costs for other staff on duty during Saturdays are already reimbursable within other cost components of the mandated program."<sup>60</sup>

Accordingly, the Controller reduced hours allowable, limiting reimbursement to the employees necessary to make the animals available for owner redemption, and eliminating 12 Saturdays per year in the latter part of the audit period. For fiscal year 1998-1999 only 37 hours were allowable; for 1999-2000 through 2001-2002, 1,560 hours were allowable; and for 2002-2003 and 2005-2006 through 2007-2008, 1,260 hours were allowable.<sup>61</sup>

The claimant does not dispute the Controller's findings with respect to which employee classifications are necessary to carry out the mandate to make the animals available for owner redemption on Saturdays; the claimant's argument more generally disputes the premise that only

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<sup>57</sup> Exhibit A, IRC, pages 39-40.

<sup>58</sup> Exhibit A, IRC, page 39.

<sup>59</sup> Exhibit A, IRC, page 39.

<sup>60</sup> Exhibit A, IRC, page 41.

<sup>61</sup> Exhibit A, IRC, page 40.

hours for those staff carrying out mandated activities on Saturdays are reimbursable. The claimant maintains that neither the test claim statutes, nor the Commission's Decision, limit the manner in which claimants implement the mandate, and "[t]he City should be allowed to staff its shelter as it sees fit to accomplish the goals set forth in statute."<sup>62</sup>

The claimant is wrong. The activity claimed under this component is to make animals available for owner redemption. The Parameters and Guidelines provide that an agency desiring to apply the shortened holding period is eligible for reimbursement for making animals available for owner redemption on one weekday evening until at least 7:00 p.m., or one weekend day; or, for local agencies with fewer than three full-time employees or that are not open during all regular weekday business hours, for establishing a procedure for owners to reclaim their animals by appointment.<sup>63</sup> For dogs and cats, reimbursement for this activity begins July 1, 1999. For "other animals" specified in Food and Agriculture Code section 31753, reimbursement for this activity begins January 1, 1999.<sup>64</sup>

Therefore, staff finds that the Parameters and Guidelines do not expressly limit the staff and employee classifications for which reimbursement is required. However, the Controller is correct that the reason to remain open on a Saturday, pursuant to the test claim statutes and the Commission's Decision, is to promote owner redemption. Indeed, the express language of the reimbursable component at issue in Finding 4 is "Making animals available for owner redemption..." Therefore, the Controller's attempt to limit reimbursement on Saturdays to those employees that are necessary to make animals available for owner redemption is consistent with the Parameters and Guidelines and the purpose of the test claim statute.

There is no dispute that the claimant's shelter was closed the last Saturday of every month for several years. In addition, the Controller's exclusion of employee hours not related to the mandate is consistent with the Parameters and Guidelines. Because the claimant has not specifically responded to the Controller's finding on this issue, other than to dispute the underlying premise of the reduction, staff finds, based on the evidence in the record, that the reduction is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

2. The Controller's reduction of salaries and benefits and related indirect costs for the increased holding period for dogs and cats for fiscal year 1998-1999 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller reduced holding period costs for fiscal year 1998-1999 on a proportional basis because reimbursement was not required for the increased holding period *for cats and dogs* until fiscal year 1999-2000.

As discussed above, the period of reimbursement for activities and costs relating to the increased holding period for cats and dogs began July 1, 1999. For the latter half of fiscal year 1998-1999,

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<sup>62</sup> Exhibit A, IRC, page 41.

<sup>63</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 10.

<sup>64</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 10.

in accordance with the effective date of the test claim statutes, only holding period costs for “other animals” are reimbursable.<sup>65</sup> The Controller therefore limited reimbursement for holding period costs for fiscal year 1998-1999, consistent with the Parameters and Guidelines, to only those costs attributable to “other animals,” and only those costs incurred between January 1, and June 30, 1999.

Based on the foregoing, staff finds that the Controller’s reductions in Finding 4 of salaries and benefits related to the increased holding period are correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

**F. The Commission Does Not Have Jurisdiction to Analyze the Controller’s Adjustment of Costs for Necessary and Prompt Veterinary Care under Finding 8, Because There Is No Reduction.**

In Finding 8 of the audit report, the Controller states that \$82,870 was claimed, and \$87,832 was found to be allowable. The Controller states that “allowable costs for this cost component consist of costs incurred for the administration of a wellness vaccine and the conduct of an initial physical exam, as well as certain necessary and prompt care services.” The Controller also notes that “[t]he city’s claims has costs for veterinary care scattered throughout various cost components.”

The claimant did not respond specifically to Finding 8, nor assert any specific flaw in the Controller’s determinations; the claimant’s allegation of an incorrect reduction is captured in the *Purifoy* discussion above.

Government Code sections 17551(d) and 17558.7 only authorize the Commission to hear and decide incorrect *reduction* claims. The Commission does not have jurisdiction over a reimbursement claim that results in no reduction of costs. Here, the Controller adjusted costs under Finding 8 in the claimant’s favor; there no reduction, and therefore the Commission does not have jurisdiction to make a finding on this adjustment.

**G. The Controller’s Reduction under Finding 9 for Equipment Procurement Costs for Fiscal Year 2005-2006 Is Incorrect as a Matter of Law, and Is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

1. The Controller’s reduction for fiscal year 2005-2006, based on the formula borrowed from other components of the Parameters and Guidelines, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

The audit report shows that for fiscal year 2005-2006, 27.26 percent of total kennel equipment procurement costs equaling \$19,617 was claimed, which the Controller recalculated based on the animal census data, the cost per animal per day times the number of eligible animals and the number of reimbursable days (3 days for dogs and cats, and 6 days for “other animals) as discussed under section B. above. The recalculation resulted in a reduction of \$16,309. The

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<sup>65</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20; 89-91 [Parameters and Guidelines]. See also, Food and Agriculture Code sections 31108 and 31572, as amended by Statutes 1998, chapter 752, effective July 1, 1999.

claimant does not allege any specific issue with respect to this reduction, but neither does the Controller explain the basis of its recalculation.

The Parameters and Guidelines authorize reimbursement for medical, kennel, and computer equipment “to the extent these costs are not claimed as an indirect cost under Section V (B) of these parameters and guidelines,” and limited to the mandated program activities as follows:

If the medical, kennel, and computer equipment is utilized in some way not directly related to the mandated program or the population of animals listed in Section IV (B), only the pro rata portion of the activity that is used for the purposes of the mandated program is reimbursable.<sup>66</sup>

Thus, costs for medical or computer equipment that is or may be used for purposes other than the mandated activities (for example, in this case, equipment used for animals that are not eligible for reimbursement) are reimbursable only as to the pro rata portion of the costs that are applied to the mandate.

The Parameters and Guidelines are not specific, however as to how that pro rata portion of medical, kennel, or computer equipment must be calculated. Accordingly, the claimant performed its pro-rata calculation for kennel equipment based on the number of animals housed in the kennels, and that fell within the scope of the mandate, stating that “44.35% of all the dogs and cats were strays” and “61.47% of the stray dogs and cats were euthanized after the holding period.”<sup>67</sup> The claimant included in its claims documentation labeled “Kennel Statistics Report,” which detailed the animals and the disposition from July 1, 2005 through June 30, 2006, and a document labeled “Euthanasia Statistics,” which detailed the number of animals euthanized and the reasons.<sup>68</sup> Multiplying the total kennel procurement costs for fiscal year 2005-2006 (\$71,958) by 44.35 percent (the number of strays), and again by 61.47 percent (the number of strays euthanized), the claimant claimed reimbursement for \$19,617.

The Controller did not make findings on the claimant’s methodology, nor express that the methodology was in any way flawed. And the Controller does not dispute the total annual cost of kennel equipment procurement, \$71,958. The audit report simply states that “the wrong pro-rata percentage was used to claim costs.”<sup>69</sup> The audit report recalculates the 2005-2006 costs for medical and kennel equipment using the same basic formula as for care and maintenance. The total annual equipment procurement cost is stated without adjustment, while the total animal census figures are as adjusted in schedule 2 of the audit report, which the Controller alleges elsewhere in the audit report are based on the exclusions from animal census data provided in the Parameters and Guidelines (such as owner-relinquished animals and animals that were deceased or gravely injured upon arrival).<sup>70</sup> In addition, the number of eligible animals to which the costs

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<sup>66</sup> Exhibit X, Adopted Parameters and Guidelines, February 28, 2002, page 13.

<sup>67</sup> Exhibit A, IRC, page 396.

<sup>68</sup> Exhibit A, IRC, pages 415-417.

<sup>69</sup> Exhibit A, IRC, page 57.

<sup>70</sup> Exhibit A, IRC, page 23; 37 [“We consistently applied the exclusions per the parameters and guidelines to the raw animal data provided by the animal shelter.”].

per animal per day were applied is the same number used for the care and maintenance component, which the Commission finds above to be correct as a matter of law, based in part on *Purifoy*.

However, nothing in the Parameters and Guidelines directs claimants to account for pro-rata costs using the same or similar formula as is applied to care and maintenance costs, facilities construction costs, or necessary and prompt veterinary care costs, as the Controller has done here. The Parameters and Guidelines only require that the claimant claim pro rata costs for medical and kennel equipment if used for purposes other than the mandate. Under the rules of statutory construction, if a statute or regulation omits a provision that is found in another related statute or regulation, the courts presume that the omission was intentional and that the provision was not meant to apply.<sup>71</sup> Thus, the Controller's methodology here is not based on the Parameters and Guidelines, and there is no support for "borrowing" the formula for care and maintenance costs to establish the pro rata portion of medical, kennel, and computer equipment.

Based on the foregoing, staff finds that the Controller's reduction of \$16,309 for fiscal year 2005-2006 is incorrect as a matter of law, and is arbitrary, capricious and entirely lacking in evidentiary support.

2. The Commission does not have jurisdiction to analyze the Controller's adjustment of costs for computer equipment under Finding 9, because there is no reduction.

As noted, the Controller found that costs for computer equipment were understated or misclassified to other components within the reimbursement claim for fiscal years 1999-2000 and 2000-2001. As a result of recalculating and relocating these costs, Finding 9 states an increase in reimbursement.

Government Code sections 17551(d) and 17558.7 only authorize the Commission to hear and decide incorrect *reduction* claims. The Commission does not have jurisdiction over a reimbursement claim that results in no reduction of costs. Here, the Controller adjusted costs under Finding 9 in the claimant's favor; there no reduction, and therefore the Commission does not have jurisdiction to analyze this adjustment.

### Conclusion

Based on the foregoing analysis, staff finds that the Controller's reductions of costs claimed are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support, *except* for the following adjustments:

- The Controller's reduction in Finding 2 of construction costs for fiscal year 1998-1999, based on the Controller's interpretation of the period of reimbursement for that activity, is incorrect as a matter of law.
- The Controller's adjustment in Finding 3 of animal census data for purposes of calculating care and maintenance costs, without explanation or analysis, is arbitrary,

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<sup>71</sup> *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827; *Craven v. Crout* (1985) 163 Cal.App.3d 779, 783 ["Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent."].

capricious, or entirely lacking in evidentiary support, to the extent the adjustments result in a reduction.

- The Controller's reduction in Finding 9 for equipment procurement costs in fiscal year 2005-2006, based on the formula borrowed from other components of the Parameters and Guidelines, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

Section VI. of the Parameters and Guidelines requires claimants to provide source documents that show the evidence of the validity of such costs and their relationship to the mandate. The supporting documentation must be kept on file by the agency during the audit period required by Government Code section 17558.5. In this respect, claimants are required by Food and Agriculture Code section 32003 to maintain records on animals that are taken up, euthanized, or impounded. Such records shall identify the date the animal was taken up, euthanized, or impounded; the circumstances surrounding these events; and the names of the personnel performing these activities. To the extent the claimant can provide such documentation to support the validity of the costs incurred, staff finds that the Controller should reinstate the following costs:

- Any reduction of costs relating to the Controller's exclusion of specified "birds" and "other animals" "legally allowed as personal property" and thus subject to the protection of the mandated activities.
- Any reduction of costs relating to the exclusion of animals deemed treatable upon arrival at the shelter and later euthanized during the increased holding period because they became non-rehabilitatable.
- Any reduction of costs relating to the Controller's recalculation of costs following the Purifoy decision and its use of an average number of reimbursable days, to the extent the recalculation resulted in an exclusion of "eligible animals" correctly held under the law.

### **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to partially approve the IRC, and pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, request the Controller reinstate costs claimed consistently with this analysis. Staff further recommends that the Commission authorize staff to make any technical, non-substantive changes following the hearing.

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Civil Code Sections 1834 and 1846; Food and Agriculture Code Sections 31108, 31752, 31752.5, 31753, 32001, and 32003, As Added or Amended by Statutes of 1998, Chapter 752 (SB 1785)

Fiscal Years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2005-2006, 2006-2007, and 2007-2008

City of Hayward, Claimant

Case No.: 11-9811-I-01

*Animal Adoption*

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

*(Adopted October 28, 2016)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on October 28, 2016. [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] this IRC by a vote of [vote count will be included in the adopted Decision] as follows:

<b>Member</b>	<b>Vote</b>
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	
Don Saylor, County Supervisor	

## **Summary of the Findings**

The Commission partially approves this IRC. The Commission finds that the Office of the State Controller's (Controller's) reductions of costs claimed are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support, *except* for the following adjustments:

- The Controller's reduction in Finding 2 of construction costs for fiscal year 1998-1999, based on the Controller's interpretation of the period of reimbursement for that activity, is incorrect as a matter of law.
- The Controller's adjustment in Finding 3 of animal census data for purposes of calculating care and maintenance costs, without explanation or analysis, is arbitrary, capricious, or entirely lacking in evidentiary support, to the extent the adjustments result in a reduction.
- The Controller's reduction in Finding 9 for equipment procurement costs in fiscal year 2005-2006, based on the formula borrowed from other components of the Parameters and Guidelines, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

The Commission finds the following reductions are arbitrary, capricious and entirely lacking in evidentiary support in the record. Section VI. of the Parameters and Guidelines requires claimants to provide source documents that show the evidence of the validity of such costs and their relationship to the mandate. The supporting documentation must be kept on file by the agency during the audit period required by Government Code section 17558.5. In this respect, claimants are required by Food and Agriculture Code section 32003 to maintain records on animals that are taken up, euthanized, or impounded. Such records shall identify the date the animal was taken up, euthanized, or impounded; the circumstances surrounding these events; and the names of the personnel performing these activities. To the extent the City of Hayward (claimant) can provide such documentation, the Commission requests that the Controller reinstate the following costs:

- Any reduction of costs relating to the Controller's exclusion of specified "birds" and "other animals" "legally allowed as personal property" and thus subject to the protection of the mandated activities.
- Any reduction of costs relating to the exclusion of animals deemed treatable upon arrival at the shelter and later euthanized during the increased holding period because they became non-rehabilitatable.
- Any reduction of costs relating to the Controller's recalculation of costs following the Purifoy decision and its use of an average number of reimbursable days, to the extent the recalculation resulted in an exclusion of "eligible animals" correctly held under the law.

Therefore, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission regulations, that the Controller reinstate costs that relate to the above incorrect reductions.

## COMMISSION FINDINGS

### I. Chronology

- 05/06/2011      Controller issued the Final Audit Report.<sup>72</sup>
- 03/08/2012      The claimant filed IRC 11-9811-I-01.<sup>73</sup>
- 01/08/2015      The Controller filed late comments on the IRC.<sup>74</sup>
- 06/14/2016      Commission staff issued the Request for Additional Information.<sup>75</sup>
- 06/24/2016      The Controller filed a response to the Request for Additional Information.<sup>76</sup>
- 09/01/2016      Commission staff issued the Draft Proposed Decision.<sup>77</sup>

### II. Background

#### The Animal Adoption Program

The *Animal Adoption* program arose from amendments to the Civil Code and Food and Agriculture Code made by Statutes 1998, chapter 752 (SB 1785).<sup>78</sup> The purpose of the test claim statute was to carry out the state policy that “no adoptable animal should be euthanized if it can be adopted into a suitable home” and “no treatable animal should be euthanized.”<sup>79</sup> Generally, the program increases the holding period to allow for the adoption and redemption of stray and abandoned dogs, cats, and other specified animals before the local agency can euthanize the animal, and requires:

- verification of the temperament of feral cats;
- posting of lost and found lists;
- maintenance of records for impounded animals; and
- that impounded animals receive “necessary and prompt veterinary care.”

On January 25, 2001, the Commission partially approved the Test Claim for the increased costs in performing the following activities only:

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<sup>72</sup> Exhibit A, IRC, page 2.

<sup>73</sup> Exhibit A, IRC, page 1.

<sup>74</sup> Exhibit B, Controller’s Late Comments on the IRC.

<sup>75</sup> Exhibit C, Commission Request for Additional Information, June 14, 2016.

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

<sup>77</sup> Exhibit E, Draft Proposed Decision.

<sup>78</sup> This legislation is sometimes referred to as the Hayden Bill.

<sup>79</sup> Civil Code section 1834.4, Penal Code section 559d, and Food and Agricultural Code section 17005 as added or amended by Statutes 1998, chapter 752.

1. Providing care and maintenance during the increased holding period for impounded dogs and cats that are ultimately euthanized. The increased holding period shall be measured by calculating the difference between three days from the day of capture and four business days from the day after impoundment, as specified below in 3 (a) and 3 (b), or six business days from the day after impoundment (Food & Agr. Code, §§ 31108, 31752);
2. Providing care and maintenance for four business days from the day after impoundment, as specified below in 3 (a) and 3 (b), or six business days from the day after impoundment, for impounded rabbits, guinea pigs, hamsters, pot-bellied pigs, birds, lizards, snakes, turtles, or tortoises legally allowed as personal property that are ultimately euthanized (Food & Agr. Code, § 31753);
3. For dogs, cats, and other specified animals held for four business days after the day of impoundment, either:
  - (a) Making the animal available for owner redemption on one weekday evening until at least 7:00 p.m., or one weekend day; or
  - (b) For those local agencies with fewer than three full-time employees or that are not open during all regular weekday business hours, establishing a procedure to enable owners to reclaim their animals by appointment at a mutually agreeable time when the agency would otherwise be closed (Food & Agr., Code §§ 31108, 31752, and 31753);
4. Verifying whether a cat is feral or tame by using a standardized protocol (Food & Agr. Code, § 31752.5);
5. Posting lost and found lists (Food & Agr. Code, § 32001);
6. Maintaining records on animals that are not medically treated by a veterinarian, but are either taken up, euthanized after the holding period, or impounded (Food & Agr. Code, § 32003); and
7. Providing “necessary and prompt veterinary care” for abandoned animals, other than injured cats and dogs given emergency treatment, that are ultimately euthanized (Civ. Code, §§ 1834 and 1846).

The Commission first addressed the Parameters and Guidelines for *Animal Adoption* at its August 23, 2001 hearing, but the matter was continued for further public comment and analysis.<sup>80</sup> The Commission adopted the Parameters and Guidelines for this program on February 28, 2002.<sup>81</sup> The Parameters and Guidelines were then re-issued as corrected on

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<sup>80</sup> Exhibit X, Staff Analysis and Proposed Parameters and Guidelines, August 23, 2001.

<sup>81</sup> Exhibit X, Staff Analysis and Proposed Parameters and Guidelines, Staff Analysis and Proposed Parameters and Guidelines, February 28, 2002. (Note that, at this time the Commission did not issue a “Decision and Parameters and Guidelines” after adoption of parameters and guidelines as it does currently.)

March 20, 2002.<sup>82</sup> Those Parameters and Guidelines, in addition to the activities identified in the Test Claim Decision, provide reimbursement for one-time activities of developing policies and procedures; training; and developing or procuring computer software for maintaining records; as well as:

- Acquisition of additional space or construction of new facilities, by purchase or lease, to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals.<sup>83</sup>
- Remodeling/renovating existing facilities to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals.<sup>84</sup>

Section VI. of the Parameters and Guidelines also require claimants to provide source documents that show the evidence of the validity of such costs and their relationship to the mandate. The supporting documentation must be kept on file by the agency during the audit period required by Government Code section 17558.5. In this respect, claimants are required by Food and Agriculture Code section 32003 to maintain records on animals that are taken up, euthanized, or impounded. Such records shall identify the date the animal was taken up, euthanized, or impounded; the circumstances surrounding these events; and the names of the personnel performing these activities.

On March 12, 2003, the Joint Legislative Audit Committee authorized an audit of the *Animal Adoption* mandate, which was completed by the Bureau of State Audits on October 15, 2003. The audit report recommended that the Legislature direct the Commission to amend the Parameters and Guidelines to correct the formula for determining the reimbursable portion of acquiring additional shelter space. In 2004, AB 2224 (Stats. 2004, ch. 313) was enacted to direct the Commission to amend the Parameters and Guidelines for the *Animal Adoption* program to:

1. Amend the formula for determining the reimbursable portion of acquiring or building additional shelter space that is larger than needed to comply with the increased holding period to specify that costs incurred to address preexisting shelter overcrowding or animal population growth are not reimbursable.
2. Clarify how the increased costs for care and maintenance shall be calculated.
3. Detail the documentation necessary to support reimbursement claims under this mandate, in consultation with the Bureau of State Audits and the Controller's office.

On January 26, 2006, the Commission adopted the amended Parameters and Guidelines, applicable to claims beginning July 1, 2005, in accordance with AB 2224, to require, among other things, contemporaneous source documents to show the validity of costs claimed and their relationship to the reimbursable activities. The 2006 amendment also clarified the definition of

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<sup>82</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002.

<sup>83</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 3.

<sup>84</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 5.

“average daily census” of dogs and cats, for purposes of the formula used to calculate care and maintenance costs; this amendment is clarifying only, and does not affect the methodology used to calculate actual costs for this component.<sup>85</sup>

### The Controller’s Audit and Summary of the Issues

The May 6, 2011 audit report determined that \$1,024,131 in claimed costs was allowable and \$1,339,152 was unallowable.<sup>86</sup> The claimant challenges the Controller’s application of the Court of Appeal’s decision in *Purifoy v. Howell (Purifoy)*,<sup>87</sup> which, the claimant alleges, affects findings 2, 3, 8, and 9. The claimant also challenges findings 2 and 4 on other grounds.<sup>88</sup>

In Finding 2, the Controller disallowed \$224,685 in claimed space and facilities acquisition costs for fiscal years 1998-1999 through 2000-2001. For fiscal year 1998-1999, the Controller reduced costs claimed from \$40,633 to \$248, finding that costs were only allowed for “other animals,” and not dogs and cats, prior to July 1, 1999.<sup>89</sup> For fiscal year 1999-2000, the Controller found that “the shelter’s animal database information for FY 1999-2000 was incomplete,” and therefore the Controller applied an average to estimate the total population of animals and the number of eligible animals for which reimbursement is required.<sup>90</sup> For fiscal year 2000-2001, the Controller “analyzed the city’s animal database information and revised the number of eligible animals” based on the Parameters and Guidelines, and, in part, on *Purifoy*. The Controller determined that “eligible animals include those that died during the increased holding period plus those that were ultimately euthanized (i.e., euthanized after the required holding period).” The Controller stated that this “analysis took into account that Saturday was not to be considered a business day,” but “had we considered Saturday as a business day, the number of eligible animals would have only increased by 147,” for fiscal year 2000-2001.<sup>91</sup>

In Finding 3, the Controller disallowed \$347,351 in claimed care and maintenance costs. The Controller found that the claimant claimed ineligible salary costs for supervisory Animal Care Attendant positions, and comingled costs for veterinary care and maintaining lost and found lists within the total annual cost for care and maintenance.<sup>92</sup> The Controller found that the annual animal census data were overstated in some years and understated in other years, and that the number of eligible animals (only a portion of the total annual animal census) was not counted consistently with the Parameters and Guidelines.<sup>93</sup> Finally, pursuant to the *Purifoy* holding, the

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<sup>85</sup> See Exhibit X, Amended Parameters and Guidelines, January 26, 2006.

<sup>86</sup> Exhibit A, IRC, page 12.

<sup>87</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

<sup>88</sup> Exhibit A, IRC, page 3.

<sup>89</sup> Exhibit A, IRC, page 28.

<sup>90</sup> Exhibit A, IRC, page 29.

<sup>91</sup> Exhibit A, IRC, page 32.

<sup>92</sup> Exhibit A, IRC, page 33; 36-37.

<sup>93</sup> Exhibit A, IRC, pages 21-24; 37.

Controller “determined that the increased holding period for dogs and cats increased from 2 days to 3 days and the increased holding period for other animals increased from 5 days to 6 days.”<sup>94</sup>

In Finding 4, the Controller disallowed \$709,853 in salaries and benefits claimed to make animals available for adoption or redemption on Saturdays or weekday evenings. The Controller found that the shelter was closed on the last Saturday of each month and open for an extra hour on one Wednesday per month instead, and adjusted the hours claimed accordingly.<sup>95</sup> In addition, the Controller determined that the claimant had claimed salaries and benefits for employee hours that were reimbursable under other mandate components, or employees that were involved in activities that were not reimbursable under the mandate.<sup>96</sup>

In Finding 8, the Controller found costs for necessary and prompt veterinary care were underclaimed by \$4,962, saying “costs were misstated because costs were unsupported, were misclassified within other cost components, and were claimed incorrectly.”<sup>97</sup>

In Finding 9, the Controller reduced \$12,894 for procuring medical and kennel equipment necessary to comply with the mandate. For fiscal year 2005-2006 the Controller recalculated costs of kennel equipment using essentially the same formula as provided in the Parameters and Guidelines for space acquisition and facilities construction, and care and maintenance. The Controller concluded that the claimant’s pro-rata percentage, calculated based solely on the percentage of animals eligible for reimbursement times the total kennel procurement costs,<sup>98</sup> resulted in “the wrong pro-rata percentage” and an overstatement of \$16,309.<sup>99</sup> And for fiscal years 1999-2000 and 2000-2001 the Controller found that costs were understated by \$452 and \$2,963, respectively, based on unclaimed or misclassified costs.<sup>100</sup>

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

#### City of Hayward

The cover page of the IRC states the total amount incorrectly reduced during the audit period as \$1,339,152.<sup>101</sup> The first page of the IRC narrative states the amount disallowed as \$1,353,637.<sup>102</sup> However, the claimant challenges only findings 2, 3, 4, 8, and 9, which total, for the entire audit period, \$1,290,177.<sup>103</sup>

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<sup>94</sup> Exhibit A, IRC, page 37.

<sup>95</sup> Exhibit A, IRC, page 38.

<sup>96</sup> Exhibit A, IRC, pages 41-42.

<sup>97</sup> Exhibit A, IRC, page 51.

<sup>98</sup> Exhibit A, IRC, page 396.

<sup>99</sup> Exhibit A, IRC, page 57.

<sup>100</sup> Exhibit A, IRC, page 57.

<sup>101</sup> Exhibit A, IRC, page 1.

<sup>102</sup> Exhibit A, IRC, page 2.

<sup>103</sup> Exhibit A, IRC, pages 18-20.

The claimant argues that findings 2, 3, 8, and 9 are incorrect primarily on the basis of the Controller's inappropriate retroactive application of the *Purifoy* decision wherein the court held that Saturday is not a business day for purposes of Food and Agriculture Code section 31108 as amended by the test claim statute.<sup>104</sup> The claimant asserts that the Controller incorrectly reduced costs claimed for space and facilities acquisition, care and maintenance, necessary and prompt veterinary care, and equipment procurement, due to excluding Saturdays from the calculations of those reimbursable components, pursuant to *Purifoy*.

Separately, the claimant challenges finding 2 on grounds that the Controller improperly excluded census data for dogs and cats between January 1, 1999 and June 30, 1999 from the calculation of space acquisition and facilities construction costs, resulting in a reduction for fiscal year 1998-1999 of \$40,385.<sup>105</sup> And, the claimant challenges finding 4 in which the Controller concluded only salaries and benefits for those staff members involved in making animals available for redemption are reimbursable for Saturday work. The claimant argues that it should be allowed to staff its shelter as it sees fit to accomplish the goals set forth in the statute.<sup>106</sup>

#### State Controller's Office

The Controller acknowledges that whether Saturday is considered a business day "affected the allowable cost calculations for overstated space and facilities acquisition costs (Finding 2) (Tab 10), unallowable care and maintenance costs (Finding 3) (Tab 11), misstated necessary and prompt veterinary care costs (Finding 8) (Tab 13), and misstated equipment procurement costs (Finding 9) (Tab 14)." The Controller "contends that the court decision clarifies the legal definition of a business day for the required holding period as of the date that the applicable statute was enacted in 1998."<sup>107</sup>

With respect to the space and facilities acquisition costs not related to the determination whether Saturday is a business day, the Controller states that not all construction costs for the period from January 1, 1999 to June 30, 1999 are reimbursable. The Parameters and Guidelines allow reimbursement only for "other" animals beginning January 1, 1999, while allowable costs for dogs and cats are reimbursable beginning July 1, 1999. Therefore, the costs claimed for fiscal year 1998-1999 are reimbursable only to the extent they are attributable to space and facilities acquisition costs for the housing of "other" animals; exclusion of dogs and cats within the census data for fiscal year 1998-1999 is consistent with the Parameters and Guidelines.<sup>108</sup>

And finally, with respect to unallowable holding period costs (Finding 4) that were not related to the determination whether Saturday is counted as a business day, the Controller asserts that the claimant included costs for employee classifications that are not reimbursable under the Parameters and Guidelines. The Controller explains:

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<sup>104</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

<sup>105</sup> Exhibit A, IRC, pages 6-7.

<sup>106</sup> Exhibit A, IRC, page 8.

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 13.

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

Shelter employees' time devoted to feeding animals, cleaning cages, duties related to the care of animals, feral cat testing, performing lost-and-found list activities, processing non-medical records, performing initial physical examinations, and administering wellness vaccines are already allowable costs that were supported by the time studies that the city conducted. Reimbursing the city for this same staff under the Holding Period cost component would constitute reimbursing the city twice for the same costs.<sup>109</sup>

In addition, the Controller asserts that “animal control officer duties, euthanasia, spay and neutering procedures, implanting microchips, licensing, processing animal adoptions, and certain other animal services are not reimbursable activities.”<sup>110</sup>

#### **IV. Discussion**

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

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to a 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.<sup>111</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>112</sup>

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

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<sup>109</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>110</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

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

<sup>112</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>113</sup> Under this standard, the courts have found that:

When reviewing the exercise of discretion, “[t]he scope of review is limited, out of deference to the agency’s authority and presumed expertise: ‘The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]’”...“In general...the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support...” [Citations.] When making that inquiry, the “ ‘ ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ ”<sup>114</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.<sup>115</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>116</sup>

#### **A. The Audit Was Both Timely Initiated and Timely Completed.**

Government Code section 17558.5, as amended effective January 1, 2003, states that a reimbursement claim for mandated costs is subject to the initiation of an audit no later than three years after the claim is filed or last amended, whichever is later.<sup>117</sup> However, the section further provides that “if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.”<sup>118</sup> The section then states that “[i]n any case, an audit shall be completed not later than two years after the date that the audit is commenced.”<sup>119</sup>

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<sup>113</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>114</sup> *American Bd. of Cosmetic Surgery, Inc., supra*, 162 Cal.App.4th 534, 547-548.

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

<sup>116</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

<sup>117</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

<sup>118</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

<sup>119</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

Here, claimant's initial annual reimbursement claims, fiscal years 1998-1999, 1999-2000, and 2000-2001, were filed with the Controller on September 4, 2002.<sup>120</sup> The claims were not immediately paid in the fiscal year following filing, but were first paid in August 2006.<sup>121</sup> Therefore, the Controller's time to initiate an audit (three years) commenced to run in August 2006. There is no law or regulation that expressly states whether an entrance conference, or the letter preceding the entrance conference, or some other event, constitutes the initiation of the audit. However, here, the entrance conference letter is dated May 12, 2009, and the entrance conference was scheduled to occur on June 8, 2009.<sup>122</sup> There is no evidence in the record to dispute that the entrance conference scheduled for June 8, 2009 took place, and thus the initiation of the audit prior to August 2009 was timely.

Because there is no law or regulation expressly stating what constitutes the initiation of the audit, the Commission must analyze the evidence in the record to determine both whether an audit was timely initiated, and whether it was timely completed. Here, based on the evidence in the record, the audit was initiated either by the entrance conference letter on May 12, 2009, or by the entrance conference itself, scheduled for June 8, 2009.<sup>123</sup> The Final Audit Report was issued on May 6, 2011,<sup>124</sup> and therefore the Commission is not required to make a legal finding whether the letter or the entrance conference itself constitutes the initiation of the audit. The audit was timely completed within the two year requirement of Government Code section 17558.5 in either case.

**B. The Controller's Exclusions of What It Deems "Ineligible Animals" Are Partially Incorrect as a Matter of Law, and Are Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support, Resulting in Some Incorrect Reductions in Findings 2 (Space and Facilities Acquisition), 3 (Care and Maintenance), 8 (Necessary and Prompt Veterinary Care), and 9 (Equipment Procurement) of the Audit Report.**

The Parameters and Guidelines for the *Animal Adoption* program authorize local agencies to claim reimbursement for the costs of care and maintenance during the increased holding period for impounded stray or abandoned animals that "die during the increased holding period or are ultimately euthanized," based on a formula for determining actual costs. The Parameters and Guidelines also authorize reimbursement for providing necessary and prompt veterinary care as specified in the Parameters and Guidelines during the holding period for stray and abandoned animals that "die during the increased holding period or are ultimately euthanized." Claimants are to calculate and claim their costs for these activities in part by determining the number of "stray or abandoned animals that die during the increased holding period or are ultimately euthanized." The Controller calls this factor of the calculation "eligible animals" or "eligible

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<sup>120</sup> Exhibit D, Controller's Response to the Request for Additional Information, page 7.

<sup>121</sup> Exhibit D, Controller's Response to the Request for Additional Information, page 57; 59; 61.

<sup>122</sup> Exhibit D, Controller's Response to the Request for Additional Information, page 63.

<sup>123</sup> Exhibit D, Controller's Response to the Request for Additional Information, page 63.

<sup>124</sup> Exhibit A, IRC, page 12.

animal population,” and determined that the claimant overstated costs by overstating the number of eligible animals for several reasons.<sup>125</sup> Specifically, the Controller in this case states:

For FY 2000-01, we analyzed the city’s animal database information and revised the eligible number of animals from 2,075 to 1,181. As previously mentioned, the city did not provide a worksheet showing how it determined that 2,075 animals were eligible. In our analysis, we applied the requirements of the parameters and guidelines, and eligible animals include those that died during the increased holding period plus those that were ultimately euthanized (i.e., euthanized after the required holding period). Our analysis took into account that Saturday was not to be considered as a business day, which is consistent with the Appellate Court decision in the case of *Purifoy et al v. Howell*. However, had we considered Saturday as a business day, the number of eligible animals would have only increased by 147, from 1,181 to 1,328 and allowable costs would have increased by \$12,183.<sup>126</sup>

“Eligible animals” under the test claim statutes generally means any cat, dog, “rabbit, guinea pig, hamster, potbellied pig, bird, lizard, snake, turtle, or tortoise that is legally allowed as personal property.”<sup>127</sup> The following animals are excluded from “eligible animals” by statute or because the Commission found there were no increased costs under Government Code section 17556(d) due to fee authority sufficient to cover the costs of the program:

- “Animals that are irremediably suffering from a serious illness or severe injury.”<sup>128</sup>
- Animals too severely injured to move or where a veterinarian is not available, in the field, and it would be more humane to dispose of the animal.<sup>129</sup>
- “Newborn animals that need maternal care and have been impounded without their mother.”<sup>130</sup>
- Animals for which fees sufficient to cover the costs of the program may be collected including:
  - Owner relinquished animals, and
  - Animals that are ultimately redeemed, adopted, or released to a nonprofit animal rescue or adoption organization.

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<sup>125</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>126</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>127</sup> Food and Agriculture Code sections 31108, 31752 and 31753. See also Parameters and Guidelines, amended January 26, 2006, pages 6-15.

<sup>128</sup> Food and Agriculture Code section 17006.

<sup>129</sup> Penal Code sections 597.1(e) and 597f(d).

<sup>130</sup> Food and Agriculture Code section 17006.

Thus, “eligible animals” are any stray or abandoned cat, dog, “rabbit, guinea pig, hamster, potbellied pig, bird, lizard, snake, turtle, or tortoise that is legally allowed as personal property” that “dies during the increased holding period or is ultimately euthanized.”<sup>131</sup>

It is unclear from this audit which animals the Controller chose to exclude as ineligible pursuant to the “requirements of the parameters and guidelines.” In another audit on this program which is the subject of another IRC (*Animal Adoption*, 13-9811-I-02) the Controller provided greater specificity when it excluded “[i]neligible other animals such as rodents, livestock, or wild animals;” and “[i]neligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls” from reimbursement based on its interpretation of the Parameters and Guidelines, although it had made no findings in the record whether those animals could legally be owned as personal property. The Commission cannot tell from the audit report in this case whether those same animals were excluded here. There is in fact no accounting for how many animals were excluded on which basis and there are no specific reasons given for the exclusions of animals based on “requirements of the parameters and guidelines” that could enable the Commission to determine whether those reductions are in fact consistent with the parameters and guidelines and correct as a matter of law and not arbitrary capricious or entirely lacking in evidentiary support. What is clear is that eligible animals were reduced by nearly half in the 2000-2001 fiscal year, and based on the Controller’s assessment only 147 of the 976 animals excluded (about 15 percent of those excluded) were excluded based on *Purifoy*.<sup>132</sup> Therefore the other 85 percent of the reduction must be attributable to those animals that were not eligible based on the auditor’s unstated interpretation of the parameters and guidelines and on those animals that did not die of natural causes during the increased holding period or were not euthanized after the increased holding period. The following analysis lays out which animals are “eligible” under the Parameters and Guidelines.

The Commission finds that some of the Controller’s exclusions of “eligible animals” are incorrect as a matter of law, and are arbitrary, capricious, or entirely lacking in evidentiary support.

1. Any reduction of costs relating to the Controller’s exclusion of specified “birds” and “other animals” “legally allowed as personal property” and thus subject to the protection of the mandated activities is incorrect as a matter of law and is arbitrary, capricious, and entirely lacking in evidentiary support.<sup>133</sup>

As described below, the Commission finds that to the extent the Controller’s excluded eligible animals including “rodents, livestock, or wild animals or “birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls” to the extent those animals are “rabbits, guinea pigs, hamsters, pot-bellied pigs, birds, lizards, snakes, turtles, or tortoises legally allowed

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<sup>131</sup> Exhibit X, Parameters and Guidelines, amended January 26, 2006, see pages 6-15.

<sup>132</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>133</sup> As acknowledged above, it is unclear whether the Controller made reductions on this basis, as the audit report fails to indicate the basis for the reduction of eligible animals with specificity. The Commission requests that the Controller reanalyze the data on eligible animals consistently with this decision and reinstate any costs incorrectly reduced on this basis.

as personal property” is incorrect as matter of law. To the extent any animals so excluded were not legally allowed as personal property, the auditor provided no facts in the record and cited no law to support that determination and, therefore, such exclusions are arbitrary, capricious, and entirely lacking in evidentiary support. Additionally, the Commission finds that most of these specified animals are allowed by state law as personal property unless restricted by local ordinance and no local ordinance was cited to support such exclusions.

The Parameters and Guidelines track the statutory language in Food and Agriculture Code section 31753 and authorize reimbursement during the required holding period for the care and maintenance of “other animals” to include “impounded stray or abandoned rabbits, guinea pigs, hamsters, pot-bellied pigs, birds, lizards, snakes, turtles, or tortoises *legally allowed as personal property.*”<sup>134</sup> Food and Agriculture Code section 31753 provides, in pertinent part:

Any rabbit, guinea pig, hamster, pot-bellied pig, bird, lizard, snake, turtle, or tortoise legally allowed as personal property impounded in a public or private shelter shall be held for the same period of time, under the same requirements of care, and with the same opportunities for redemption and adoption by new owners or nonprofit...animal rescue or adoption organizations as cats and dogs.<sup>135</sup>

The Commission finds that the phrase “legally allowed as personal property” applies to all the animals listed in the statute. Under the rules of statutory construction, where a list of things is followed by a qualifying word or phrase, such as “legally allowed as personal property,” it is presumed that “qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.”<sup>136</sup> In that case, the phrase “legally allowed as personal property would apply only to its “last antecedent,” which in Section 31753 is “tortoises.” However, there is an exception, which applies in this case, that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be applicable to all.”<sup>137</sup> Under that construction, “legally allowed as personal property” applies to the entire list, including “...bird, lizard, snake, turtle, or tortoise...” This latter construction is consistent with Section 1(c)(3) of the test claim statute (Statutes 1998, chapter 752), which states that the intent of the act includes extending public shelter responsibilities from dogs and cats to “other legal pets.”<sup>138</sup> In addition, several of the code sections reenacted or amended by Statutes 1998, chapter 752, state that it is the policy of the

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<sup>134</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 8; Test Claim Decision, January 25, 2001, page 35 (emphasis added).

<sup>135</sup> Food and Agriculture Code section 31753 (Stats. 1998, ch. 752), emphasis added.

<sup>136</sup> *Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 726 [quoting *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680; *Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389.].

<sup>137</sup> *Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 726 [citing *People v. Corey* (1978) 21 Cal.3d 738, 742; (quoting *Wholesale T. Dealers v. National etc. Co.* (1938) 11 Cal.2d 634, 659).].

<sup>138</sup> Statutes 1998, chapter 752, section 1.

state of California “that *no adoptable animal* should be euthanized if it can be adopted into a suitable home.”<sup>139</sup>

All property must be real or personal in nature,<sup>140</sup> and animals, to the extent they are legally allowed to be property, fall into the latter category.<sup>141</sup> Even many types of wild animals may be legally allowed as personal property in certain circumstances.<sup>142</sup> And whether a particular animal is “legally allowed as personal property” can be a complex issue of law and fact. The purpose of the test claim statute is to carry out the state policy that “*no adoptable animal* should be euthanized if it can be adopted into a suitable home” and “*no treatable animal* should be euthanized.”<sup>143</sup> With this purpose in mind, the proper inquiry is whether the animal is “legally allowed as personal property” or, more simply put, legally allowed to be owned.

Here, to the extent the Controller excluded “[i]neligible other animals such as rodents, livestock, or wild animals;” and “[i]neligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls” from reimbursement, it provided no notice in the audit report and made no findings whether these animals can legally be owned as personal property.

The test claim statute mandates the claimant to hold rabbits. Rabbits may be classified as livestock,<sup>144</sup> pets,<sup>145</sup> or wild animals<sup>146</sup> depending on the breed and the owner. However, to the extent the Controller excluded “livestock” or “wild animals,” there are no findings or evidence in the record whether that exclusion included rabbits that are legally allowed as pets. The test claim statute also protects and mandates the local agency to hold guinea pigs and hamsters, which are classified as “rodents.”<sup>147</sup> However, it is unclear whether the Controller excluded all rodents,

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<sup>139</sup> See, e.g., Civil Code section 1834.4; Food and Agriculture Code section 17005; Penal Code section 599d (as added or amended, Stats. 1998, ch. 752) (emphasis added).

<sup>140</sup> Civil Code section 657.

<sup>141</sup> See Civil Code sections 658-660, 662 (further defining real property); see also Civil Code section 663 (stating that all property which is not real is defined as personal).

<sup>142</sup> See, e.g., Civil Code section 656 and California Code of Regulations, title 14, section 671.

<sup>143</sup> Civil Code section 1834.4, Penal Code section 559d, Agricultural Code section 17005, emphasis added.

<sup>144</sup> “Livestock” is undefined in California law, but rabbits are listed as “specialty livestock” by the United States Department of Agriculture, See <https://www.nal.usda.gov/afsic/specialty-livestock>.

<sup>145</sup> See California Penal Code section: (“Pet animals” means dogs, cats, monkeys and other primates, *rabbits*, birds, guinea pigs, hamsters, mice, snakes, iguanas, turtles, and any other species of animal sold or retained for the purpose of being kept as a household pet.) Emphasis added.

<sup>146</sup> See, e.g. 50 Code of Federal Regulations Part 17, listing the riparian brush rabbit as an endangered species.

<sup>147</sup> See California Code of Regulations, Title 14, section 671(c)(6)(J)(1) b. and d. *excluding* from restriction under the “*order rodentia*,” among several other rodents, “domesticated races of

and there is no evidence in the record of the type of rodents excluded or whether the rodent can legally be allowed as a pet. Therefore, to the extent the Controller excluded rabbits, guinea pigs, and hamsters without analysis of the animals held by the claimant and whether the animal can legally be held as pets, that exclusion is facially inconsistent with the law and the Parameters and Guidelines, is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support.

Additionally, the test claim statute expressly requires local agencies to hold stray or abandoned “birds...legally allowed as personal property” pending adoption or redemption. The statute does not distinguish between types of birds required to be held, some of which may be poultry (e.g. chickens and ducks), pets,<sup>148</sup> or wild animals,<sup>149</sup> depending on the breed and owner. However, to the extent the Controller generally excluded “birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls,” without identifying any law rendering these birds illegal to possess as pets or specifying the birds actually held by the claimant, those reductions are incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

Indeed, there are some animals that are whose ownership is restricted by state<sup>150</sup> or local ordinance.<sup>151</sup> With the exception of owls,<sup>152</sup> the animals listed as restricted in the law are not included in the list of animals “excluded” in the audit report at issue in *Animal Adoption*, 13-9811-I-02, however. And even animals that are so restricted, are not strictly prohibited as personal property in all cases. And, though federal law prohibits the capture or ownership of wild mallard ducks and wild migratory waterfowl generally, it authorizes the ownership of captive raised mallards and other captive raised protected migratory waterfowl under specified circumstances.<sup>153</sup>

However, the Controller states no specific law or provision of the Parameters and Guidelines to justify its exclusions of eligible animals or which prohibits the ownership of the particular animals that may have been “excluded” in this case, and the Controller makes no findings in the audit that such excluded animals, which may be restricted by law in some cases, did not meet the requirements in law to be legally allowed in this case. Nor does the audit report state with

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golden hamsters of the species *Mesocricetus auratus* and domesticated races of dwarf hamsters of the Genus *Phodopus*” and domesticated races of guinea pigs of the species *Cavia porcellus*.” Emphasis added.

<sup>148</sup> See California Penal Code section 597l(c)(1): “‘Pet animals’ means dogs, cats, monkeys and other primates, *rabbits*, birds, guinea pigs, hamsters, mice, snakes, iguanas, turtles, and any other species of animal sold or retained for the purpose of being kept as a household pet.” Emphasis added.

<sup>149</sup> Title 50 Code of Federal Regulations, section 21.13.

<sup>150</sup> Fish and Game Code section 2118; California Code of Regulations, title 14, section 671.

<sup>151</sup> Fish and Game Code section 2156; California Code of Regulations, title 14, section 671.

<sup>152</sup> See California Code of Regulations, title 14, section 671(c)(1)(J).

<sup>153</sup> Title 50 Code of Federal Regulations, section 21.13.

specificity, sufficient to provide claimant with reasons for the reductions, which specific animals or how many animals are being excluded on this basis.

Therefore, the Controller's reduction of costs for space and facilities acquisition (Finding 2) care and maintenance (Finding 3), necessary and prompt veterinary care (Finding 8), and equipment and procurement (Finding 9) associated with the exclusion of "[i]neligible other animals such as rodents, livestock, or wild animals;" and "[i]neligible birds, such as pigeons, doves, ducks, chickens, owls, pheasants, mallards, and gamefowls," is incorrect as a matter of law and arbitrary, capricious, and entirely lacking in evidentiary support.

2. The exclusion of animals deemed treatable upon arrival at the shelter and later euthanized during the increased holding period because they became non-rehabilitatable, is incorrect as a matter of law.

The Controller excludes from reimbursement all costs incurred for space and facilities acquisition (Finding 2) care and maintenance (Finding 3), necessary and prompt veterinary care (Finding 8), and equipment and procurement (Finding 9) for dogs, cats, and other animals that were euthanized *during* the increased holding period. The Controller states eligible animals include those that died during the increased holding period plus those that were ultimately euthanized (i.e., euthanized *after* the required holding period).<sup>154</sup> The Controller bases its finding to exclude animals euthanized during the extended holding period on the plain language of the Parameters and Guidelines, which provides that local agencies are eligible to receive reimbursement for care and maintenance costs and for necessary and prompt veterinary costs only for those animals "that die during the increased holding period or are ultimately euthanized." The Controller maintains that these costs are only eligible for reimbursement for those animals that die of natural causes during the increased holding period or are euthanized *after* the increased holding period. Thus, the Controller argues, if an animal is euthanized during the increased holding period, then no costs for that animal are eligible for reimbursement.

The Commission finds that the Controller's interpretation of the Parameters and Guidelines is not correct. The Parameters and Guidelines provide that local agencies are eligible to receive reimbursement for care and maintenance and prompt and necessary veterinary costs only for those animals "that die during the increased holding period or are ultimately euthanized." The plain language of the phrase "animals that die during the increased holding period or are ultimately euthanized" is vague and ambiguous because the word "die" can include both death by natural causes and death by euthanasia. Since the plain language is not clear, it is necessary to review the decisions adopted by the Commission on this issue and the statutory scheme of the test claim statutes.<sup>155</sup>

The phrase "ultimately euthanized" was used in the Test Claim Statement of Decision only to identify those animals whose owners are unknown or are not adopted, meaning that the costs for

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<sup>154</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>155</sup> The Parameters and Guidelines are regulatory in nature (*Clovis Unified School Dist. v. Chiang* (2010) 188 Cal. App. 4th 794, 799), and, thus, must be construed in accordance with the rules of statutory and regulatory construction.

care, treatment, and veterinary services during the holding period for this group of animals could not be recovered by fee revenue. The Test Claim Statement of Decision states in relevant part:

Fee Authority – Government Code Section 17556, Subdivision (d). Government Code section 17556, subdivision (d), provides that there shall be no costs mandated by the state if the local agency has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program.

In the present case, local agencies do have the authority, under certain circumstances, to assess fees upon the owner of an impounded animal for the care and maintenance of the animal. For example, pursuant to Civil Code section 2080, any public agency that takes possession of an animal has the authority to charge the owner, *if known*, a reasonable charge for saving and taking care of the animal.

Similarly, Penal Code sections 597f and 597.1 also allow local agencies to pass on the costs of caring for abandoned or seized animals to their owners by providing that “the cost of caring for the animal shall be a lien on the animal until the charges are paid.”

Moreover, Penal Code section 597f allows the cost of hospital and emergency veterinary services provided for impounded animals to be passed on to the owner, if known. [Footnote omitted.]

The fee authority granted under the foregoing authorities applies only if the owner is known. Thus, local agencies have the authority to assess a fee to care and provide treatment for animals relinquished by their owners pursuant to Food and Agriculture Code section 31754. Local agencies also have the authority to assess a fee for the care and treatment of impounded animals that are ultimately redeemed by their owners. Under such circumstances, the Commission finds that the fee authority is sufficient to cover the increased costs to care, maintain, and provide necessary veterinary treatment for the animal during the required holding period since the “cost of caring” for the animal can be passed on to the owner.

Accordingly, pursuant to Government Code section 17556, subdivision (d), the Commission finds that there are no costs mandated by the state for the care, maintenance and necessary veterinary treatment of animals relinquished by their owners or redeemed by their owners during the required holding period.

The Commission further finds that there are no costs mandated by the state under Government Code section 17556, subdivision (d), for the care, maintenance, and treatment of impounded animals that are ultimately adopted by a new owner; for the care, maintenance, and treatment of impounded animals that are requested by a nonprofit animal rescue or adoption organization; or for the administrative activities associated with releasing the animal to such organizations.

The test claim legislation gives local agencies the authority to assess a standard adoption fee, in addition to any spay or neuter deposit, upon nonprofit animal rescue or adoption organizations that request the impounded animal prior to the scheduled euthanization of the animal. [Footnote omitted.]

The claimant contends that the “standard adoption fee” is not sufficient to cover the costs for animals adopted or released to nonprofit animal rescue or adoption organizations. However, based on the evidence presented to date, the Commission finds that local agencies are not prohibited by statute from including in their “standard adoption fee” the costs associated with caring for and treating impounded animals that are ultimately adopted by a new owner or released to nonprofit animal rescue or adoption organizations, and the associated administrative costs. Rather, local agencies are only prohibited from charging nonprofit animal rescue or adoption organizations a higher fee than the amount charged to individuals seeking to adopt an animal.

However, the fees recovered by local agencies under the foregoing authorities do *not* reimburse local agencies for the care and maintenance of stray or abandoned animals, or the veterinary treatment of stray or abandoned animals (other than cats and dogs) during the holding period required by the test claim legislation when:

- The owner is unknown;
- The animal is not adopted or redeemed; or
- The animal is not released to a nonprofit animal rescue or adoption organization.

*Thus, the fee authority is not sufficient to cover the increased costs for care, maintenance, and treatment during the required holding period for those animals that are ultimately euthanized.* Under such circumstances, the Commission finds that that Government Code section 17556, subdivision (d), does not apply to deny this claim. Rather, local agencies may incur increased costs mandated by the state to care for these animals during the required holding period.<sup>156</sup>

There was no discussion of animals that die during the increased holding period in the Test Claim Statement of Decision.

During the adoption of the Parameters and Guidelines, however, the County of Fresno requested reimbursement for animals that die during the increased holding period while being held pending adoption or euthanization as follows:

Fresno County recommends that reimbursements that apply to animals that are ultimately euthanized also apply to those animals that die while being held pending adoption or euthanization. If the animal dies pending adoption, obviously no adoption fees can be paid, and thus there is no revenue pertaining to that animal. If the animal dies pending euthanasia, the animal still had to be held until its untimely demise.<sup>157</sup>

The staff analysis adopted for the Parameters and Guidelines agreed with the request as follows:

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<sup>156</sup> Exhibit X, Test Claim Statement of Decision, pages 27-29. (Emphasis added.)

<sup>157</sup> Exhibit X, Staff Analysis for Item 4, February 28, 2002 Commission Hearing, page 6.

If a stray or abandoned animal dies during the time an agency is required to hold that animal, the agency would still be required by the state to incur costs to care and maintain the animal, and to provide “necessary and prompt veterinary care” for the animal before the animal died. The agency cannot recover those costs from the adoptive owner since the animal was never adopted or released to a nonprofit adoption organization. Thus, staff agrees with the County that these costs are eligible for reimbursement.<sup>158</sup>

Thus, the Parameters and Guidelines define the mandated population of animals for purposes of calculating reimbursement for the care and maintenance, and necessary and prompt veterinary care, as those that “die during the holding period or are ultimately euthanized.”

However, neither the Parameters and Guidelines, nor the analyses adopted for the Parameters and Guidelines, define what it means to “die” during the holding period. And the decisions do *not* limit reimbursement to animals that die of natural causes during the increased holding period. Such a limitation would be contrary to the statutory scheme.

Food and Agriculture Code section 17006 provides that the holding period does not apply to animals that are irremediably suffering from a serious illness or severe injury or to newborn animals that need maternal care and have been impounded without their mothers. Such animals may be euthanized without being held for owner redemption or adoption. A related statute addresses the issue of a “treatable” animal’s health changing over the course of impoundment. Food and Agricultural Code section 17005 reads in its entirety:

(a) It is the policy of the state that no adoptable animal should be euthanized if it can be adopted into a suitable home. Adoptable animals include only those animals eight weeks of age or older that, at or subsequent to the time the animal is impounded or otherwise taken into possession, have manifested no sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet, and have manifested no sign of disease, injury, or congenital or hereditary condition that adversely affects the health of the animal or that is likely to adversely affect the animal's health in the future.

(b) *It is the policy of the state that no treatable animal should be euthanized. A treatable animal shall include any animal that is not adoptable but that could become adoptable with reasonable efforts.* This subdivision, by itself, shall not be the basis of liability for damages regarding euthanasia.<sup>159</sup> (Emphasis added.)

Section 17005, thus, expressly contemplates an animal’s health changing over the course of impoundment. Read together with section 17006, the two statutes require a shelter to hold an animal which is ill or injured— but not an animal which is irremediably suffering — for the relevant holding period on the ground that the animal’s health may improve. The stated intent of

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<sup>158</sup> Exhibit X, Staff Analysis for Item 4, February 28, 2002 Commission Hearing, page 7.

<sup>159</sup> Emphasis added.

the test claim statute was to require shelters to care for all pets and to shift the focus from euthanasia to owner redemption or adoption:

According to the author, the purpose of this bill is: (1) to make it clear that animal shelters and private individuals have the same responsibility to animals under their care; (2) to reduce the number of adoptable animals euthanized at shelters by shifting the focus of shelters from killing to owner redemption and adoption; (3) to give owner-relinquished pets the same chance to live as stray animals by providing for uniform holding periods; (4) to establish clearer guidelines for the care and treatment of animals in shelters; and (5) *to require shelters to care for all pets*.

*The author argues that too many adoptable animals are euthanized by shelters and that the proposed changes will decrease the frequency of this tragedy.*

Further, the author argues that taxpayers who own legally allowed pets other than cats and dogs should be treated the same as taxpayers who own cats and dogs.<sup>160</sup>

Consistent with the statutory scheme, the Parameters and Guidelines expressly contemplate an animal's health changing over the course of impoundment from "treatable" to "adoptable." Section IV.(B)(8) of the Parameters and Guidelines allows reimbursement for the initial physical examination of a stray or abandoned animal to determine the animal's baseline health status and classification as "adoptable, treatable, or non-rehabilitatable." The Parameters and Guidelines further authorize reimbursement for the administration of a wellness vaccine to "treatable" or "adoptable" animals, veterinary care to stabilize and/or relieve the suffering of a "treatable" animal, and veterinary care intended to remedy any applicable disease, injury, or congenital or hereditary condition that adversely affects the health of a "treatable" animal until the animal becomes "adoptable."

Even with veterinary care, the condition of the animal can change during the increased holding period and the animal can become non-rehabilitatable. If that occurs, the animal is not "adoptable" or "treatable" and may be euthanized under the law. Therefore, to deny reimbursement for the costs incurred during the increased holding period for an animal that becomes non-rehabilitatable and that has to be euthanized during, but before the end of, the increased holding period conflicts with the test claim statute and the Parameters and Guidelines. The Commission finds that reimbursement is required under these circumstances.

Therefore, to the extent the Controller's reduction includes costs incurred for space and facilities acquisition (Finding 2) care and maintenance (Finding 3), necessary and prompt veterinary care (Finding 8), and equipment and procurement (Finding 9) for dogs, cats, and other animals that became non-rehabilitatable and were euthanized during, but before the expiration of, the increased holding period, the reduction is incorrect as a matter of law.

3. The Commission and the Controller are bound by the *Purifoy* decision and, thus, the Controller's exclusion of animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is correct as a matter

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<sup>160</sup> Senate Judiciary Committee Analysis of S.B. 1785 (1997-1998 Regular Session) (Hearing Date: April 21, 1998), page 3-4. Emphasis added.

of law. However, the Controller’s recalculation of costs using an average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of “eligible animals” held for the time required under *Purifoy*.

As indicated above, the Controller only included as eligible animals those dogs, cats, and other animals “*euthanized after the holding period.*”<sup>161</sup> Animals may have been euthanized during the holding period because of claimant’s misinterpretation of the required holding period in conflict with the Court of Appeal’s decision in *Purifoy*, which held that Saturday is not a “business day” for purposes of calculating the required holding period under the test claim statutes before a stray or abandoned dog can be adopted or euthanized.<sup>162</sup> Before the decision was issued, many local agencies were operating under the assumption that Saturday was a “business day” that could be counted as part of the holding period, which resulted in the disposal of some animals at least one day too early.<sup>163</sup> Pursuant to the *Purifoy* decision, the Controller excluded those animals from the number of “eligible animals that die during the holding period or are ultimately euthanized,” because they were disposed of at least one day too early.

The Commission finds that the court’s interpretation of “business day” in *Purifoy* is binding, and that the Controller’s exclusion of Saturday as a business day when calculating the increased holding period is correct as a matter of law. Thus, except in the circumstances described below, the Controller’s exclusion of animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is also correct as a matter of law. However, the Controller’s recalculation of costs for space and facilities acquisition costs (Finding 2), care and maintenance (Finding 3), necessary and prompt veterinary care (Finding 8), and equipment procurement (Finding 9)<sup>164</sup> using an average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of “eligible animals” held for the time required under *Purifoy*.

- a) *The court’s interpretation of “business day” in Purifoy is binding and, thus, the Controller’s exclusion of Saturday as a business day when calculating the increased holding period is correct as a matter of law. Therefore, the exclusion of animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is also correct as a matter of law.*

The court in *Purifoy* held that Saturday is not a “business day” for purposes of calculating the required holding period. In that case, Plaintiff Veena Purifoy’s dog Duke was impounded on a Thursday, and adopted the following Wednesday by a new owner (Duke was returned to Purifoy). The shelter, Contra Costa County Animal Services, counted the required holding

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<sup>161</sup> Exhibit A, IRC, page 32 (Final Audit Report).

<sup>162</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

<sup>163</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>164</sup> Exhibit A, IRC, page 60 (Final Audit Report), “For the purposes of this audit, this [*Purifoy*] affected our calculations of allowable costs for Finding 2 (overstated space and facilities acquisition costs), Finding 3 (unallowable care and maintenance costs), Finding 8 (misstated necessary and prompt veterinary care costs), and Finding 9 (misstated equipment procurement costs).”

period for Duke under section 31108 beginning Friday (the day after impoundment), Saturday (day 2), Tuesday (day 3), and Wednesday (day 4). The shelter was closed on Sunday and Monday, and did not count those as business days, by its own admission.<sup>165</sup> The court examined the meaning of “business days” elsewhere in state law and in case law, and found that sometimes “business day” includes Saturdays, but sometimes it does not. The court reasoned that the purpose of the statute was to promote a longer holding period for animal adoption and redemption, and that excluding Saturday as a business day would generally mean extending the holding period by one day. Thus, the court held “in light of our obligation to choose a construction that most closely comports with the Legislature’s intent and promotes, rather than defeats, the statute’s general purposes, we conclude that ‘business days’ in section 31108(a) means Monday through Friday, the meaning most commonly used in ordinary discourse.”<sup>166</sup> The court applied this interpretation to the case of Duke, and concluded that the shelter in question had not held the animal for the required number of business days before permitting his adoption to a new owner.<sup>167</sup>

Here, applying the *Purifoy* decision, the Controller determined that the number of “eligible animals” was overstated, because the claimant incorrectly calculated the holding period to *include* Saturdays and thus euthanized at least some number of animals one day too early. For example, a dog impounded on a Thursday, in a shelter that stays open weekend hours, would be subject to a four day holding period beginning on Friday, excluding Saturday and Sunday, and through the close of business on Wednesday; if the shelter counted Saturday as a business day, the holding period for the same dog would end a day earlier. The Controller maintains that application of the *Purifoy* decision is appropriate because the decision clarified the legal definition of a business day “as of the date that the applicable statute was enacted in 1998.”<sup>168</sup> The Controller further explains:

We acknowledge that many animal shelters were operating under the assumption that they could count Saturday as a business day to calculate the holding period of an animal. However, the court’s decision declared that this assumption was incorrect.<sup>169</sup>

The claimant strenuously protests the Controller’s application of the *Purifoy* holding. The claimant maintains that its calculation of the holding period was based on a reasonable interpretation of the test claim statute and the Parameters and Guidelines, and that the Controller’s application of the *Purifoy* holding to recalculate the increased holding period, and the resulting adjustment to the population of eligible animals, is an unfair and unreasonable retroactive application of the law. The claimant notes that “*Purifoy* is not a decision of the

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<sup>165</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166, 171-172.

<sup>166</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166, 182.

<sup>167</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

<sup>168</sup> Exhibit A, IRC, page 63 (Final Audit Report).

<sup>169</sup> Exhibit A, IRC, page 64 (Final Audit Report).

Commission nor is it a decision to which the Commission was a party.”<sup>170</sup> Additionally, the claimant notes that there has been no subsequent amendment to the Parameters and Guidelines, or request for a new test claim decision, and therefore the effect of the decision on the Parameters and Guidelines has not been analyzed by the Commission.<sup>171</sup>

The claimant argues that although judicial decisions are generally given retroactive effect because the court is said to interpret the law as it always was, rather than to alter it, there are several exceptions to the general rule which apply in this instance.<sup>172</sup> Specifically, claimant asserts that the change is procedural, not substantive; that retroactive application of *Purifoy* would produce unjust results with respect to local governments that are subject to audit; and that retroactive application cannot achieve the goal of extending the holding period for animals long since retrieved, adopted, or euthanized.<sup>173</sup> Furthermore, the claimant argues that the Legislature has, by enacting Statutes 2011, chapter 97, since clarified by subsequent statute that a “business day” for purposes of the relevant Food and Agriculture Code sections “includes any day that a public or private shelter is open to the public for at least four hours, excluding state holidays.” The claimant asserts that this legislative change was an attempt to correct the interpretation of *Purifoy*.<sup>174</sup> The claimant argues that these precedents provide “sufficient reason for the Commission to reverse the SCO as to the retroactive application of the *Purifoy* case to the instant audit and reimburse any and all attendant costs.”<sup>175</sup>

It is undisputed that the Commission was not a party to the *Purifoy* matter, and that the court did not expressly address the effect of its decision on mandate reimbursement. And, as both the claimant and the Controller acknowledge, there has been no amendment to the Parameters and Guidelines, and no request for amendment.<sup>176</sup> It is also undisputed that the Commission did not define “business day” as used in the plain language of the test claim statutes in either the Test Claim Decision or the Parameters and Guidelines.

However, the court’s interpretation of “business day” is binding. The interpretation of a statute is an exercise of the judicial power the Constitution assigned to the courts, and constitutes the authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.<sup>177</sup> This is why judicial decisions are normally said to have

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<sup>170</sup> Exhibit A, IRC, page 3.

<sup>171</sup> Exhibit A, IRC, page 3.

<sup>172</sup> Exhibit A, IRC, page 3.

<sup>173</sup> Exhibit A, IRC, page 61 (citing *Camper v. Workers’ Comp. Appeals Bd.* (1992) 3 Cal.4th 679).

<sup>174</sup> Exhibit A, IRC, page 6.

<sup>175</sup> Exhibit A, IRC, page 6.

<sup>176</sup> Exhibit A, IRC, page 3; Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>177</sup> *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473; *Carter v. California Department of Veteran Affairs* (2006) 38 Cal.4th 914, 922.

retroactive effect, because the court is interpreting the law, rather than making new law.<sup>178</sup> Moreover, where a judicial decision is limited to prospective effect, the court will exercise equitable authority and, based on the facts of a particular case, will so state that its decision operates prospectively only. Indeed, in the principal case cited by the claimants discussing retroactivity, the court explains that “[a] *court* may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law.”<sup>179</sup> “In other words,” the Court continued, “*courts* have looked to the ‘hardships’ imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases.”<sup>180</sup> Unlike the courts, the Commission’s jurisdiction is limited, as a quasi-judicial agency created by statute, and the Commission has no authority to do equity.<sup>181</sup> Absent a statement by the court that *Purifoy* should be limited in its application, the Commission and the Controller are bound to apply the court’s definition of “business day” for purposes of the test claim statute particularly where, as here, it does not conflict with the Parameters and Guidelines. Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.<sup>182</sup>

Furthermore, even though *Purifoy* only directly and expressly defines “business day” for purposes of section 31108 (the holding period for dogs), the court’s analysis and conclusion apply with equal force to sections 31752 and 31753 (holding periods for cats and for “other animals,” respectively). The California Supreme Court has declared that “[a] statute that is modeled on another, and that shares the same legislative purpose is in *pari materia* with the other, and should be interpreted consistently to effectuate congressional intent.”<sup>183</sup> Accordingly, Food and Agriculture sections 31752 and 31753 should be interpreted consistently with section 31108, because all three code sections provide for the same holding period for different animals, and all three were enacted within the test claim statute.

Moreover, even though the Legislature amended the code after the decision in *Purifoy* was issued to state that any day that a shelter is open for four or more hours is a “business day,” this later amendment by the Legislature cannot be interpreted as the Legislature’s declaration of the original existing law. When the court “‘finally and definitively’ interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared

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<sup>178</sup> See *Newman v. Emerson Radio Corp.*, (1989) 48 Cal.3d 973, 978 (“The general rule that judicial decisions are given retroactive effect is basic in our legal tradition.”).

<sup>179</sup> *Newman v. Emerson Radio Corp.*, (1989) 48, Cal.3d 973, 983, emphasis added.

<sup>180</sup> *Newman v. Emerson Radio Corp.*, (1989) 48, Cal.3d 973, 983, emphasis added.

<sup>181</sup> *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

<sup>182</sup> *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d. 450, 454.

<sup>183</sup> *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129.

existing law.”<sup>184</sup> The later amendment goes into effect only when the statute is operative and effective, in this case on January 1, 2012, many years after the fiscal years at issue in this IRC.

Accordingly, the Controller’s exclusion of Saturday as a business day when calculating the increased holding period is correct as a matter of law. Thus, the exclusion from the population of “eligible animals” those animals that were euthanized too early because Saturday was counted as a business day for the required holding period, is also correct as a matter of law.

*b) However, the Controller’s recalculation of costs for space and facilities acquisition (Finding 2), care and maintenance (Finding 3), necessary and prompt veterinary care (Finding 8), and equipment procurement (Finding 9) using an average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of “eligible animals” held for the duration required under Purifoy.*

The Parameters and Guidelines provide for a formula for reimbursement of care and maintenance that requires multiplying the cost per animal per day by the number of “eligible animals,” and by “each reimbursable day.” But the actual number of calendar days of the holding period is not a constant, as it depends on the day of impoundment. The Parameters and Guidelines state that for dogs and cats the reimbursable holding period “shall be measured by calculating the difference between three days from the day of capture, and four or six business days from the day after impoundment” (four business days for shelters that choose to make animals available for owner redemption on a weekend day or weekday evening). For “other animals,” the reimbursable holding period is four or six business days from the day after impoundment, because prior law did not define a specific holding period.<sup>185</sup>

Assuming a local agency, like the claimant, makes dogs and cats available for owner redemption on a weekend day or weekday evening and is thus subject to only the four business day holding period for dogs and cats, the increased holding period operates as follows (the 72 hour holding period for dogs and cats under prior law is shaded in each case, and the day of impoundment is indicated by “Imp”):

Mon	Tues	Wed	Thurs	Fri	Sat	Sun	Mon	Tues	Wed	Thurs
Imp	One	Two	Three	Four						
	Imp	One	Two	Three			Four			
		Imp	One	Two			Three	Four		
			Imp	One			Two	Three	Four	
				Imp			One	Two	Three	Four
					Imp		One	Two	Three	Four
						Imp	One	Two	Three	Four

<sup>184</sup> *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473; *Carter v. California Department of Veteran Affairs* (2006) 38 Cal.4th 914, 922.

<sup>185</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 6.

The chart does not count Saturday as a business day, in accordance with *Purifoy*.<sup>186</sup> As it plainly appears, the *increased* holding period for dogs and cats ranges from two to four calendar days, depending on the day of the week that an animal is first impounded. An animal impounded on a Monday or Sunday would be subject to a two day increased holding period, while an animal impounded on a Thursday or a Friday would be subject to a four day increased holding period, because Saturday and Sunday cannot be counted.

For a local agency subject to the shortened four day holding period for “other animals,” the number of “reimbursable days” is as follows:

Mon	Tues	Wed	Thurs	Fri	Sat	Sun	Mon	Tues	Wed	Thurs	Fri
Imp	One	Two	Three	Four							
	Imp	One	Two	Three			Four				
		Imp	One	Two			Three	Four			
			Imp	One			Two	Three	Four		
				Imp			One	Two	Three	Four	
					Imp		One	Two	Three	Four	
						Imp	One	Two	Three	Four	

Again, this chart does not count Saturday and Sunday as business days, consistently with *Purifoy*. If the animal is impounded on a Monday, the reimbursable increased holding period is four calendar days. If the animal is impounded on a Saturday, the reimbursable increased holding period is five calendar days. If the animal is impounded on a Tuesday, the reimbursable increased holding period is seven calendar days because Saturday and Sunday cannot be counted.

When auditing and recalculating the number of reimbursable days pursuant to *Purifoy*, the Controller did not include either Saturday, Sunday, or other days that the agency was closed as a business day. And, like the claimant,<sup>187</sup> and without explanation, Controller calculated an *average* increased holding period for all dogs and cats to be three days, and the average increased holding period for all other “eligible” animals to be six days, and did not state the total number of reimbursable days for each eligible animal.<sup>188</sup>

However, even if the increased holding period averages three days for dogs and cats, or six days for other animals, the Parameters and Guidelines do not provide for reimbursement based on an average number of days. The Controller’s recalculation may also result in the exclusion of animals that are euthanized during the Controller’s defined “average” holding period but which have been held for the period required by law as set out in *Purifoy*. For example, as explained

<sup>186</sup> *Purifoy v. Howell* (2010) 183 Cal.App.4th 166.

<sup>187</sup> See, e.g., Exhibit A, IRC, pages 741-742. The reimbursement claims claimed two reimbursable days for all dogs and cats, and four reimbursable days for all “other animals,” and made no attempt to state the total number of reimbursable days for each eligible animal.

<sup>188</sup> Exhibit A, IRC, pages 21-24.

above, the Controller applied an increased holding period for dogs and cats of three days, after which the animal may be euthanized. However, if a stray or abandoned dog or cat is impounded on a Monday or Sunday, the actual increased holding period under the law is two calendar days, and not three days, and the dog or cat may be euthanized on day three (a day before the Controller's average and, thus, as "during the holding period" as defined by the Controller). Similarly, for "other animals," the Controller applied an increased holding period of six days. However, if a stray bird or rabbit is impounded on a Monday, the actual increased holding period under the law is four calendar days, and not six days, and the bird or rabbit may be euthanized on day five (a day before the Controller's average and, thus, "during the holding period" as defined by the Controller). Similarly for "other animals," an animal impounded on a Saturday has an increased holding period of five days under *Purifoy* and may be euthanized on day six, a Friday consistent with the mandated program.

Under these circumstances, the Controller's recalculation and use of the average number of reimbursable days is incorrect as a matter of law to the extent it results in an exclusion of "eligible animals" held for the duration required by law.

4. The remaining exclusions from the population of "eligible animals" are correct as a matter of law.

To the extent that the Controller excludes from the population of "eligible animals" dogs, cats, and other animals that were owner-relinquished, the Test Claim Decision provides that although such animals are required to be held during the holding period if accepted, the test claim statute does not require local agencies to accept owner-relinquished animals.<sup>189</sup> Accordingly, the Parameters and Guidelines provide for reimbursement only for stray or abandoned animals.<sup>190</sup> This exclusion is consistent with the Parameters and Guidelines and the test claim statute, and is therefore correct as a matter of law.

To the extent that the Controller excludes dogs, cats, and other animals that were ultimately adopted, transferred, rescued, or redeemed, this is consistent with the Test Claim Decision finding that local agencies have fee authority to recoup costs of care and maintenance for animals that are adopted or redeemed, or released to a nonprofit animal rescue organization.<sup>191</sup> This exclusion from "eligible animals" is therefore correct as a matter of law.

To the extent that the Controller excludes dogs, cats, and other animals that were deceased on arrival at the shelter, such animals are expressly excluded from reimbursement by the Parameters and Guidelines since these animals did not die *during* the increased holding period and were not ultimately euthanized. Moreover, no costs for care and maintenance during the increased holding period were incurred for such animals. This exclusion is therefore consistent with the Parameters and Guidelines, and is correct as a matter of law.

To the extent that the Controller excludes dogs, cats and other animals that were euthanized as requested by owners or if euthanasia was required, the Test Claim Decision states that local

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<sup>189</sup> Exhibit X, Test Claim Decision, adopted January 25, 2001, page 19.

<sup>190</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 6.

<sup>191</sup> Exhibit X, Test Claim Decision, adopted January 25, 2001, page 31.

agencies were not required to accept owner-relinquished animals<sup>192</sup> and the Parameters and Guidelines expressly prohibit reimbursement for the activity of euthanizing an animal.<sup>193</sup> Therefore, this population exclusion is consistent with the Test Claim Decision and Parameters and Guidelines, and is correct as a matter of law.

To the extent that the Controller excludes “Dogs, cats, and other animals that were euthanized for humane reasons (usually on day 1)” and “Dogs, cats, and other animals that were suffering from a serious illness or severe injury (usually euthanized on day 1 or died on day 1), as noted above, Food and Agriculture Code section 17006 provides that the holding period does not apply to animals that are irremediably suffering from a serious illness or severe injury or to newborn animals that need maternal care and have been impounded without their mothers. Such animals may be euthanized without being held for owner redemption or adoption. However, Food and Agricultural Code section 17005 provides, in pertinent part: “It is the policy of the state that no treatable animal should be euthanized. A treatable animal shall include any animal that is not adoptable but that could become adoptable with reasonable efforts.” And, as discussed above, the Parameters and Guidelines contemplate an animal’s treatable or adoptable status changing within the course of the holding period, even with veterinary care. Thus, to the extent an animal is initially deemed treatable but then later euthanized during the increased holding period, the law requires reimbursement for care and maintenance costs during the increased holding period. However, to the extent the exclusion includes animals euthanized prior to the increased holding period (or on day one for birds and other animals), these exclusions are consistent with the Parameters and Guidelines and therefore are correct as a matter of law.

To the extent that the Controller excludes “Newborn animals that need maternal care and were impounded without their mothers (usually died or were euthanized within the first few days; the excluded categories included ‘Unweaned’ or ‘8 weeks unsustainable’),” the Parameters and Guidelines expressly exclude such animals from reimbursement, referencing Food and Agriculture Code section 17006.<sup>194</sup> This exclusion is thus correct as a matter of law.

To the extent that the Controller excludes dogs and cats that died in the shelter’s kennels *outside the increased* holding period, meaning within the first few days of the holding period required under prior law, or *after* the required holding period; and “other animals” that died in the shelter’s kennels after the increased holding period.<sup>195</sup> The Commission finds that the exclusion of stray or abandoned dogs and cats that die within the holding period *required by prior law* is correct as a matter of law, since that requirement was not new and determined to be reimbursable in the Test Claim Decision. No reimbursement for the care and maintenance of a stray or abandoned dog or cat is required until *after* the first three days from the day of capture as follows:

For stray and abandoned dogs and cats, the increased holding period is the difference between three days from the day of capture, and either four or six

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<sup>192</sup> Exhibit X, Test Claim Decision, adopted January 25, 2001, page 19.

<sup>193</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 13.

<sup>194</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, page 8.

<sup>195</sup> Exhibit A, IRC, page 689.

business days from the day after impoundment. Eligible claimants are not entitled to reimbursement for the first three days of that period.<sup>196</sup>

Thus, if a stray or abandoned dog or cat dies before the increased holding period begins, reimbursement is not required.

The Commission also finds that the Controller's exclusion of animals that died after the increased holding period is consistent with the Parameters and Guidelines and is correct as a matter of law. The Parameters and Guidelines provide for reimbursement for dogs and cats, and other animals, that died during the increased holding period or were ultimately euthanized after the increased holding period.<sup>197</sup> Reimbursement is limited to: stray or abandoned dogs and cats and other animals are subject to reimbursement because their owners are not known, and cannot have fees levied against them; animals that are not adopted during the holding period, but are "ultimately euthanized" when the holding period expires, are subject to reimbursement on the theory that there is no new owner or redeemed owner from whom fees could be exacted; both of these situations were contemplated in the test claim decision and animals that die *during* the increased holding period.<sup>198</sup> And with respect to animals that die during the increased holding period, this issue arose during the consideration of Parameters and Guidelines, when the County of Fresno filed comments requesting reimbursement for the care and maintenance of stray or abandoned animals that die while being held pending adoption or euthanasia. As discussed above, the County requested reimbursement for animals that "die while being held pending adoption or euthanization [sic]."<sup>199</sup>

The Commission approved the request, clarifying that increased costs for the care and maintenance of animals that die during the increased holding period are eligible for reimbursement as follows:

[S]taff has inserted language in Sections IV (B) (1), (2), (3), (4), and (9) of the proposed Parameters and Guidelines clarifying that increased costs for the care and maintenance of animals that die during the increased holding period, and for providing "necessary and prompt veterinary care" to animals that die during the holding period are eligible for reimbursement.<sup>200</sup>

The Parameters and Guidelines, however, do not authorize reimbursement for animals that continue to be held by the local agency for adoption longer than the holding period and die *thereafter*. The Parameters and Guidelines are binding, and no requests to amend the Parameters and Guidelines have been filed. Thus, the Controller's interpretation is consistent with the plain language of the Parameters and Guidelines. Based on the foregoing, the Commission finds that this reduction of eligible animals on these grounds is correct as a matter of law.

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<sup>196</sup> Exhibit X, Parameters and Guidelines Analysis, adopted February 28, 2002, page 7.

<sup>197</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, pages 6; 8.

<sup>198</sup> Exhibit X, Test Claim Decision, pages 19-20; 30-31. Emphasis added.

<sup>199</sup> Exhibit X, Parameters and Guidelines Analysis, adopted February 28, 2002, page 6.

<sup>200</sup> Exhibit X, Parameters and Guidelines Analysis, adopted February 28, 2002, pages 7-8.

**C. The Controller’s Reduction in Finding 2 Relating to Facilities Construction Costs Based on the Period of Reimbursement for the Increased Holding Period for Dogs and Cats Is Incorrect as a Matter of Law. However, the Remaining Grounds for Reduction Are Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support, Except as Provided in Section B. of This Decision.**

The Commission finds above that the *Purifoy* decision applies to this claim, but that the Controller’s recalculation under its interpretation *Purifoy* may have resulted in the exclusion of “eligible animals” used to calculate reimbursement for several activities, including facilities construction and space acquisition and that the other reasons for the exclusion of eligible animals are partially incorrect. Here, the Commission analyzes the remaining alternative reasons in Finding 2 for reduction of this activity stated in the audit report.

The Controller reduced costs claimed for construction or acquisition of new animal shelter space for fiscal years 1998-1999, 1999-2000, and 2000-2001 by a total of \$224,685. These costs were claimed based on the approval of plans and specifications claimant’s city council for construction of 6,700 square feet of additional kennel space, adoption gallery, night deposit area, get-acquainted room, and grooming and laundry rooms. The project also included an outside concrete pad for the freezer unit and filling the existing loading ramp to provide better access and additional parking space. On January 4, 2000, the claimant awarded the project to a contractor and the project was completed during fiscal year 2000-2001.<sup>201</sup>

For fiscal year 1998-1999, the Controller reduced costs claimed finding that the period of reimbursement for costs relating to the increased holding period for dogs and cats did not begin until fiscal year 1999-2000 (beginning July 1, 1999) and only costs for “other animals” were reimbursable for the 1998-1999 fiscal year (beginning January 1, 1999). This resulted in a reduction from \$40,633 to \$248, based on the proportion of “other animals” that were eligible for reimbursement, as compared to the total number of animals for that period (January 1, 1999 to June 30, 1999). For fiscal year 1999-2000, the Controller reduced costs on the basis of a lack of supporting documentation for the total population of animals, and exclusions from the population of eligible animals pursuant to the Parameters and Guidelines, including the interpretation of *Purifoy*, as discussed above.<sup>202</sup> This resulted in reductions of \$159,544 and \$24,756 for fiscal years 1999-2000 and 2000-2001, respectively.

The Parameters and Guidelines authorize reimbursement for facilities construction of shelter space based on the number of animals that must be housed during the increased holding period, excluding any animals redeemed by their owners or adopted, for which there is fee authority sufficient to fund the costs of the program.<sup>203</sup> Based on these exclusions, reimbursement is

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<sup>201</sup> Exhibit A, IRC, page 27.

<sup>202</sup> *Purifoy*, *supra*, 183 Cal.App.4th 166.

<sup>203</sup> See Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 [Test Claim Decision, CSM-9811, pages 29-30 (Discussing fee authority for animals redeemed by their owners or adopted by new owners, and the resulting absence of “costs mandated by the state” pursuant to Government Code section 17556(f).)].

calculated by a ratio of the number of animals that die during the increased holding period or are ultimately euthanized after the holding period (i.e., those not adopted or redeemed) to the total population of animals housed at the facility. That ratio is then multiplied by all costs incurred by the claimant applicable to animal shelter construction to determine pro rata reimbursement of construction costs.

1. The Controller's reduction of construction costs for fiscal year 1998-1999 is incorrect as a matter of law.

For fiscal year 1998-1999, claimant requested reimbursement for \$40,633 for design and planning costs to acquire or construct sufficient space to comply with the mandated new or increased holding periods for dogs and cats, and other animals.<sup>204</sup> The Controller reduced those design and planning costs claimed by \$40,385, based on the Controller's finding that the test claim statute and the Parameters and Guidelines only authorize reimbursement for "other animals," and not dogs and cats, for the period between January 1, 1999 and June 30, 1999.<sup>205</sup> The Controller relies on the following language in Section III. of the Parameters and Guidelines:

However, except for the amendments to Food and Agriculture Code sections 31108 and 31752, Statutes of 1998, Chapter 752 became operative and effective on January 1, 1999. Therefore, except for the amendments to Food and Agriculture Code sections 31108 and 31752, the costs incurred for Statutes of 1998, Chapter 752 are eligible for reimbursement on or after January 1, 1999.

Section 21 of Statutes of 1998, Chapter 752 establishes an operative date of July 1, 1999 for the amendments to Food and Agriculture Code section 31108 (holding period for stray dogs) and Food and Agriculture Code section 31752 (holding period for stray cats). Therefore, costs incurred for Food and Agriculture Code sections 31108 and 31752, as amended by Statutes of 1998, Chapter 752, are eligible for reimbursement on or after July 1, 1999.<sup>206</sup>

Accordingly, the Controller concludes that any construction costs or facilities acquisition costs incurred to provide additional space to comply with the increased holding period for dogs and cats would not be reimbursable until July 1, 1999, the operative date of the code sections governing the holding period for dogs and cats.

The claimant argues that the Controller is misinterpreting the period of reimbursement for construction of new facilities, arguing that all construction costs based on the mandate are eligible for reimbursement beginning January 1, 1999:

The SCO takes the position that the increased number of animals for which the costs were incurred between January 1, 1999, and June 30, 1999, should not include the costs for dogs and cats. The Ps & Gs did not suggest that that six month period should limit the state's share of the costs to only considering

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<sup>204</sup> Exhibit A, IRC, pages 106-108.

<sup>205</sup> Exhibit A, IRC, pages 29-30.

<sup>206</sup> Exhibit B, Controller's Late Comments on the IRC, page 108 (Corrected Parameters and Guidelines, dated March 20, 2002).

eligible construction costs for “other animals.” Indeed, in no place is there any reference to removing the number of dogs and cats from determining what construction costs should be reimbursed. The City requests the Commission recalculate the costs for FY 1998-99 and restore the cost claimed by the City for that period.

In addition, the claimant argues that reimbursement is permitted, under the Commission’s regulations, for “the most reasonable methods of complying with the activities determined by the Commission to constitute reimbursable state mandated activities,” and that the Commission’s Parameters and Guidelines Decision instructed claimants that “in order...to be entitled to reimbursement for construction of new buildings, the claimants will have to show at the parameters and guidelines phase that construction of new buildings occurred as a direct result of the mandated activities and was the most reasonable method of complying with the mandated activities.”<sup>207</sup>

The Commission finds that the Controller’s reduction for fiscal year 1998-1999 is inconsistent with the Parameters and Guidelines, and is therefore incorrect as a matter of law. Although the Parameters and Guidelines provide that reimbursement for costs incurred under Food and Agriculture Code sections 31108 and 31752 are eligible for reimbursement on or after July 1, 1999, the Parameters and Guidelines also state that reimbursement for all other requirements, including the reimbursable activity of “Acquisition of Additional Space and/or Construction of New Facilities” for all animals, begins January 1, 1999, as follows:

*Beginning January 1, 1999 - Acquiring additional space by purchase or lease and/or construction of new facilities to provide appropriate or adequate shelter necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals specified in Statutes of 1998, Chapter 752 that die during the increased holding period or are ultimately euthanized.*<sup>208</sup>

Under the rules of interpretation, when the language allows for more than one reasonable construction, the courts look to the legislative history of a statute or regulation to determine what was intended.<sup>209</sup> In this case, the Commission approved reimbursement for “Acquisition of Additional Space and/or Construction of New Facilities” on the ground that such activities were reasonably necessary to comply with the new mandated holding period for all animals. The staff analysis for the August 23, 2001 hearing states the following:

The claimants, and several interested parties, request reimbursement for the construction of new facilities and/or remodeling and renovation of existing

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<sup>207</sup> Exhibit A, IRC, pages 7-8 [Quoting Test Claim Decision, CSM-9811, page 27.].

<sup>208</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 3, emphasis added.

<sup>209</sup> *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190; see also *Butts v. Board of Trustees of the California State University* (2014) 225 Cal.App.4th 825, 835, where the court stated that “The rules of statutory construction also govern our interpretation of regulations promulgated by administrative agencies.”

facilities to comply with the increased holding periods for dogs, cats, and other specified animals. [Footnote omitted.]

For example, the County of Los Angeles states that facility construction and/or renovation is reasonably necessary because adequate space is required to accommodate animals under the new holding period; to isolate infected animals in order to prevent the spread of disease; to provide increased animal housing in a safe manner, meeting local building codes and zoning ordinances; and to prevent fighting, starvation, and other care problems. [Footnote omitted.]

The County of San Diego states that the test claim legislation in Civil Code sections 1834, 1846, and 2080 require that adequate shelter be provided to impounded animals. The County contends that adequate shelter was construed at an American Humane Association conference as “housing that is appropriate for species, age, and size. The environment must meet temperature, health and safety requirements of the animal.” The County further contends that the holding period of the test claim legislation resulted in a greater number of stray animals being housed in public shelters. Thus, they state that many shelters renovated and installed different and/or supplementary enclosures and temperature control/ventilation systems in order to provide “adequate shelter.” [Footnote omitted.]

The State Controller’s Office states that the parameters and guidelines should require a certification from the claimant to ensure that construction or remodeling was required by the test claim legislation.

*Staff finds facility construction, renovation, and/or remodeling is reasonably necessary to provide appropriate space necessary to comply with the mandated activities during the increased holding period for impounded stray or abandoned dogs, cats, and other animals specified in Statutes of 1998, Chapter 752 that are ultimately euthanized.* [Emphasis added.]

The test claim legislation required, for the first time, that local agencies hold rabbits, guinea pigs, hamsters, pot-bellied pigs, birds, lizards, snakes, turtles, and tortoises legally allowed as personal property for four to six business days from the day of impoundment. In addition, the test claim legislation increased the holding period for dogs and cats. Thus, local agencies are required to hold more animals, for a longer period of time.

However, to ensure that the construction of new facilities, or the remodeling/renovation of existing facilities is directly related to this mandated program, staff included language in the Proposed Parameters and Guidelines requiring eligible claimants to submit documentation with their reimbursement claims evidencing that the governing board (in the case of new construction) or a delegated representative (in the case of a remodel/renovation job) made findings that the construction and/or renovation was required because of the increased holding periods, and was the most feasible solution. The Proposed Parameters and Guidelines state the following:

[¶¶]

In addition, the Commission's Statement of Decision limited reimbursement for care and maintenance to impounded stray dogs, cats, and other specified animals that are *ultimately euthanized*. Thus, the Proposed Parameters and Guidelines clarify that eligible claimants are only entitled to reimbursement for the proportionate share of actual costs to plan, design, construct or remodel/renovate in a given year based on the pro rata representation of impounded stray or abandoned dogs, cats, and other animals specified in the test claim legislation that are ultimately euthanized to the total population of animals housed in the facility.<sup>210</sup>

The staff analysis further states that the *activities associated with the holding period for stray dogs and cats* begins on or after July 1, 1999 because of delayed operative date for those code sections, but the period of reimbursement for all other reimbursable activities begins January 1, 1999, the effective date of the test claim statute as follows:

Claimant contends that the period of reimbursement begins on September 23, 1998, the *enactment* date of the test claim legislation. [Footnote omitted.] Staff disagrees with the claimant's contention.

With the exception of Section 21 of the test claim legislation (Statutes of 1998, Chapter 752), the test claim legislation became operative and effective on January 1, 1999. Section 21 established a delayed operative date of July 1, 1999 for the holding period for stray dogs and cats (Food & Agr. Code, §§ 31108, 31752). The test claim legislation does not contain an urgency clause. [Citation omitted.]

Providing for reimbursement *before* the effective date of a statute, as proposed by claimant, conflicts with article IV, section 8 of the California Constitution. That section, and California courts interpreting that section, provide that a statute becomes operative on one of three dates. If the legislation contains an urgency clause, it becomes effective immediately upon the Governor's signature and transmittal to the Secretary of State. If the legislation does not contain an urgency clause, it becomes effective on January first following the date the Governor signed the bill. A bill can also contain a delayed operative date, where it goes into effect on January first, but does not become operative until a later date. Until a statute becomes effective and operative, it has no force for any purpose. [Citation omitted.]

Accordingly, section III, Period of Reimbursement, of staff's Proposed Parameters and Guidelines states that *the period of reimbursement for the activities associated with the holding period for stray dogs and cats begins on or*

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<sup>210</sup> Exhibit X, Staff's Proposed Parameters and Guidelines, Item 8, August 23, 2001 Commission Hearing, pages 7-9.

*after July 1, 1999, and the period of reimbursement for all other reimbursable activities begins on or after January 1, 1999.*<sup>211</sup>

Therefore, under Section IV. of the Parameters and Guidelines, the period of reimbursement for the activities associated with the holding period for dogs and cats (i.e., care and maintenance of dogs and cats that die during the increased holding period or are ultimately euthanized, and the activities associated with using a four business day holding period by making the animal available for owner redemption or establishing a procedure to enable owners to reclaim their animals by appointment) begin July 1, 1999. Reimbursement for all other reimbursable activities (acquisition or construction of additional space, remodeling/renovating existing facilities, verifying whether a cat is feral or tame, lost and found lists, maintaining non-medical records, and providing necessary and prompt medical care) begins on the effective date of the 1998 test claim statute, January 1, 1999.

Accordingly, the Controller's reduction of construction costs in proportion to the total number of dogs and cats housed at the shelter during the period between January 1, 1999 and June 30, 1999 is inconsistent with the Parameters and Guidelines and is incorrect as a matter of law. Costs should be reinstated consistently with proportionate share of actual costs required to plan, design, acquire, and/or build facilities based on the pro rata representation of all eligible animals to the total population of animals housed in the facilities during the entire holding period.

2. The Controller's reduction of construction costs for fiscal years 1999-2000 and 2000-2001, based on pro rata representation of eligible animals to the total population of animals not supported by documentation, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support, except as provided in section B. of this Decision.

For fiscal years 1999-2000 and 2000-2001, the Controller reduced costs on the basis of a lack of supporting documentation for the total population of animals, and exclusions from the population of eligible animals pursuant to the Parameters and Guidelines, including the interpretation of *Purifoy*, as discussed above. This resulted in reductions of \$159,544 and \$24,756 for fiscal years 1999-2000 and 2000-2001, respectively.<sup>212</sup>

The Controller explains that the claimant's database information for fiscal year 1999-2000 was incomplete, and so the Controller estimated the total population of animals and the number of animals eligible for reimbursement based on an average of the database information for the last six years of the audit.<sup>213</sup>

For fiscal year 2000-2001, the Controller states that it "extracted" the required information from the claimant's "Chameleon software system database." The Controller explains that "[i]n its claims for both fiscal years, the city did not provide worksheets showing how it computed the

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<sup>211</sup> Exhibit X, Staff's Proposed Parameters and Guidelines, Item 8, August 23, 2001 Commission Hearing, page 6.

<sup>212</sup> Exhibit A, IRC, page 27.

<sup>213</sup> Exhibit A, IRC, page 32.

number of ‘eligible animals’ or the ‘total number of animals’ that is used to determine reimbursement ratios.”

The claimant does not specifically address the reduction of construction costs on the basis of unsupported eligible animals claimed, or unsupported total population of animals. The claimant focuses entirely on the *Purifoy* reduction on the basis of Saturday not being considered a business day, which is addressed above.<sup>214</sup> However, because the claimant seeks reimbursement of the full amount reduced, the Commission analyzes the merits of the Controller’s calculation of the reduction for construction of additional space.

It is the claimant’s burden to support its costs claimed, including the eligible animal and total animal population information used to calculate costs related to the increased level of service. The Parameters and Guidelines state that “all costs claimed shall be traceable to source documents (e.g., employee time records, cost allocation reports, invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, time studies, etc.) that show evidence of the validity of such costs and their relationship to this mandate.”<sup>215</sup> Since the claimant did not provide source documents to validate these cost components, the Controller’s reduction of costs is correct as a matter of law.

Moreover, the Controller’s decision to apply an average of both eligible animals and total animal population, based on the claimant’s database in later years of the audit period, is not arbitrary or capricious, since the claimant did not provide documentation to support the necessary pro rata calculation. In addition, there is no evidence that the Controller’s calculations of these components is wrong, or arbitrary or capricious.

Based on the foregoing, except as provided in section B. of this Decision with regard to defining “eligible animals,” the Commission finds that to the extent the Controller’s reductions of construction costs are based on a lack of supporting documentation, those reductions are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**D. Some of the Reductions under Finding 3 Relating to Care and Maintenance Costs During the Increased Holding Period Are Correct as a Matter of Law, But Reductions Based on Adjustments to Animal Census Data Throughout the Audit Period, Made Without Any Analysis or Explanation, Are Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines provide for reimbursement of care and maintenance costs for impounded stray or abandoned animals that die during the increased holding period or are ultimately euthanized either by claiming actual costs or by performing a time study.<sup>216</sup> The claimant used the actual cost method, which is a formula designed to reimburse a proportion of total care and maintenance costs based on the incremental increase in service (the increased holding period) and the animals for which no fees can be collected (animals that are not adopted,

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<sup>214</sup> Exhibit A, IRC, page 7.

<sup>215</sup> Exhibit X, Adopted Parameters and Guidelines, February 28, 2002, page 15.

<sup>216</sup> Exhibit X, Parameters and Guidelines, adopted February 28, 2002, pages 7-10.

redeemed, or released to a nonprofit animal rescue organization). The Parameters and Guidelines provide that actual costs for dogs and cats shall be calculated as follows:

Actual Cost Method – Under the actual cost method, actual reimbursable care and maintenance costs per animal per day are computed for an annual claim period.

- a) Determine the total annual cost of care and maintenance for all dogs and cats impounded at a facility. Total cost of care and maintenance includes labor, materials, supplies, indirect costs, and contract services.
- b) Determine the average daily census of dogs and cats.<sup>217</sup>
- c) Multiply the average daily census of dogs and cats by 365 = yearly census of dogs and cats.
- d) Divide the total annual cost of care by the yearly census of dogs and cats = cost per animal per day.
- e) Multiply the cost per animal per day, by the number of impounded stray or abandoned dogs and cats that die during the increased holding period or are ultimately euthanized, by each reimbursable day (the difference between three days from the day of capture, and four or six business days from the day after impoundment).<sup>218</sup>

For “other animals,” the actual cost formula is essentially the same, except that the number of reimbursable days is not counted as “the difference between three days...and four or six business days.” Because there was no 72 hour holding period required under prior law for “other animals,” the “reimbursable days” multiplier is simply “four or six business days.”<sup>219</sup> The Parameters and Guidelines also note that reimbursement is not required for stray or abandoned animals irretrievably suffering from a serious injury or illness; newborn animals that need maternal care and have been impounded without their mothers; stray or abandoned animals too severely injured to move or where it would be more humane to dispose of the animal; owner relinquished animals; and stray or abandoned animals that are ultimately redeemed, adopted, or released to a nonprofit animal rescue organization.<sup>220</sup>

For all years of the audit period except fiscal year 2007-2008, the Controller reduced costs claimed for care and maintenance based on unsupported costs, and commingled veterinary care costs and lost and found list costs included within the total annual cost of care and maintenance; “misstated animal census data;” misstated “eligible animals” based on the Parameters and

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<sup>217</sup> The Parameters and Guidelines, amended January 26, 2006, state also: “For purposes of claiming reimbursement under IV.B.3, average daily census is defined as the average number of all dogs and cats at a facility housed on any given day, in a 365-day period.” This amendment is clarifying only, and has no substantive effect on the methodology used to calculate actual costs. (Exhibit X, Parameters and Guidelines, amended January 26, 2006, page 11.)

<sup>218</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 7.

<sup>219</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, pages 8-9.

<sup>220</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, pages 8-9.

Guidelines; and an incorrectly calculated increased holding period, based on *Purifoy*, as discussed above.

The claimant alleges that Finding 3 is incorrect only to the extent that the Controller should not have applied the *Purifoy* holding. However, neither the claimant nor the Controller explicitly state the amount reduced in Finding 3 because of the *Purifoy* decision. For that reason, and because the claimant requests reinstatement of the entire amount reduced in Finding 3, the Commission analyzes the merits of the remaining adjustments in Finding 3.

Based on the analysis herein, the Commission finds that some of the reductions made to the cost of care and maintenance during the increased holding period are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support, except that the finding is arbitrary, capricious, and entirely lacking in evidentiary support to the extent that adjustments of animal census data throughout the audit period are not sufficiently explained and their effect on the reimbursement claims is unknown.

1. The Controller's adjustments of total annual costs for care and maintenance are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Parameters and Guidelines provide that the first step in calculating actual costs for care and maintenance is to identify the total annual cost of this component (including labor, materials, supplies, indirect costs, and contract services) for all dogs, cats, and other animals impounded at the facility.<sup>221</sup>

The audit report states that for all years of the audit, the claimant claimed eighty percent of labor costs for full-time animal care attendants as time spent on care and maintenance, and thirty percent of labor costs incurred for the Senior Animal Care Attendant/Animal Care Attendant Supervisor position. The Controller determined that eighty percent was a reasonable figure for animal care attendants, but that the claimant did not support that the senior animal care attendant spent thirty percent of his or her time performing care and maintenance activities. Thus, all costs claimed for supervisory position were determined unallowable.<sup>222</sup>

The audit report also states that the claimant claimed costs for food based on its contract with a supplier, and claimed costs for supplies based on estimates that were not supported. However, during the audit, the claimant compiled invoices to support costs for food and supplies in additional amounts of \$23,470 and \$183,083, respectively, for fiscal years 2005-2006, 2006-2007, and 2007-2008. In addition, the Controller used an average of the amount allowable for supplies for those three years and applied that average to the remaining audit years, for which no documentation was provided. This resulted in an increase in the total annual cost of care and maintenance.<sup>223</sup>

In addition, the audit report states that for fiscal years 1999-2000 through 2002-2003, the claimant included costs of veterinary care related to initial physical examinations and wellness

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<sup>221</sup> Exhibit X, Corrected Parameters and Guidelines, dated March 20, 2002, page 7.

<sup>222</sup> Exhibit A, IRC, page 36.

<sup>223</sup> Exhibit A, IRC, page 36.

vaccinations in the cost calculations for care and maintenance. The Controller determined that these costs should be claimed under another cost component and removed these costs from the calculation of total annual costs for this component.<sup>224</sup>

The claimant does not specifically address these adjustments, focusing instead on the effect of the *Purifoy* decision on reimbursement for care and maintenance costs.

The Commission finds that to the extent the Controller determined allowable costs for food and other supplies in amounts greater than that originally claimed or supported in the claimant's annual reimbursement claims, there is no reduction, and the Commission does not have jurisdiction to analyze such adjustments.

With respect to the unsupported salaries and benefits of the Senior Animal Care Attendant position, and the commingled costs for veterinary care, the Commission finds that these adjustments are consistent with the claimant's duty to claim and support its costs in accordance with the Parameters and Guidelines. With respect to the salary and benefits for the Senior Animal Care Attendant Supervisor, the Parameters and Guidelines require, for claiming salaries and benefits:

Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed, specify the actual time devoted to each activity by each employee, and the productive hourly rate, and related fringe benefits.

Here, the Controller found that the claimant did not support that the Senior Animal Care Attendant Supervisor spent any time performing care and maintenance activities.<sup>225</sup> The claimant does not dispute that finding, and therefore the reduction is consistent with the Parameters and Guidelines, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

With respect to veterinary care costs that the Controller found were commingled within care and maintenance costs, the Parameters and Guidelines authorize reimbursement separately for necessary and prompt veterinary care as follows:

Beginning January 1, 1999 - Providing "necessary and prompt veterinary care" for stray and abandoned animals, other than injured cats and dogs given emergency treatment, that die during the holding period or are ultimately euthanized, during the holding periods specified in Statutes of 1998, Chapter 752.

"Necessary and prompt veterinary care" means all reasonably necessary medical procedures performed by a veterinarian or someone under the supervision of a veterinarian to make stray or abandoned animals "adoptable." The following veterinary procedures, if conducted, are eligible for reimbursement:

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<sup>224</sup> Exhibit A, IRC, page 37.

<sup>225</sup> Exhibit A, IRC, page 36.

- An initial physical examination of the animal to determine the animal’s baseline health status and classification as “adoptable,” “treatable,” or “non-rehabilitatable.”
- A wellness vaccine administered to “treatable” or “adoptable” animals.
- Veterinary care to stabilize and/or relieve the suffering of a “treatable” animal.
- Veterinary care intended to remedy any applicable disease, injury, or congenital or hereditary condition that adversely affects the health of a “treatable” animal or that is likely to adversely affect the animal’s health in the future, until the animal becomes “adoptable.”<sup>226</sup>

The Parameters and Guidelines also state that claimants are not entitled to reimbursement for the following veterinary care procedures:

- Emergency treatment given to injured cats and dogs (Pen. Code, § 597f, subd. (b));
- Administration of rabies vaccination to dogs (Health & Saf. Code, § 121690);
- Implantation of microchip identification;
- Spay or neuter surgery and treatment;
- Euthanasia.<sup>227</sup>

Here, the Controller found that the claimant commingled costs for necessary and prompt veterinary care within the total annual cost of care and maintenance, and the claimant does not dispute that finding. Therefore, the reduction to the total annual cost of care and maintenance is consistent with the Parameters and Guidelines, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

Based on the foregoing, the Commission finds that the Controller’s adjustments of total annual costs for care and maintenance are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

2. The Controller’s adjustment of animal census data without explanation or analysis is arbitrary, capricious, or entirely lacking in evidentiary support, to the extent the adjustments result in a reduction.

The second element of the actual cost formula in the Parameters and Guidelines for determining the reimbursable costs for care and maintenance is to divide the total annual cost of care and maintenance by the average yearly census of animals, calculated by multiplying the average daily census, defined as the number of all animals housed at a facility on any given day, by

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<sup>226</sup> Exhibit X, Parameters and Guidelines, corrected March 20, 2002, pages 11-12.

<sup>227</sup> Exhibit X, Corrected Parameters and Guidelines, dated March 20, 2002, pages 12-13.

365.<sup>228</sup> The adjustments made to annual animal census data are not reflected in the narrative for Finding 3. The numerical values of the adjustments are reflected in Schedule 2 of the audit report, (“Summary of Care and Maintenance Costs,” pages 7-10).<sup>229</sup> In addition, the Controller’s Schedule 2 does not use the term “census,” but instead uses “total dog and cat kennel days” and “total other ‘eligible’ animal kennel days.”<sup>230</sup> It is unclear whether “kennel days” is calculated consistent with the Parameters and Guidelines for animal census data as discussed in section B. of this Decision relating to “eligible animals.”

For fiscal year 2000-2001, the Controller increased “total dog and cat kennel days” from 13,922 to 57,206 and increased “other ‘eligible’ animal kennel days” from 1,947 to 3,583, without any explanation or analysis.<sup>231</sup> Beginning in fiscal year 2001-2002, the Controller adjusted animal census data in each remaining year of the audit without articulating the basis of its adjustments, sometimes increasing the number of animals subject to the actual cost formula, and sometimes decreasing. Because total annual costs are *divided* by the annual census (again the Controller uses “total [dog and cat, or other ‘eligible’ animal] kennel days”), the increase of animal census figures results in a decrease in allowable costs, while the decrease in animal census results in an increase in reimbursement since it results in an increase in the cost per animal per day. However, some increases and decreases were taken in the same year, and there is no indication to what extent the animal census data actually resulted in a reduction of costs for care and maintenance, because other elements of the calculation were also adjusted.

The record contains documentation labeled “Shelter Statistics” or “Kennel Statistics,” which reflects the number and disposition of animals passing through the shelter during the fiscal year.<sup>232</sup> Furthermore, the Controller indicates in other parts of the audit report that it had access to the claimant’s animal database.<sup>233</sup> But nowhere in the audit report or the comments on the IRC does the Controller explain the adjustments made to the animal census data, beginning in fiscal year 2000-2001, for the calculation of care and maintenance costs. Therefore, the animal census adjustments made in each audit year, beginning in fiscal year 2000-2001, are arbitrary, capricious, and entirely lacking in evidentiary support, to the extent that the adjustments result in a reduction of care and maintenance costs. Furthermore, the adjustments to the animal census data made in these years without any legal or evidentiary basis taints the average animal census figures applied to fiscal years 1998-1999 and 1999-2000.

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<sup>228</sup> Exhibit X, Parameters and Guidelines, amended January 26, 2006, page 16.

<sup>229</sup> Exhibit A, IRC, pages 21-24.

<sup>230</sup> Exhibit A, IRC, pages 21-24.

<sup>231</sup> Exhibit A, IRC, page 22.

<sup>232</sup> Exhibit A, IRC, pages 258-259; 330-339; 382-384; 415-416; 425-426; 464-467 (No similar document is included for fiscal year 2007-2008, but Schedule 2 of the audit report indicates an increase in care and maintenance costs for fiscal year 2007-2008 in any case.).

<sup>233</sup> See Exhibit A, IRC, page 32 (Finding 2).

Accordingly, the Commission finds that to the extent the adjustments to the animal census data during the audit period results in a reduction of care and maintenance costs, that reduction is arbitrary, capricious, and entirely lacking in evidentiary support.

**E. The Controller's Reductions in Finding 4 Relating to Unallowable Salaries and Benefits for the Increased Holding Period Are Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

1. The Controller's adjustment of salaries and benefits and related indirect costs for the increased holding period hours for fiscal years 1998-1999 through 2007-2008, based on the hours the shelter was open for owner redemption and the staff necessary to make animals available for redemption, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

For fiscal year 1998-1999 (but including only the period between January 1, 1999 and June 30, 1999), 2,808 employee hours were claimed for increased holding period costs as follows: seven Animal Care Attendants, three Police Records Clerks, one Animal Control Officer, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal years 1999-2000 through 2001-2002, 5,616 hours were claimed each year for seven Animal Care Attendants, three Police Records Clerks, one Animal Control Officer, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal year 2002-2003, 3,744 hours were claimed for seven full-time Animal Care Attendants, two part-time Animal Care Attendants, three Police Records Clerks, and one Senior Animal Care Attendant, each for six hours for every Saturday. For fiscal year 2005-2006, the claimant claimed 2,912 hours for five Animal Care Attendants, two Police Records Clerks, one Senior Animal Care Attendant, one Acting Records Supervisor, and one Volunteer Coordinator, each for six hours every Saturday. And finally, for fiscal years 2006-2007 and 2007-2008, 3,432 hours were claimed for five Animal Care Attendants, four Police Records Clerks, one Senior Animal Care Attendant, one Senior Records Clerk, and one Animal Care Attendant Supervisor, each for six hours every Saturday.<sup>234</sup>

The Controller relied on the claimant's "Notice of Impoundment" and other information provided to determine that the claimant was not always open every Saturday during the audit period. For fiscal years 1998-1999 through 2001-2002, claimant's shelter was open six hours every Saturday, but was not open for an extra hour on Wednesdays, as shown on a Notice of Impoundment dated October 2001. For fiscal years 2002-2003, 2005-2006, 2006-2007, and 2007-2008, claimant's shelter was closed on Sundays and Mondays, open an extra hour on Wednesdays, and six hours on most Saturdays. The shelter was closed on the last Saturday of every month (i.e., 12 Saturdays each year).<sup>235</sup>

In addition, the Controller determined that "when the shelter is open to the public to make animals available for owner redemption, one additional Animal Care Attendant, two Police Records Clerks II, one 'floating' Police Records Clerk II...and one Senior Police Records Clerk Supervisor or Acting Records Supervisor were on duty to perform the required mandated

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<sup>234</sup> Exhibit A, IRC, pages 39-40.

<sup>235</sup> Exhibit A, IRC, page 39.

activities.”<sup>236</sup> The Controller states that this determination is based on “language in the parameters and guidelines that the reason to be open on a weekend is to make animals available for redemption...” The Controller further explains that “costs for other staff on duty during Saturdays are already reimbursable within other cost components of the mandated program.”<sup>237</sup>

Accordingly, the Controller reduced hours allowable, based on only a portion of the employees claimed to make the animals available for owner redemption, and based on eliminating 12 Saturdays per year in the latter part of the audit period. For fiscal year 1998-1999 only 37 hours were allowable; for 1999-2000 through 2001-2002, 1,560 hours were allowable; and for 2002-2003 and 2005-2006 through 2007-2008, 1,260 hours were allowable.<sup>238</sup>

The claimant does not dispute the Controller’s findings with respect to which employee classifications are necessary to carry out the mandate to make the animals available for owner redemption on Saturdays; the claimant’s argument more generally disputes the premise that only hours for those staff carrying out mandated activities on Saturdays are reimbursable. The claimant states that it “objects to the Controller’s determination that when the shelter is open to the public on Saturday’s, [sic] only a portion of its staff time and costs are reimbursable.”<sup>239</sup> The claimant argues that the *Animal Adoption* mandate “requires the city to be open on Saturdays for business operations that are reasonably required by the Hayden Bill.”<sup>240</sup> The claimant maintains that neither the test claim statutes, nor the Commission’s Decision, limit the manner in which claimants implement the mandate, and “[t]he City should be allowed to staff its shelter as it sees fit to accomplish the goals set forth in statute.”<sup>241</sup>

The claimant is wrong. The activity claimed under this component is to make animals available for owner redemption. The Parameters and Guidelines provide that an agency desiring to apply the shortened holding period is eligible for reimbursement for making animals available for owner redemption on one weekday evening until at least 7:00 p.m., or one weekend day; or, for local agencies with fewer than three full-time employees or that are not open during all regular weekday business hours, for establishing a procedure for owners to reclaim their animals by appointment.<sup>242</sup> For dogs and cats, reimbursement for this activity begins July 1, 1999. For “other animals” specified in Food and Agriculture Code section 31753, reimbursement for this activity begins January 1, 1999.<sup>243</sup>

The Commission finds that the Parameters and Guidelines do not expressly limit the staff and employee classifications for which reimbursement is required. However, the Controller is

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<sup>236</sup> Exhibit A, IRC, page 39.

<sup>237</sup> Exhibit A, IRC, page 41.

<sup>238</sup> Exhibit A, IRC, page 40.

<sup>239</sup> Exhibit A, IRC, page 41.

<sup>240</sup> Exhibit A, IRC, page 41.

<sup>241</sup> Exhibit A, IRC, page 41.

<sup>242</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 10.

<sup>243</sup> Exhibit X, Corrected Parameters and Guidelines, March 20, 2002, page 10.

correct that the reason to remain open on a Saturday, pursuant to the test claim statutes and the Commission's Decision, is to promote owner redemption. Indeed, the express language of the reimbursable component at issue in Finding 4 is "Making animals available for owner redemption..." Therefore, the Controller's attempt to limit reimbursement on Saturdays to those employees that are necessary to make animals available for owner redemption is consistent with the Parameters and Guidelines and the purpose of the test claim statute.

There is no dispute that the claimant's shelter was closed the last Saturday of every month for several years. In addition, the Controller's exclusion of employee hours not related to the mandate is consistent with the Parameters and Guidelines. Because the claimant has not specifically responded to the Controller's finding on this issue, other than to dispute the underlying premise of the reduction, the Commission must find, based on the evidence in the record, that the reduction is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

2. The Controller's reduction of salaries and benefits and related indirect costs for the increased holding period for dogs and cats for fiscal year 1998-1999 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

In addition to reducing employee hours based on the claimant's shelter being closed on many Saturdays during the audit period, and limiting the employees for whom hours are reimbursable based on their involvement in mandate-related activities, the Controller also reduced holding period costs for fiscal year 1998-1999 on a proportional basis because reimbursement was not required for the increased holding period *for cats and dogs* until fiscal year 1999-2000.

As discussed above, the period of reimbursement for activities and costs relating to the increased holding period for cats and dogs began July 1, 1999. For the latter half of fiscal year 1998-1999, in accordance with the effective date of the test claim statutes, only costs for "other animals" are reimbursable.<sup>244</sup> The Controller therefore limited reimbursement for holding period costs for fiscal year 1998-1999, consistent with the Parameters and Guidelines, to only those costs attributable to "other animals," and only those costs incurred between January 1, and June 30, 1999. The claimant alleged 2,808 employee hours for fiscal year 1998-1999 for "seven Animal Care Attendants, three Police Records Clerks, One Animal Control Officer, and one Senior Animal Care Attendant for six hours per employee for every Saturday."<sup>245</sup> In accordance with its determination relating to the staff necessary to perform the mandated activities on a Saturday (discussed above), the Controller reduced the claimed hours to 780 hours during the 26 Saturdays between January 1 and June 30, 1999. Further, the Controller explains that because "other animals" were 4.72 percent of the total population of animals housed by the claimant in fiscal year 1998-1999, the Controller applied that percentage to the total 780 employee hours, resulting in a calculation of 37 hours.

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<sup>244</sup> Exhibit B, Controller's Late Comments on the IRC, page 20; 89-91 [Parameters and Guidelines]. See also, Food and Agriculture Code sections 31108 and 31572, as amended by Statutes 1998, chapter 752, effective July 1, 1999.

<sup>245</sup> Exhibit A, IRC, page 39.

The claimant does not specifically dispute, with respect to Finding 4, the Controller's limitation of reimbursable costs for only "other animals" for fiscal year 1998-1999. And the Commission finds above that the limitation of reimbursement to only "other animals" is consistent with the Parameters and Guidelines. Nor does the claimant provide any evidence disputing the Controller's calculations.

Based on the foregoing, the Controller's reductions in Finding 4 of salaries and benefits related to the increased holding period are correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

**F. The Commission Does Not Have Jurisdiction to Analyze the Controller's Adjustment of Costs for Necessary and Prompt Veterinary Care under Finding 8, Because There Is No Reduction.**

In Finding 8 of the audit report, the Controller states that \$82,870 was claimed, and \$87,832 was found to be allowable. The Controller states that "allowable costs for this cost component consist of costs incurred for the administration of a wellness vaccine and the conduct of an initial physical exam, as well as certain necessary and prompt care services." The Controller also notes that "[t]he city's claims had costs for veterinary care scattered throughout various cost components."<sup>246</sup>

The claimant did not respond specifically to Finding 8, nor assert any specific flaw in the Controller's determinations; the claimant's allegation of an incorrect reduction is captured in the *Purifoy* discussion above.

Government Code sections 17551(d) and 17558.7 only authorize the Commission to hear and decide incorrect *reduction* claims. The Commission does not have jurisdiction over a reimbursement claim that results in no reduction of costs. Here, the Controller adjusted costs under Finding 8 in the claimant's favor; there no reduction, and therefore the Commission does not have jurisdiction to analyze this adjustment.

**G. The Controller's Reduction under Finding 9 for Equipment Procurement Costs for Fiscal Year 2005-2006 Is Incorrect as a Matter of Law, and Is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

In Finding 9 the Controller states that claimant claimed \$19,617 for procuring medical and kennel equipment necessary to comply with the mandate, but that only \$6,723 is allowable. The Controller states that for fiscal year 2005-2006, "costs claimed for procuring shelter equipment were overstated by \$16,309 because the wrong pro-rata percentage was used." The Controller further states that for fiscal year 1999-2000, costs were understated by \$452 because the pro-rata share of computer equipment was not claimed, and for fiscal year 2000-2001, costs were understated by \$2,963 because the pro-rata share of computer equipment costs was misclassified and claimed elsewhere.<sup>247</sup>

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<sup>246</sup> Exhibit A, IRC, page 57 (Final Audit Report).

<sup>247</sup> Exhibit A, IRC, page 57 (Final Audit Report).

As discussed above, the claimant argues only that the misapplication of the *Purifoy* holding by the Controller affects the calculations of Finding 9. Because the claimant requests the entire amount reduced, including Finding 9, the Commission analyzes Finding 9 in its entirety.

1. The Controller's reduction for fiscal year 2005-2006, based on the formula borrowed from other components of the Parameters and Guidelines, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

The audit report shows that for fiscal year 2005-2006, 27.26 percent of total kennel equipment procurement costs, or \$19,617 was claimed. The Controller recalculated these costs based on the animal census data, the cost per animal per day times the number of eligible animals and the number of reimbursable days (3 days for dogs and cats, and 6 days for "other animals") as discussed under section B. of this Decision. The recalculation resulted in a reduction of \$16,309.

The Parameters and Guidelines provide reimbursement as follows:

Beginning January 1, 1999 - Procuring medical, kennel, and computer equipment necessary to comply with the reimbursable activities listed in Section IV (B) of these parameters and guidelines, to the extent these costs are not claimed as an indirect cost under Section V (B) of these parameters and guidelines. If the medical, kennel, and computer equipment is utilized in some way not directly related to the mandated program or the population of animals listed in Section IV (B), only the pro rata portion of the activity that is used for the purposes of the mandated program is reimbursable.<sup>248</sup>

Thus, costs for medical or computer equipment that is or may be used for purposes other than the mandated activities (for example, in this case, equipment used for animals that are not eligible for reimbursement) are reimbursable only as to the pro rata portion of the costs that are applied to the mandate.

The Parameters and Guidelines are not specific, however as to how that pro rata portion of medical, kennel, or computer equipment must be calculated. Accordingly, the claimant performed its pro-rata calculation for kennel equipment based on the number of animals housed in the kennels, and that fell within the scope of the mandate, stating that "44.35% of all the dogs and cats were strays" and "61.47% of the stray dogs and cats were euthanized after the holding period."<sup>249</sup> The claimant included in its claims documentation labeled "Kennel Statistics Report," which detailed the animals and the disposition from July 1, 2005 through June 30, 2006, and a document labeled "Euthanasia Statistics," which detailed the number of animals euthanized and the reasons.<sup>250</sup> Multiplying the total kennel procurement costs for fiscal year 2005-2006 (\$71,958) by 44.35 percent (the number of strays), and again by 61.47 percent (the number of strays euthanized), the claimant claimed reimbursement for \$19,617.

The Controller did not make findings on the claimant's methodology or express that the methodology was in any way flawed. And the Controller does not dispute the total annual cost

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<sup>248</sup> Exhibit X, Adopted Parameters and Guidelines, February 28, 2002, page 13.

<sup>249</sup> Exhibit A, IRC, page 396.

<sup>250</sup> Exhibit A, IRC, pages 415-417.

of kennel equipment procurement was \$71,958. The audit report simply states that “the wrong pro-rata percentage was used to claim costs.”<sup>251</sup> The audit report recalculates the 2005-2006 costs for medical and kennel equipment using the same basic formula as for care and maintenance. The total annual equipment procurement cost is stated without adjustment, while the total animal census figures are as adjusted in schedule 2 of the audit report, which the Controller alleges elsewhere in the audit report are based on the exclusions from animal census data provided in the Parameters and Guidelines (such as owner-relinquished animals and animals that were deceased or gravely injured upon arrival).<sup>252</sup> In addition, the number of eligible animals to which the costs per animal per day were applied is the same number used for the care and maintenance component, which the Commission finds above to be correct as a matter of law, based in part on *Purifoy*, except as provided in section B. of this Decision.

There is nothing in the Parameters and Guidelines that directs claimants to account for pro-rata costs using the same or similar formula as is applied to care and maintenance costs, facilities construction costs, or necessary and prompt veterinary care costs, as the Controller has done here. The Parameters and Guidelines only require that the claimant claim pro rata costs for medical and kennel equipment if used for purposes other than the mandate. Under the rules of statutory construction, if a statute or regulation omits a provision that is found in another related statute or regulation, the courts presume that the omission was intentional and that the provision was not meant to apply.<sup>253</sup> Thus, the Controller’s methodology here is not based on the Parameters and Guidelines, and there is no support for “borrowing” the formula for care and maintenance costs to establish the pro rata portion of medical, kennel, and computer equipment. Moreover, as discussed in section B. of this Decision, many of the Controller’s exclusions from “eligible animals” may be incorrect as a matter of law and the fact that they are not specified with any particularity so as to give the claimant sufficient notice of the reasons for those exclusions, makes them arbitrary, capricious and entirely lacking in evidentiary support in the record.

Based on the foregoing, the Commission finds that the Controller’s reduction of \$16,309 for fiscal year 2005-2006 is incorrect as a matter of law, and is arbitrary, capricious and entirely lacking in evidentiary support.

2. The Commission does not have jurisdiction to analyze the Controller’s adjustment of costs for computer equipment under Finding 9, because there is no reduction.

As noted, the Controller found that costs for computer equipment were understated or misclassified to other components within the reimbursement claim for fiscal years 1999-2000

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<sup>251</sup> Exhibit A, IRC, page 57.

<sup>252</sup> Exhibit A, IRC, page 23; 37 [“We consistently applied the exclusions per the parameters and guidelines to the raw animal data provided by the animal shelter.”].

<sup>253</sup> *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827; *Craven v. Crout* (1985) 163 Cal.App.3d 779, 783 [“Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent.”].

and 2000-2001. As a result of recalculating and relocating these costs, Finding 9 states an increase in reimbursement.

Government Code sections 17551(d) and 17558.7 only authorize the Commission to hear and decide incorrect *reduction* claims. The Commission does not have jurisdiction over a reimbursement claim that results in no reduction of costs. Here, the Controller adjusted costs under Finding 9 in the claimant's favor; there no reduction, and therefore the Commission does not have jurisdiction to analyze this adjustment.

## V. Conclusion

Based on the foregoing analysis, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission regulations, that the Controller reinstate costs that relate to the following incorrect reductions.

- The Controller's reduction in Finding 2 of construction costs for fiscal year 1998-1999, based on the Controller's interpretation of the period of reimbursement for that activity, is incorrect as a matter of law.
- The Controller's adjustment in Finding 3 of animal census data for purposes of calculating care and maintenance costs, without explanation or analysis, is arbitrary, capricious, or entirely lacking in evidentiary support, to the extent the adjustments result in a reduction.
- The Controller's reduction in Finding 9 for equipment procurement costs in fiscal year 2005-2006, based on the formula borrowed from other components of the Parameters and Guidelines, is incorrect as a matter of law, and arbitrary, capricious, and entirely lacking in evidentiary support.

Section VI. of the Parameters and Guidelines requires claimants to provide source documents that show the evidence of the validity of such costs and their relationship to the mandate. The supporting documentation must be kept on file by the agency during the audit period required by Government Code section 17558.5. In this respect, claimants are required by Food and Agriculture Code section 32003 to maintain records on animals that are taken up, euthanized, or impounded. Such records shall identify the date the animal was taken up, euthanized, or impounded; the circumstances surrounding these events; and the names of the personnel performing these activities. To the extent the claimant can provide such documentation to support the validity of the costs incurred, the Commission requests that the Controller reinstate the following costs:

- Any reduction of costs relating to the Controller's exclusion of specified "birds" and "other animals" "legally allowed as personal property" and thus subject to the protection of the mandated activities.
- Any reduction of costs relating to the exclusion of animals deemed treatable upon arrival at the shelter and later euthanized during the increased holding period because they became non-rehabilitatable.
- Any reduction of costs relating to the Controller's recalculation of costs following the Purifoy decision and its use of an average number of reimbursable days, to the extent the recalculation resulted in an exclusion of "eligible animals" correctly held under the law.

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 1, 2016, I served the:

**Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**

*Animal Adoption*, 11-9811-I-01

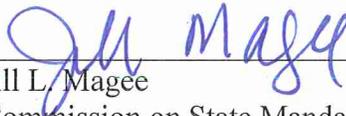
Civil Code Sections 1834 and 1846; Food and Agriculture Code Sections 31108, 31752, 31752.5, 31753, 32001, and 32003; As Added or Amended by Statutes 1998, Chapter 752 (SB 1785)

Fiscal Years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003; 2005-2006, 2006-2007, and 2007-2008

City of Hayward, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 1, 2016 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

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# COMMISSION ON STATE MANDATES

## Mailing List

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**Claim Number:** 11-9811-I-01

**Matter:** Animal Adoption

**Claimant:** City of Hayward

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Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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