



March 27, 2018

Mr. William Tunick  
Dannis Woliver Kelley  
275 Battery Street, Suite 1150  
San Francisco, CA 94111

Ms. Jill Kanemasu  
Division of Accounting and Reporting  
State Controller's Office  
3301 C Street, Suite 700  
Sacramento, CA 95816

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

Re: **Decision**

*Integrated Waste Management*, 14-0007-I-08  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011  
North Orange County Community College District, Claimant

Dear Mr. Tunick and Ms. Kanemasu:

On March 23, 2018, the Commission on State Mandates adopted the Decision on the above-entitled matter.

Sincerely,

Heather Halsey  
Executive Director

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

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

Fiscal Years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

North Orange County Community College District, Claimant

Case No.: 14-0007-I-08

*Integrated Waste Management*

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

*(Adopted March 23, 2018)*

*(Served March 27, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on March 23, 2018. The claimant, North Orange County Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to deny the IRC by a vote of 5-0 as follows:

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

## **Summary of the Findings**

This IRC addresses reductions made by the Controller to reimbursement claims of the claimant for fiscal years 2005-2006 through 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste.<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid waste by January 1, 2004.<sup>2</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>3</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The Commission finds that the Controller correctly presumed, consistent with the test claim statutes and the court’s interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste diverted. The record shows that the claimant diverted solid waste each year during the audit period and thus, achieved cost savings from the avoided landfill fee per ton of waste diverted.<sup>5</sup>

The Commission also finds, based on the evidence in the record, that the Controller’s calculation of offsetting cost savings for all fiscal years in the audit period is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. In 2006, when the claimant exceeded the mandate to divert 50 percent of its solid waste, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated rate of solid waste diverted under the test claim statute (50 percent) by the actual rate of solid waste diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>5</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 32-63 (Annual Reports), 84-85.

statewide average fee) to calculate the offsetting savings realized.<sup>6</sup> The formula allocates or reduces the offsetting cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>7</sup>

To calculate cost savings in all other years when the claimant did not exceed the 50 percent diversion rate,<sup>8</sup> the Controller multiplied 100 percent of the solid waste that the claimant diverted by the avoided landfill disposal fee (based on the statewide average fee).<sup>9</sup>

These formulas are consistent with the statutory presumption of cost savings and correctly presume, without any evidence to the contrary, that waste diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted. In 2006 when the claimant exceeded the mandated diversion rate, the Controller's formula limited the offset to the mandated diversion rate.

The Commission therefore concludes that the Controller's reduction of costs claimed for all years in the audit period is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. Accordingly, the Commission denies this IRC.

## COMMISSION FINDINGS

### I. Chronology

- 01/04/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>10</sup>
- 02/11/2008 The claimant filed its 2006-2007 reimbursement claim.<sup>11</sup>
- 02/02/2009 The claimant filed its 2007-2008 reimbursement claim.<sup>12</sup>
- 01/25/2011 The claimant filed its 2008-2009 amended reimbursement claim.<sup>13</sup>
- 02/15/2012 The claimant filed its 2009-2010 amended reimbursement claim.<sup>14</sup>
- 02/15/2012 The claimant filed its 2010-2011 reimbursement claim.<sup>15</sup>

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<sup>6</sup> Exhibit A, IRC, pages 34; Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>7</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>8</sup> Fullerton College achieved 49.96 percent in 2005 and 32.75 percent in 2007 – 2011, and Cypress College achieved 49.98 percent in 2005, and 40.41 percent in 2007-2011 (Exhibit B, Controller's Late Comments on the IRC, pages 36-37, 40-51, 54-63, 84-85.)

<sup>9</sup> Exhibit B, Controller's Late Comments on the IRC, pages 84-85.

<sup>10</sup> Exhibit A, IRC, page 203.

<sup>11</sup> Exhibit A, IRC, page 209.

<sup>12</sup> Exhibit A, IRC, page 213.

<sup>13</sup> Exhibit A, IRC, page 223.

<sup>14</sup> Exhibit A, IRC, page 231.

<sup>15</sup> Exhibit A, IRC, page 239. This reimbursement claim is for July 1, 2010 to October 7, 2010 only.

- 07/02/2013 The Controller notified the claimant of the audit.<sup>16</sup>
- 08/15/2013 The Controller issued the Final Audit Report.<sup>17</sup>
- 07/31/2014 The claimant filed this IRC.<sup>18</sup>
- 12/07/2015 The Controller filed late comments on the IRC.<sup>19</sup>
- 12/20/2017 Commission staff issued the Draft Proposed Decision.<sup>20</sup>
- 01/04/2018 The Controller filed comments on the Draft Proposed Decision.<sup>21</sup>

## II. Background

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

The test claim statutes require community college districts<sup>22</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>23</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>24</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>25</sup> Each district is also required to report annually to CIWMB on its

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<sup>16</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 5, 87-89.

<sup>17</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>18</sup> Exhibit A, IRC, pages 1-2.

<sup>19</sup> Exhibit B, Controller’s Late Comments on the IRC, page 1. Note that Government Code section 17553(d) states: “the Controller shall have no more than 90 days after the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the Commission.” However, in this instance, due to the backlog of IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and Proposed Decision.

<sup>20</sup> Exhibit C, Draft Proposed Decision.

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

<sup>22</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>23</sup> Public Resources Code section 42920(b).

<sup>24</sup> Public Resources Code section 40124.

<sup>25</sup> Public Resources Code section 42920(b)(3).

progress in reducing solid waste; and the reports' minimum contents are specified in statute.<sup>26</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB's requirements.<sup>27</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

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

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college's IWM plan be deposited in CIWMB's Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>28</sup>

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

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

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<sup>26</sup> Public Resources Code section 42926.

<sup>27</sup> Public Resources Code section 42924(b).

<sup>28</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub. Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Late Comments on the IRC, pages 71-72 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

- A. One-Time Activities (*Reimbursable starting January 1, 2000*)
1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
  2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.
- B. Ongoing Activities (*Reimbursable starting January 1, 2000*)
1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
    - a. state agency or large state facility information form;
    - b. state agency list of facilities;
    - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
    - d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.
  2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)

1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the January 1, 2002 deadline.
  - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
  - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
  - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.
2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;



- (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
- (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
- (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>29</sup>

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

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

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

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to

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<sup>29</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;

6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

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

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>30</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>31</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>32</sup>

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

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for a writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.<sup>33</sup>

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<sup>30</sup> Exhibit A, IRC, page 40-43 (Parameters and Guidelines, adopted March 30, 2005).

<sup>31</sup> Exhibit A, IRC, page 40 (Parameters and Guidelines, adopted March 30, 2005).

<sup>32</sup> Exhibit A, IRC, pages 45 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> *State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355).

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

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>34</sup>

Instead, the court recognized that community colleges are "*likely* to experience costs savings in the form of reduced or avoided costs of landfill disposal" as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs "are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided."<sup>35</sup> The court noted that "diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates" and cited the statutory definition of diversion: "activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]" as well as the statutory definition of disposal: "the management of solid waste through landfill disposal or transformation at a permitted solid waste facility."<sup>36</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated

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<sup>34</sup> Exhibit B, Controller's Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

<sup>35</sup> Exhibit B, Controller's Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>36</sup> Exhibit B, Controller's Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>37</sup>

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

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>38</sup>

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

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>39</sup>

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<sup>37</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>38</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>39</sup> Exhibit B, Controller’s Late Comments on the IRC, page 29 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

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

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

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>40</sup>

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

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

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

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*et al.* (Sacramento County Superior Court, Case No. 07CS00355, Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>40</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

~~appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>41</sup>

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

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>42</sup> As the court found:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs "in accordance with Sections 12167 and 12167.1 of the Public Contract Code," section 42925 assures that cost savings realized from state agencies' IWM plans are handled in a manner consistent with the handling of revenues received from state agencies' recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>43</sup>

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<sup>41</sup> Exhibit A, IRC, pages 45, 57-58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>42</sup> Exhibit X, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

<sup>43</sup> Exhibit B, Controller's Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

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

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

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>44</sup>

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

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>45</sup>

**F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 2005-2006 through 2010-2011. Of the \$567,598 claimed during the audit period, the Controller found that \$190,901 is allowable and \$376,697 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>46</sup>

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<sup>44</sup> Exhibit X, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>45</sup> See Government Code section 17581.5.

<sup>46</sup> Exhibit A, IRC, page 24 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 7 and 26. The Controller actually found that claimant realized savings of \$531,973,

The Controller’s audit finding is based on the court’s ruling, which states that “the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,”<sup>47</sup> the resulting amendment to the Parameters and Guidelines, and the claimant’s annual reports to CIWMB.

During the audit period, the claimant operated two campuses: Fullerton College and Cypress College, each of which submitted annual reports to CIWMB.<sup>48</sup> The Controller determined that at both colleges, the claimant diverted solid waste each year of the audit period, and thus realized cost savings in each year. The Controller further found that the claimant diverted less solid waste than the amount mandated by the test claim statute in all years, except for calendar year 2006 when the Controller found that the claimant diverted more solid waste (76.36 percent at Fullerton College and 51.88 percent at Cypress College) than the mandated 50 percent diversion rate.<sup>49</sup>

For calendar year 2006, when the claimant exceeded the 50 percent diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated diversion rate (50 percent) by the actual diversion rate (76.36 percent at Fullerton College and 51.88 percent at Cypress College). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>50</sup>

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

The Controller provided an example of how the formula works. For calendar year 2006, Fullerton College reported diversion of 4,337.2 tons of solid waste and disposal of 1,342.8 tons

but because the offsetting savings exceeded the amount claimed for 2005-2006 and 2006-2007, the Controller found that \$190,901 is allowable and \$376,697 is unallowable.

<sup>47</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>48</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36-51 (Fullerton College Annual Reports) and 54-63 (Cypress College Annual Reports).

<sup>49</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, pages 38 (Fullerton College 2006 Annual Report), 52 (Cypress College 2006 Annual Report) and 84-85.

<sup>50</sup> Exhibit A, IRC, pages 33 (Final Audit Report). Exhibit B, Controller’s Late Comments on the IRC, page 18.



generated. Diverting 4,337.2 tons out of the 5,680 tons of waste generated results in a diversion rate of 76.4 percent (exceeding the 50 percent required).<sup>51</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>52</sup> instead of using 100 percent of the claimant's diversion to calculate offsetting savings, the Controller allocated the diversion by dividing the mandated diversion rate (50 percent) by the actual diversion rate (76.4 percent), which equals 65.48 percent. The 65.48 allocated rate is then multiplied by the 4,337.2 tons diverted in 2006, which equals 2,840 tons of diverted solid waste, instead of the 4,337.2 tons actually diverted. The allocated 2,840 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in 2006 was \$46, resulting in "offsetting cost savings" for calendar year 2006 of \$130,640.<sup>53</sup>

In years when the claimant did not achieve the mandated diversion rate, the Controller multiplied 100 percent of the solid waste diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>54</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant's report of 2007 percentage of tons diverted to calculate the offsetting savings for fiscal years 2007-2008 to 2010-2011.<sup>55</sup>

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<sup>51</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18, 84 (Controller's calculation of offsetting savings).

<sup>52</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18.

<sup>53</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18, 84 (Controller's calculations of offsetting savings). Page 18 of the Controller's Late Comments on the IRC describe the calculation differently than the formula in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (50 percent), times the avoided landfill disposal fee:

For example, in calendar 2006, for Fullerton College, the district reported to CalRecycle that it diverted 4,337.2 tons of solid waste and disposed of 1,372.8 tons, which results in an overall diversion percentage of 76.4% [Tab 5, page 3]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to have diverted only 2,840.0 tons (5,680.0 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 2,840.0 tons of diverted solid waste rather than a total of 4,337.2 tons diverted.

Using this formula also results in cost savings for calendar year 2006 of \$130,640 (5,680 tons generated x 50 percent = 2,840 tons x \$46 = \$130,640).

<sup>54</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, pages 84-85.

<sup>55</sup> Exhibit A, IRC, page 34 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 19, 84-85.

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>56</sup>

### III. Positions of the Parties

#### A. North Orange County Community College District

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced. The claimant alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing that:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>57</sup>

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

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>58</sup>

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

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<sup>56</sup> Exhibit A, IRC, page 34 (Final Audit Report).

<sup>57</sup> Exhibit A, IRC, page 11.

<sup>58</sup> Exhibit A, IRC, pages 12-13. Emphasis in original.

statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>59</sup>

The claimant contends that application of the formula is incorrect, alleging that it “did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed.”<sup>60</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 26 other claimants under the *Integrated Waste Management* program, that application of the Controller's formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>61</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings “because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>62</sup>

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

#### **B. State Controller's Office**

The Controller maintains that the audit findings are correct. Regarding the claimant's statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. The Controller asserts that the claimant's comments relating to alternatives for the disposal of solid waste are irrelevant since the claimant does not state that it disposed of its solid waste at any location other than a landfill or used any other means to dispose of its waste than to contract with a commercial waste hauler.<sup>63</sup>

The Controller also cites the claimant's annual reports, its disposal of 14,400.7 tons of solid waste during the audit period, and mention of its contract with a waste hauler in its annual reports that indicates that the claimant disposed of waste in a landfill.<sup>64</sup> The Controller states:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for no cost. We confirmed that the district incurred a fee to dispose of its solid waste during the fiscal years in the review period. An internet search on the district's website revealed that on June 28, 2005, during a regular meeting of the board of

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<sup>59</sup> Exhibit A, IRC, pages 13-16.

<sup>60</sup> Exhibit A, IRC, page 16.

<sup>61</sup> Exhibit A, IRC, pages 17-18.

<sup>62</sup> Exhibit A, IRC, pages 20-21.

<sup>63</sup> Exhibit B, Controller's Late Comments on the IRC, page 15.

<sup>64</sup> Exhibit B, Controller's Late Comments on the IRC, pages 15-16.

trustees, the district awarded a bid for “Trash Container Services for the District, to M-G Disposal, LLC, in the amount of \$696,192.” The minutes go on to state, “This is subject to contract allowance for adjustments in *charges levied for the use of the County refuse facility*. . .”<sup>65</sup>

The Controller acknowledged that the claimant has not remitted cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code. But the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>66</sup>

In response to the claimant’s argument that the Controller’s formula is a standard of general application that is an underground regulation, the Controller asserts that it used a “court approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this “court-identified” approach provides a reasonable methodology to identify the required offset.”<sup>67</sup>

The Controller also states that it “allocated” the offsetting savings to avoid penalizing the claimant for diverting more than the minimum rate of diversion required in calendar year 2006.<sup>68</sup> According to the Controller: “As there is no State mandate to exceed solid waste diversion greater than 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.”<sup>69</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their diversion information, but they are still required to divert 50 percent of their solid waste.<sup>70</sup>

Defending its use of the claimant’s 2007 reported diversion rate to calculate offsetting savings for fiscal years 2007-2008 to 2010-2011, the Controller calls the 2007 report a “fair representation” of 2008-2011 because “In reviewing the 2008, 2009, and 2010 annual reports, we found the district’s annual per capita disposal rate for both the employee and student populations to be below the target rate. Therefore, the district met its requirement to divert 50% of its solid waste.”<sup>71</sup> The Controller also cites the 2008 annual reports for Fullerton and Cypress Colleges that describe improvements to their office paper recycling programs.<sup>72</sup>

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<sup>65</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16. Emphasis in original.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16-17.

<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>70</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>71</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>72</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller points to statements in Fullerton College's 2000 annual report that its composting and mulching will reduce waste going to the landfill.<sup>73</sup>

The Controller also states that the claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>74</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CalRecycle, and is based on private surveys of a large percentage of landfills across California. The Controller also states that "a cost analysis based on the district's contract with M-G Disposal, LLC indicates that the district paid approximately \$45.94 per ton in 2005 to \$55.20 per ton in 2010 for waste disposal, which is consistent with the statewide average landfill fee provided by CalRecycle."<sup>75</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs of having the waste hauled there, which creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>76</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>77</sup> The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan. The Controller also asserts that the claimant's reference to other IWM audits is irrelevant to the current issue.<sup>78</sup>

The Controller disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant's "mandated cost claims exceeded the

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<sup>73</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>74</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>75</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>76</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>77</sup> Public Resources Code section 42925. Emphasis added.

<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, pages 21-22.

proper amount based on the reimbursable costs allowable per statutory language and the program's parameters and guidelines.”<sup>79</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program.<sup>80</sup>

The Controller filed comments agreeing with the Draft Proposed Decision.<sup>81</sup>

#### **IV. Discussion**

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

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

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>82</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>83</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>84</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.

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<sup>79</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>80</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>81</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>82</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>83</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>84</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

[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.” [Citation.]’ ”<sup>85</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>86</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>87</sup>

**The Controller’s Reduction of Costs Claimed Is Correct as a Matter of Law and Not Arbitrary, Capricious or Entirely Lacking in Evidentiary Support.**

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

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

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>88</sup> The court explained:

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<sup>85</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>86</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>87</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>88</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State*

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>89</sup>

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

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>90</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.:

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*Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>89</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>90</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).



as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>91</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>92</sup>

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

The Parameters and Guidelines are consistent with the court’s ruling and require in Section IV. that “[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.”<sup>93</sup> Section VIII. requires that “[r]educed or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1.”<sup>94</sup> The court’s decision and the amended Parameters and Guidelines are binding.<sup>95</sup>

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

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<sup>91</sup> Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>92</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>93</sup> Exhibit A, IRC, page 53 (Parameters and Guidelines).

<sup>94</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>95</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>96</sup>

The mandate requires community colleges to divert at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>97</sup> The record shows that the claimant diverted solid waste each year during the audit period and thus, achieved cost savings from the avoided landfill fee per ton of waste diverted. The claimant's annual reports to CIWMB for calendar years 2005 and 2007 indicate diversion percentages of 49.96 percent to 32.75 percent of the solid waste generated at Fullerton College,<sup>98</sup> and of 40.41 percent to 49.98 percent of the solid waste generated at Cypress College.<sup>99</sup> These diversions fall short of the mandated diversion requirement of 50 percent. The claimant's annual reports to CIWMB for calendar year 2006 reports diversion percentages of 76.4 percent at Fullerton College, and 51.9 percent at Cypress College, both of which exceed the mandated diversion requirement of 50 percent.<sup>100</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>101</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. Consequently, the Controller used the percentage of tons diverted identified in claimant's 2007 annual report to calculate the offsetting savings for fiscal years 2007-2008 to 2010-2011.<sup>102</sup> The claimant has not filed any evidence to show that the Controller's use of the 2007 diversion rates for subsequent years is incorrect. Moreover, the claimant's annual reports after 2007 show that the claimant was continuing or expanding the program to divert solid waste.<sup>103</sup>

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<sup>96</sup> Exhibit A, IRC, page 9.

<sup>97</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 50 and 54 (Parameters and Guidelines, section IV.(B)(5)).

<sup>98</sup> Exhibit B, Controller's Late Comments on the IRC, pages 36-37, 40-41, and 84.

<sup>99</sup> Exhibit B, Controller's Late Comments on the IRC, pages 50-51, 54-55, and 85.

<sup>100</sup> Exhibit B, Controller's Late Comments on the IRC, pages 38-39, 52-53, and 84-85.

<sup>101</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>102</sup> Exhibit A, IRC, page 34 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 19, 84-85.

<sup>103</sup> In its reports for 2008, 2009 and 2010 reported annual per capita disposal rates for both the employee and student populations at or below the target rates at both Colleges. Exhibit B, Controller's Late Comments on the IRC, pages 42 (Fullerton College 2008 report, showing an employee population target of 21.8, and 10.2 was achieved; and a student population target of 0.9, and 0.36 was achieved), 44 (Fullerton College 2009 report, showing an employee population target of 21.8, and 10.0 was achieved; and a student population target of 0.9, and 0.32 was achieved), 47 (Fullerton College 2010 report, showing an employee population target of 21.8, and 15.2 was achieved; and a student population target of 0.9, and 0.51 was achieved), 56 (Cypress College 2008 report, showing an employee population target of 4.9, and 4.3 was achieved; and a student population target of 0.20, and 0.14 was achieved), 58 (Cypress College 2009 report, showing an employee population target of 4.9, and 4.0 was achieved; and a student

Fullerton College's 2008 report shows it had waste reduction programs in place, listing the following: "Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Glass, Newspaper, Office Paper (white), Office Paper (mixed), Plastics, Scrap Metal, Other Materials, Xeriscaping, grasscycling, Alternative Daily Cover." Fullerton College also listed the following programs that were planned or expanding: "On-site composting/mulching, Other composting."<sup>104</sup> Fullerton College also reported in 2008 that it had made improvements in its office paper recycling program by increasing the number of bins and increasing collection efforts.<sup>105</sup> Fullerton College's 2009 report states that it added recycling bins for plastics and cans,<sup>106</sup> and its 2010 report stated it was "working ... to promote and improve our recycling program,"<sup>107</sup> and showed "other composting" as an existing program<sup>108</sup> (which in previous years had been shown in the Planned/Expanding column).

Similarly, Cypress College's 2008 report listed the following waste reduction programs in place: "Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Glass, Newspaper, Plastics, Scrap Metal, Xeriscaping, grasscycling, Self-haul greenwaste, Commercial pickup of compostables, wood waste, concrete/asphalt/rubble C&D, MRF, Alternative daily cover, Other factory recovery." And the following programs were listed as Planned/Expanding: "Office Paper (mixed), On-site composting/mulching."<sup>109</sup> Cypress College also reported in 2008 that it had made improvements in its office paper recycling program by increasing the number of bins and increasing collection efforts, and also reported improvements in on-site composting.<sup>110</sup> Cypress College's 2009 report stated that it recycled six truckloads of classroom furniture, and used contract language in its construction bids to ensure that construction debris is recycled.<sup>111</sup> And Cypress College reported "On-site composting/mulching" and "Tires" as existing program in 2010, whereas in previous years these program were listed as Planned/Expanding.<sup>112</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The Controller submitted minutes of the June 28, 2005 meeting of the claimant's board of trustees that shows it approved a Trash Container Services contract to M-G Disposal, LLC, for July 1, 2005 to June 30, 2010. The contract was subject to allowance for

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population target of 0.20, and 0.15 was achieved), 61 (Cypress College 2010 report, showing an employee population target of 4.9, and 2.1 was achieved; and a student population target of 0.20, and 0.10 was achieved).

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, page 43 (Fullerton College 2008 report).

<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 43 (Fullerton College 2008 report).

<sup>106</sup> Exhibit B, Controller's Late Comments on the IRC, page 45 (Fullerton College 2009 report).

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 48 (Fullerton College 2010 report).

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, page 49 (Fullerton College 2010 report).

<sup>109</sup> Exhibit B, Controller's Late Comments on the IRC, page 57 (Cypress College 2008 report).

<sup>110</sup> Exhibit B, Controller's Late Comments on the IRC, page 57 (Cypress College 2008 report).

<sup>111</sup> Exhibit B, Controller's Late Comments on the IRC, page 59 (Cypress College 2009 report).

<sup>112</sup> Exhibit B, Controller's Late Comments on the IRC, page 63 (Cypress College 2010 report).

adjustments levied for use of the county refuse facility.<sup>113</sup> The claimant's annual reports filed with CIWMB during the audit period also identify the tonnage of waste disposed<sup>114</sup> and that it used a waste hauler.<sup>115</sup>

The avoided landfill disposal fee used by the Controller was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it may have been charged.<sup>116</sup>

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

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>117</sup> The claimant has the burden of

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<sup>113</sup> Exhibit B, Controller's Late Comments on the IRC, page 66 (Board of Trustee's Meeting Minutes).

<sup>114</sup> Exhibit B, Controller's Late Comments on the IRC, pages 36 (Fullerton College 2005 report), 38 (Fullerton College 2006 report), 40 (Fullerton College 2007 report), 42 (Fullerton College 2008 report), 44 (Fullerton College 2009 report), 47 (Fullerton College 2010 report), 50 (Cypress College 2005 report), 52 (Cypress College 2006 report), 54 (Cypress College 2007 report), 56 (Cypress College 2008 report), 58 (Cypress College 2009 report), 61 (Cypress College 2010 report).

<sup>115</sup> The Fullerton College 2005 report cites "better reporting and tracking ... in conjunction with ... our waste hauler (MG Disposal)," and "tonnages for the materials disposed were reported by the waste hauler (MG Disposal)." (Exhibit B, Controller's Late Comments on the IRC, page 36 (Fullerton College 2005 report)). The Fullerton College 2006 and 2007 reports cite "increased efficiency in respect to tracking waste streams in conjunction with our ... waste hauler (MG Disposal)" and "tonnages for the materials disposed were reported by the waste hauler (MG Disposal)." (Exhibit B, Controller's Late Comments on the IRC, pages 39 (Fullerton College 2006 report)), 41 (Fullerton College 2007 report). Fullerton College's 2008, 2009 and 2010 reports and Cypress College's 2008, 2009 and 2010 reports expressly state that the numbers for the report were provided by MG Disposal (or in 2010, Ware Disposal), the claimant's service provider. (Exhibit B, Controller's Late Comments on the IRC, pages 43 (Fullerton College 2008 report)), 45 (Fullerton College 2009 report), 48 (Fullerton College 2010 report). The Fullerton College 2010 report also mentions "Ware," a second vendor. (Exhibit B, Controller's Late Comments on the IRC, pages 57 (Cypress College 2008 report), 59 (Cypress College 2009 report)).

<sup>116</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21, 108-136. Exhibit A, IRC, page 34 (Final Audit Report).

<sup>117</sup> Government Code section 17559, which requires that the Commission's decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then

proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller's Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>118</sup> The Parameters and Guidelines, as amended pursuant to the court's writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: "Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings."<sup>119</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

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it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>118</sup> Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that "the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon." This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining "costs mandated by the state"], 17560(a) ["A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year."]; 17561 [providing that the issuance of the Controller's claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to "verify the actual amount of the mandated costs."]; 17558.7(a) ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>119</sup> Exhibit A, IRC, page 58 (Amended Parameters and Guidelines). Emphasis added.

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

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

The Controller correctly determined that during the audit period, the claimant diverted solid waste, as mandated by the test claim statute, and exceeded the mandated diversion rate in calendar year 2006 at both Fullerton College and Cypress College.<sup>120</sup> Because the claimant exceeded the mandate in 2006, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated rate under the test claim statute (50 percent) by the actual rate diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>121</sup>

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

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>122</sup>

For years the claimant did not exceed the 50 percent mandated diversion rate (all years except 2006), the Controller multiplied 100 percent of the solid waste annually diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee), to calculate the total offset.<sup>123</sup>

These formulas are consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to

<sup>120</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 38 (Fullerton College 2006 report), 52 (Cypress College 2006 report), 84-85.

<sup>121</sup> Exhibit A, IRC, pages 33 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 18-19.

<sup>122</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 18.

<sup>123</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report).

CIWMB.<sup>124</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>125</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted. And in 2006 when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to the allocated rate.

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

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>126</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>127</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state’s account as required by the test claim statutes, and the claimant’s failure to comply with the law does not make the Controller’s calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: “[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs.”<sup>128</sup>

The claimant next asserts that the Controller’s formula is an underground regulation.<sup>129</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost

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<sup>124</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>125</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>126</sup> Exhibit A, IRC, pages 12-13.

<sup>127</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

<sup>128</sup> Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>129</sup> Exhibit A, IRC, pages 13-14.

savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>130</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because “[t]he District did not claim landfill costs, so there are none to be offset.”<sup>131</sup> The claimant’s interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>132</sup> As explained by the court:

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

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>133</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>134</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2007 applies equally to subsequent years, the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>135</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the

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<sup>130</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>131</sup> Exhibit A, IRC, page 14.

<sup>132</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>133</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>134</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>135</sup> Exhibit A, IRC, pages 14-16.



actual amount and percent of tonnage diverted in 2008. As the Controller notes, the claimant's diversion program was well-established by 2007, and the claimant's reports for 2008-2011 shows continued diversion, and that the claimant's annual per capita disposal rate for both the employee and student populations were below or near the target rate at both Fullerton and Cypress colleges.<sup>136</sup> And the narrative in the 2008-2011 reports, as discussed above, reveals that the claimant was continuing to divert solid waste.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on private surveys of a large percentage of landfills across California.<sup>137</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>138</sup> As stated above, the Controller submitted minutes of the June 28, 2005 meeting of the claimant's board of trustees during which it approved a Trash Container Services contract to M-G Disposal, LLC, for July 1, 2005 to June 30, 2010. According to the Controller's analysis of this contract:

A cost analysis based on the district's contract with M-G Disposal, LLC, indicates that the district paid approximately \$45.94 per ton in 2005 to \$55.20 per ton in 2010 for waste disposal, which is consistent with the statewide average landfill fee provided by CalRecycle.<sup>139</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>140</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

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<sup>136</sup> Exhibit B, Controller's Late Comments on the IRC, pages 42 (Fullerton College 2008 report, showing an employee population target of 21.8, and 10.2 was achieved; and a student population target of 0.9, and 0.36 was achieved), 44 (Fullerton College 2009 report, showing an employee population target of 21.8, and 10.0 was achieved; and a student population target of 0.9, and 0.32 was achieved), 47 (Fullerton College 2010 report, showing an employee population target of 21.8, and 15.2 was achieved; and a student population target of 0.9, and 0.51 was achieved), 56 (Cypress College 2008 report, showing an employee population target of 4.9, and 4.3 was achieved; and a student population target of 0.20, and 0.14 was achieved), 58 (Cypress College 2009 report, showing an employee population target of 4.9, and 4.0 was achieved; and a student population target of 0.20, and 0.15 was achieved), 61 (Cypress College 2010 report, showing an employee population target of 4.9, and 2.1 was achieved; and a student population target of 0.20, and 0.10 was achieved).

<sup>137</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21, 108-136.

<sup>138</sup> Exhibit A, page 34 (Final Audit Report).

<sup>139</sup> Exhibit B, Controller's Late Comments on the IRC, pages 21, 68.

<sup>140</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>141</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

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

#### **V. Conclusion**

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

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<sup>141</sup> Exhibit A, IRC, pages 17-18.



RE: **Decision**

*Integrated Waste Management*, 14-0007-I-08

Public Resources Code Sections 40148, 40196.3, 42920-42928;

Public Contract Code Sections 12167 and 12167.1

Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)

State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years: 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

North Orange County Community College District, Claimant

On March 23, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Heather Halsey, Executive Director

Dated: March 27, 2018

**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 March 27, 2018, I served the:

- **Decision adopted March 23, 2018**

*Integrated Waste Management*, 14-0007-I-08

Public Resources Code Section 40148, 40196.3, 42920-42928;

Public Contract Code Section 12167 and 12167.1

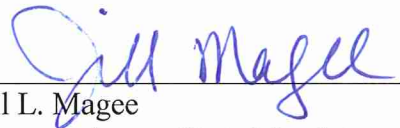
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years: 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

North Orange County Community College District, 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 March 27, 2018 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

Sacramento, CA 95814

(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 3/22/18

**Claim Number:** 14-0007-I-08

**Matter:** Integrated Waste Management

**Claimant:** North Orange County Community College District

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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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