

# MINUTES

## COMMISSION ON STATE MANDATES

State Capitol, Room 447

Sacramento, California

January 30, 2009

Present: Member Tom Sheehy, Chairperson  
Representative of the Director of the Department of Finance  
Member Richard Chivaro, Vice Chairperson  
Representative of the State Controller  
Member Francisco Lujano  
Representative of the State Treasurer  
Member Cynthia Bryant  
Director of the Office of Planning and Research  
Member Sarah Olsen  
Public Member  
Member J. Steven Worthley  
County Supervisor

Absent: Member Paul Glaab  
City Council Member

### CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 10:32 a.m. Executive Director Paula Higashi called the roll and stated that Member Glaab was absent due to illness.

### ELECTION OF OFFICERS

#### Item 1 Staff Report

Ms. Higashi stated that the annual election of officers is held in January. She noted all members are eligible for election as chairperson and vice-chairperson. Ms. Higashi asked for nominations for chairperson.

Member Bryant nominated Director of Finance Mike Genest. With a second by Member Worthley, Director of Finance Mike Genest was unanimously elected chairperson.

Chairperson Sheehy asked for nominations for vice-chairperson. Member Bryant nominated State Treasurer Bill Lockyer for vice-chairperson. Member Lujano noted that it is customary to alternate nominations between the State Treasurer and the State Controller. Member Bryant withdrew her nomination. Member Lujano nominated State Controller John Chiang for vice-chairperson. With a second by Member Olsen, State Controller John Chiang was unanimously elected vice-chairperson.

### APPROVAL OF MINUTES

Item 2a November 6, 2008

Item 2b December 29, 2008

The November 6, 2008 and the December 29, 2008 hearing minutes were unanimously adopted by a vote of 6-0.

### PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS ON TEST CLAIMS AND STATEMENT OF DECISIONS,  
PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5,  
ARTICLE 7 (GOV. CODE, § 17551) (action)

DISMISSAL OF WITHDRAWN PORTIONS OF TEST CLAIM

- Item 8 *Stormwater Pollution Control Requirements*, 03-TC-21  
Los Angeles Regional Water Quality Control Board Order 01-182,  
Permit CAS004001: Parts 1; 2; 4.C.2.c; 4.F.5.a; 4.F.5.b; and 4.F.6.  
Cities of Bellflower, Covina, Downey, Monterey Park, and Signal Hill,  
Claimants

INFORMATIONAL HEARING ON STATEWIDE COST ESTIMATES PURSUANT TO  
CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

A. STATEWIDE COST ESTIMATE

- Item 10 *Fire Safety Inspections of Care Facilities*, 01-TC-16  
Health and Safety Code Section 13235, Subdivision (a)  
Statutes 1989, Chapter 993 (SB 1098)  
City of San Jose, Claimant

B. ADOPTION OF PROPOSED RULEMAKING CALENDAR

- Item 11 Proposed Rulemaking Calendar, 2009

Member Olsen made a motion to adopt items 8, 10 and 11 on the consent calendar. With a second by Member Chivaro, the consent calendar was adopted by a vote of 6-0.

**APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA  
CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)**

- Item 3 Staff Report (if necessary)

There were no appeals to consider.

**HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA  
CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551  
and 17559) (action)**

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

TEST CLAIMS

- Item 4 *Surplus Property Advisory Committees*, 02-TC-36  
Education Code Sections 17387, 17388, 17389, 17390, 17391  
Statutes 1982, Chapter 689 (AB 1775), Statutes 1984, Chapter 584  
(AB 2912); Statutes 1986, Chapter 1124 (AB 3263), Statutes 1987,  
Chapter 655 (AB 2375), Statutes 1996, Chapter 277 (SB 1562)  
Clovis Unified School District, Claimant

Eric Feller, Senior Commission Counsel presented this item. Mr. Feller stated that this test claim alleges a reimbursable mandate for costs associated with appointing and supervising a school district advisory committee on surplus property. Staff finds that this is not a reimbursable program because there is no legal or practical compulsion to designate property as surplus or to transfer school district property. Therefore, neither formation of the committee nor its duties are state-mandated. As an alternative ground for denial, staff found that the statutes claimed were

not a new program or higher level of service because they predated the statutes pled in the test claim.

Mr. Feller indicated that the Department of Finance agrees with the staff analysis. The claimant, however, disagrees with the staff analysis and argues that it is practically compelled to designate property as surplus because of factors beyond its control.

Mr. Feller explained that staff addressed this argument in the analysis. The *Kern* Court stated that practical compulsion means that the state must impose substantial penalties for not complying. Staff finds no state imposed penalties in this case. Staff recommends that the test claim be denied.

Parties were represented as follows: Art Palkowitz representing San Diego Unified School District and Susan Geanacou representing the Department of Finance.

Art Palkowitz asserted that section 17388 states that a governing board, prior to the sale, lease, or rental of excess real property, shall appoint an advisory committee to advise the governing board. Section 17390 states that this advisory committee shall perform the following duties: review the projected school enrollment data; establish a priority list of surplus property; provide for hearings of the community; and forward their recommendations to the district governing board.

Mr. Palkowitz further explained that the Legislature intended that leases entered into by school districts should receive the community involvement. The community could analyze the attendance data and try to project into the future what properties will be needed and won't be needed as an attempt to help schools plan on how they should handle their property. It was meant as a way to facilitate the best judgment for the community and the school, and for school districts to offset revenue losses due to declining enrollment. It was the intent of the Legislature to make sure there is collaboration and transparency with the community so that the best practices for school districts on how they handle their property will be done in the correct manner.

Mr. Palkowitz pointed out that this is a very important process for school districts that is shown by the fact that a school board cannot sell or lease a property without a two-thirds majority vote.

Mr. Palkowitz asserted that legal compulsion is clearly indicated by the statutory language of "shall appoint an advisory committee" and "shall perform these duties." The practical compulsion is set out in the legislative intent with the legislators commenting on how the community must be involved and how they should act to offset revenue. Therefore, this qualifies as a state mandate.

Susan Geanacou, Department of Finance, stated that Finance supports the staff analysis. She also observed that the duties the claimant cites as being mandated are layered on top of the underlying discretionary choice of a district to find or declare property as surplus, and to make the discretionary decision to dispose of it or transfer it in the first place.

Ms. Geanacou stated that both the *Kern High School District* case and the *City of Merced* case illustrate that this is not a reimbursable mandate because the districts have the underlying discretionary choice that thereafter triggers the language to which Mr. Palkowitz refers.

Member Worthley asked Mr. Palkowitz to address whether or not this constitutes a new program. There were two arguments presented by staff. One was that this was discretionary; the other one was that it did not constitute a new program.

Mr. Palkowitz responded by saying that once a school district decides to take the action to sell or lease or rent surplus property, the duties and the committee are required.

Member Worthley questioned the concept of the discretionary act. For example, if a school district has a site they no longer need, they can decide to sell that property or shutter that building. Simply owning property costs the district money to maintain the building. It is poor policy and would not make sense for a district with limited resources to keep a piece of property it cannot use when it could be sold and that money could be used for other purposes, and it's limited what it can be used for, capital-type projects. If a district has extra property, they really should get rid of it because otherwise they're going to be wasting their resources, keeping that property.

Mr. Palkowitz noted that with declining enrollments, this situation is being exacerbated throughout California.

Member Worthley stated that with a declining enrollment population in the state, school districts will have excess facilities and that good public policy would say they should turn those properties over.

Mr. Palkowitz noted the tough decisions for boards and committees are sales; they are leasing properties to bring in the income and that is adding up to a lot of money that's going to affect programs.

Member Olsen questioned the idea of practical compulsion based on the words "should" instead of "must." She stated that while best business practices may mean that a school district should declare something as surplus property, it does not have to. She then questioned whether or not it was possible to recover the costs of this program through the lease because it seems there's nothing to preclude a school district from doing that.

Ms. Olsen reiterated that she was talking about the underlying issue of whether or not a school district decides to declare something surplus property. She noted the issue is they don't have to do that.

Mr. Palkowitz responded that it is not feasible to raise rents to justify the costs of the program. He also reviewed the legislative intent language.

Member Olsen reiterated the lack of compulsion imposed on a district.

Mr. Palkowitz replied that if the Commission is not going to put weight into the language of "shall" and "shall," it could put weight into the practical compulsion, there could be serious consequences for districts that do not try to offset this revenue and use it for the opening and maintaining schools and educational programs.

With a motion by Member Olsen to adopt the staff recommendation, and a second by Member Bryant, the staff recommendation to deny the test claim was adopted by a vote of 5-1, with Member Worthley voting no.

Item 5 Proposed Statement of Decision: *Surplus Property Advisory Committees*,  
02-TC-36

[Item 4 above.]

Mr. Feller also presented this item. He stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the *Surplus Property Advisory Committees* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision including minor changes reflecting the witnesses' hearing testimony and vote count.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the Statement of Decision was adopted by a vote of 6-0.

Item 6 *Prevailing Wage Rate, 01-TC-28*  
Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1771.7, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861  
Public Contract Code Section 22002  
Statutes 2002, Chapter 868 (AB 1506); Statutes 2001, Chapter 938 (SB 975); Statutes 2001, Chapter 804 (SB 588); Statutes 2000, Chapter 954 (AB 1646); Statutes 2000, Chapter 920 (AB 1883); Statutes 2000, Chapter 881 (SB 1999); Statutes 2000, Chapter 875 (AB 2481); Statutes 2000, Chapter 135 (AB 2539); Statutes 1999, Chapter 903 (AB 921); Statutes 1999, Chapter 220 (AB 302); Statutes 1999, Chapter 83 (SB 966); Statutes 1999, Chapter 30 (SB 16); Statutes 1998, Chapter 485 (AB 2803); Statutes 1998, Chapter 443 (AB 1569); Statutes 1997, Chapter 757 (SB 1328); Statutes 1997, Chapter 17 (SB 947); Statutes 1993, Chapter 589 (AB 2211); Statutes 1992, Chapter 1342 (SB 222); Statutes 1992, Chapter 913 (AB 1077); Statutes 1989, Chapter 1224 (AB 114); Statutes 1989, Chapter 278 (AB 2483); Statutes 1988, Chapter 160 (SB 2637); Statutes 1983, Chapter 1054 (AB 1666); Statutes 1983, Chapter 681 (AB 2037); Statutes 1981, Chapter 449 (AB 1242); Statutes 1980, Chapter 992 (AB 3165); Statutes 1980, Chapter 962 (BA 2557); Statutes 1979, Chapter 373 (SB 925); Statutes 1978, Chapter 1249 (AB 3174); Statutes 1977, Chapter 423 (SB 406); Statutes 1976; Chapter 1179 (AB 3676); Statutes 1976; Chapter 1174 (AB 3365); Statutes 1976, Chapter 861 (SB 1953); Statutes 1976, Chapter 599 (AB 1125); Statutes 1976, Chapter 538 (AB 2466); Statutes 1976, Chapter 281 (AB 2363);  
Title 8, California Code of Regulations Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802, 17201-17212, 17220-17229, 17230-17237, 17240-17253, 17260-17264  
School Facility Program Substantial Progress and Expenditure Audit Guide – May 2003 (Prepared by the Office of Public School Construction)  
AB 1506 Labor Compliance Program Guidebook – February 2003 (Prepared by the Division of Labor Standards Enforcement)  
Antioch Unified School District Labor Compliance Program  
January 17, 2003  
Grossmont Union High School District, Claimant

Chief Legal Counsel Camille Shelton presented this item. Ms. Shelton stated that this test claim addresses the California Prevailing Wage Law which is designed to enforce the minimum wage standards on public works projects that exceed \$1000 and are funded in whole or in part with public funds. The prevailing wage law applies to school districts and community college districts that award contracts to private contractors for projects including the construction, alteration, repair or maintenance of school property.

The law requires school districts, as the awarding body, to perform a number of activities to ensure that the employees of the private contractor are receiving prevailing wages. Staff finds that only the activities required by Labor Code section 1776, subdivisions (g) and (h), section 16403, subdivision (a), and 16408, subdivision (b), of the Department of Industrial

Relations regulations constitute a reimbursable program within the meaning of Article XIII B, Section 6 of the California Constitution, and only when school districts and community college districts are required to contract for the repair or maintenance of school property.

Staff further finds that there is fee authority that applies to some of these activities which shall be identified in the parameters and guidelines as offsetting revenue. In addition, there may be grant funding that may apply to reduce a reimbursement claim.

Staff recommends that the Commission deny the test claim with respect to all other statutes, regulations, and other alleged executive orders that have been pled by the claimant.

Staff recommends that the Commission adopt the analysis to partially approve this test claim.

Parties were represented as follows: Keith Petersen representing claimant Grossmont Union High School District; Anthony Mischel and Gary O'Mara, Department of Industrial Relations; and Donna Ferebee, Department of Finance.

Mr. Petersen stated that this test claim deals with the administrative activities to enforce the prevailing wage law when contracting with private companies to construct, repair, and replace buildings.

He explained that there are two threshold questions to be decided. The first is whether school districts are compelled to build schools; the second is whether school districts, in building these schools, are compelled to seek state financing. When seeking state financing, there is a need to comply with state rules. In this case, a labor compliance plan.

Mr. Petersen reported that the staff analysis concluded that local public school districts and community college districts are not required to build schools because staff could not find the word "*shall*," which is the legal compulsion, in a statute connected with school districts.

Mr. Petersen stated that the issue then is whether local school districts are practically compelled to construct schools. He continued that as a matter of law, residents of a certain age in this state are required to attend public school and school districts and community colleges are required to enroll those students. With more students come more facilities. To comply with state law and regulations on class size, schools must be built to house those new and continuing students.

Mr. Petersen pointed out that, constitutionally, the Legislature is required to provide for public schools. They accomplish this by statutorily delegating most of that activity to the local school boards. School districts and community college districts are the only entities authorized by the Legislature to build public schools. Therefore, it is not a big leap in logic to conclude that public school and community college districts are required to build those schools.

Mr. Petersen continued that the second threshold issue is using state funds in the construction of schools. Although the words "you shall use state funds" were not found in the staff analysis, the Legislature pointed out that it is responsible for providing for schools and facilities and assists the districts by providing state funding.

Mr. Petersen stated that since the property tax law changes in 1977, local property tax is no longer sufficient to build new schools. He pointed out that billions of dollars of state funding is being provided for the construction of new school facilities. He also cited a study from the State Department of General Services, State Allocation Board which said there is a need for 16 new classrooms per day to be built.

Mr. Petersen concluded that the need for construction is clear. The only public entities authorized to build are the local school districts and community colleges as delegated by Legislature. Therefore, Mr. Petersen recommended that the staff analysis be rejected, and the

Commission instead find that local public school agencies are required and compelled to build new facilities and replace old facilities. And, since they are compelled to build, they are also compelled to follow the Public Contract Code and Labor Code sections adopted after 1974 for administering those contracts. In addition, because local agencies must rely on state funds, they must follow state rules including the Labor Compliance Program.

Chairperson Sheehy stated that many schools are being constructed in the state without using state funds. Mr. Petersen responded that some school districts do not rely on state funds, but he has no evidence that many school districts do not rely on state funding. Chairperson Sheehy responded that as chairperson of the State Allocation Board, he meets monthly to allocate school bond funding, and therefore, in that capacity he has knowledge that there are many school districts that do not rely on state funding to build schools.

Chairperson Sheehy asked Mr. Petersen if he was claiming that only state funds are used to build schools, and noted that the School Facilities Program requires a local funding match.

Mr. Petersen replied that he was stating some districts are compelled to use state funds.

Chairperson Sheehy reported that the largest school district, Los Angeles Unified School District, recently passed billions of dollars in new bond authority, and despite the fact that the Pooled Money Investment Board took action to stop releasing money out of the Pooled Money Investment Account, Los Angeles' construction program continues because they are using local bond money. Mr. Petersen countered that while that is good news for Los Angeles, there are 900 other districts and many cannot pass bonds. Chairperson Sheehy argued that many were successful in passing bonds.

Anthony Mischel, Department of Industrial Relations, explained that one of his functions with the Department is the lead hearing officer on all prevailing wage enforcement cases against private contractors and subcontractors for failing to pay prevailing wage, or failing to provide adequate certified payroll records. He noted that Los Angeles Unified School District is completing an enormous effort to build new schools. For 35 years the district built no new schools, and as a result, some of its schools were dangerous and in need of repair. Therefore, the voters approved new bonds, and today, there is \$23 billion of school construction being completed in Los Angeles Unified School District, with most of it being funded with local bond money.

Chairperson Sheehy stated that \$23 billion is four and a half times the amount of the state's present bond authority.

Mr. Mischel added that if the state's largest school district could wait 35 years before building new schools and no penalty was imposed on the district, then there is no practical compulsion.

Mr. Petersen reiterated the difficulty in obtaining two-thirds majority voter approval for bonds, and he noted that it has been made easier in the last few years since there are now bonds that can be approved by 55% of the voters. Still, there are districts that only have one source of funding - state funding.

Donna Ferebee, Department of Finance, stated that Finance supports the final staff analysis.

Mr. Mischel stated that he would like to comment on the portions of the analysis where staff is recommending approval.

Mr. Mischel explained that there should be no partial approval. The staff analysis misreads CCR [California Code of Regulations sections] 16400-16403. According to the Labor Commissioner's Office, the awarding body, under normal circumstances, has no obligation to ask a contractor or subcontractor for certified payroll records. These are records the contractor is

required to keep on a weekly basis of every employee with name, home address, Social Security number, classification, amount of hours worked, wages paid, fringe benefits paid, etc. The only time an awarding body is obligated to ask for certified payroll records is when a labor management compliance organization or a member of the public requests these records. Depending on whether it is a labor management organization or a member of the public, there is a certain amount of redaction that must occur because of the Information Practices Act.

Mr. Mischel continued that awarding bodies under section 16400 (c) and (d) have the ability to either redact and copy the certified payroll records itself or tell the contractor to do it and provide them to the awarding body. Therefore, an awarding body which is a school district is not mandated to do the copying and redacting, because they do have the ability to require the private contractor to do so.

Furthermore, section 16403, which states the limitation on the costs of copying is one dollar for the first page, 25¢ for the second page, and \$10 for the certification, is what the awarding body uses to tell the contractor it can charge for the copies. It is not a limit on the awarding body. The awarding body's limitation is in section 1776 (i), which says it has to comply with the Public Records Act, which back to 1968, says only direct costs can be charged.

In the Department of Industrial Relations' experience, awarding bodies never turn over the certified payroll records. They always tell the contractor, "Redact, copy. Send them to us. This is the maximum you can charge."

Ms. Shelton cited to and reviewed pages 61 and 81 of the staff analysis; then reviewed the regulations cited with Mr. Mischel. She explained that she understood his argument but staff did not read the Department's initial comments that way. She asked Mr. Mischel if he was asserting that only "redacting and copying" were not reimbursable. Mr. Mischel clarified that the only activity he is discussing is "redacting."

Ms. Shelton reviewed the activities: obtaining the payroll records from the contractor, sending the acknowledgment to the requester, including notification of the costs to be paid for preparing the records, and then making the redactions, and then providing the copies to the requester."

Mr. Mischel moved to a different issue and stated that since staff is recommending approval of only a few activities out of this massive original filing, claimants may not have \$200 worth of claim left, which means they do not meet the Commission's filing requirements. Chairperson Sheehy asked Ms. Shelton to clarify. Ms. Shelton stated that no claimant may file a test claim if they do not have \$200 in costs (today it is \$1,000). So if the Commission approves only a portion of this test claim, school districts would be unable to file a reimbursement claim unless they showed under penalty of perjury that they have incurred \$1,000 in costs. Chairperson Sheehy clarified that if the Commission partially approved the claim, they do not have to consider whether or not school districts may or may not meet the minimum threshold for filing a reimbursement claim. Ms. Shelton concurred.

Chairperson Sheehy asked Ms. Shelton if she agreed with Mr. Mischel's previous argument that the redactions should be taken out of the staff recommendation as a reimbursable activity. She concurred and also noted that the language in (d)(2)(B) of that regulation penalizes the contractor for not complying in a certain time period.

Mr. Petersen clarified that on the jurisdictional issue of \$200, \$1,000, the test claimant district alleges those costs based on the test claim as filed, not how it turns out.

Mr. Mischel then stated that the remaining activities are "de minimis" in nature and should not be reimbursable. Ms. Shelton responded that Mr. Mischel was referring to the *San Diego Unified School District* case, where the court ruled that some of the state-required activities exceeded



federal law, but were not reimbursable because they were de minimis in cost and were part and parcel of federal requirements. She added that that was the first time the court used that language and it did not refer to the \$1,000 threshold.

Mr. Mischel asked the Commission to define "de minimis." For example, while the activity of withholding contract funds for 1776(g) violations is proposed for approval, he has never seen a single request for this activity. Therefore, this is an insignificant activity and should not be reimbursed. Ms. Shelton responded that the California Constitution requires reimbursement for "all" costs mandated by the state. In addition, the cases mentioned by Mr. Mischel are not on point. Both cases involved federal due process requirements which are not the case here.

Ms. Ferebee cited to the Department of Finance's letter dated April 15, 2008, in which two possible offsetting revenue sources were identified: State School Deferred Maintenance Program, and the Community Colleges Facility Deferred Maintenance and Special Repair Program. She requested clarification as to whether the second funding source was not intentionally omitted from the staff analysis for some reason. Ms. Shelton stated that there is no denial of any potential offsetting revenue source and this issue can be clarified and considered at the parameters and guidelines phase.

Member Olsen requested a clarification as to the staff recommendation. Ms. Shelton recommended that the Commission make a modification after reviewing that language again and looking at that penalty provision on the contract for redacting that information. She reiterated that she could see that interpretation of that regulation. Chairperson Sheehy asked Ms. Shelton if the staff recommendation now is "what it was minus the redaction." Ms. Shelton concurred. Member Olsen moved to adopt the staff recommendation as modified to delete the activity of redacting as reimbursable. With a second by member Lujano, the modified staff recommendation was adopted by a vote of 5-1, with Member Worthley voting no.

Item 7 Proposed Statement of Decision: *Prevailing Wage Rate*, 01-TC-28

[See Item 6 above.]

Ms. Shelton also presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the *Prevailing Wage Rate* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision including changes to reflect the Commission's vote with regard to taking out the redaction, and to authorize staff to make those changes with regard to that finding, as well as other non-substantive changes.

Member Olsen moved to adopt the staff recommendation as modified. With a second by member Bryant, the Proposed Statement of Decision, as modified, was adopted by a vote of 6-0.

**INFORMATIONAL HEARING ON PARAMETERS AND GUIDELINES  
AMENDMENTS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2,  
CHAPTER 2.5 ARTICLE 8 (action)**

**PARAMETERS AND GUIDELINES AMENDMENTS**

- Item 9 *Integrated Waste Management*, 05-PGA-16  
Public Resources Code Sections 40148, 40196.3, 42920-42928  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1999, Chapter 764 (AB 75); Statutes 1992, Chapter 1116  
(AB 3521)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Integrated Waste Management Board, Requestor

Ms. Shelton presented this item. Ms. Shelton stated that this is a request filed by the Integrated Waste Management Board pursuant to Government Code section 17557, subdivision (d), to amend the original parameters and guidelines for the Integrated Waste Management Program.

The Board requests that the parameters and guidelines be amended in Section VIII, Offsetting Cost Savings, to include language requiring community college districts to analyze avoided disposal costs and other offsetting savings related to staffing, overhead materials, and storage as a result of the test claim statutes when filing reimbursement claims.

Ms. Shelton noted that a similar request was made by the Board at the Commission's September hearing and the Commission denied that request. Staff recommends that the Commission deny this request.

Ms. Shelton added that the Board also requests that specified language be included in Section IX of the parameters and guidelines to require the Controller's claiming instructions ensure that only additional expenses related to the mandate are included in a reimbursement claim, and that any offsetting savings not be included.

Staff also recommends that the Commission deny this request. The parameters and guidelines already contain offsetting cost savings language and boilerplate language allowing reimbursement for only increased costs. Therefore, staff recommends that the Commission adopt the analysis to deny the Board's request to amend the parameters and guidelines.

The parties were represented as follows: Elliott Block, Integrated Waste Management Board and Susan Geanacou, Department of Finance.

Chairperson Sheehy asked if the Integrated Waste Management Board has the authority to issue its own regulations on this matter.

Elliott Block, Integrated Waste Management Board, responded that the Board does have the authority to issue regulations regarding the reports. As with any regulations, the Board would have to show necessity for adopting those regulations. Currently, the Board does not have any regulations or requirements for dollar amounts.

Chairperson Sheehy asked if adopting Board regulations would solve the problem. Mr. Block replied that new regulations would impose a new mandate.

Mr. Block responded to a comment in the staff analysis about information on cost savings already being available to the Board. Specifically, the Board has information about reduction in disposal tonnage at landfills but that does not include the actual costs. The Board has used such information to estimate statewide costs using average tipping fee costs but it does not have information for specific community college districts or cost information relating to other savings.

Susan Geanacou, Department of Finance, stated that Finance supports the staff analysis.

With a motion by member Worthley and a second by member Olsen, the staff recommendation to adopt the analysis and deny the Board's request to amend the parameters and guidelines was approved by a vote of 6-0.

## STAFF REPORTS

### Item 12 Chief Legal Counsel's Report (info)

Ms. Shelton stated that decisions have not yet been issued on two oral arguments from December and January. She also introduced Heather Halsey, new staff attorney. Heather is a former staff counsel with the Department of Health Services. She was a committee consultant for the Legislature, and also worked at the Office of Planning and Research. She was a member of the Commission during the Davis Administration, and has worked in private practice representing local government.

Chair Sheehy welcomed Ms. Halsey and thanked her for joining the staff.

### Item 13 Executive Director's Report (info)

Workload. Ms. Higashi reported that two new test claims and incorrect reduction claims have been filed as well as a request for review of claiming instructions for *Graduation Requirements*. All of these will be processed in the next few days.

Ms. Higashi stated she has added a new workload category to track applications for finding of significant financial distress. She introduced Nancy Patton, Assistant Executive Director, to report on possible filings.

SB 1033. Ms. Patton reported that three counties have made inquiries regarding the process for filing applications for finding of significant financial distress, also known as the SB1033 process.

Current law authorizes any county to file an application with the Commission, and requires the Commission to conduct a public hearing in the applicant county, and issue preliminary and final decisions on that application within 90 days. This is a complex and expensive process, and it requires the Commission to review the applicant county's budget and provide a thorough fiscal and legal analysis.

Ms. Patton added that current law prohibits the Commission from making a finding of significant financial distress unless the county has made a compelling case that basic county services, including public safety, cannot be maintained.

The Commission typically contracts with the Department of Finance's Office of Audits and Evaluations to conduct the fiscal portion of the analysis. The Commission is not budgeted for this process. So whenever an application is filed, the Commission must submit a request for deficiency funding with the Department of Finance under budget control section 9840.

The last application was filed by Butte County in 2005. The Commission spent approximately \$106,000 to process that application. That included \$93,000 to contract with Finance. We also hired a retired annuitant to perform other parts of the analysis and to organize the process. About 180 hours of Commission staff time was spent reviewing and analyzing the application.

Finance's audit unit estimates that today, it would cost between \$130,000 and \$150,000 to contract for performance of the fiscal analysis. That does not include travel time. Also, the commission would need to pay for public members and Commission and Finance staff travel to the applicant county.

If an application is filed, the Commission will need to decide how they want to conduct the hearing process. It can choose for the entire Commission to go to the applicant county and conduct the hearing, and approve the preliminary and final analysis; or it could decide to select a subcommittee of Commission members that would go to the applicant county, and then report to the full commission for its decision on the analysis. Ms. Patton continued that the counties are conducting a separate meeting today and will discuss this issue.

Chairperson Sheehy asked Ms. Higashi for a recommendation as to whether or not to engage in a discussion now on how to handle the situation should an actual request be filed.

Ms. Higashi responded that staff would like to have an idea whether every Commission member would like to participate in the review process or nominate a subcommittee.

Chairperson Sheehy expressed concern about the deficiency funding process in light of the bad economy and the possibility of many applications being filed.

Ms. Patton explained that the Commission's budget has language in it so that the funding could be requested using the 9840 control section and that we have 90 days once we get the funding to complete an application. Also, there is language in the governing statutes that says the Commission completes one application at a time.

Member Lujano suggested that staff be directed to use the same process that was used for past applications.

Member Olsen clarified the need for the Commission to decide on subcommittee versus full committee and expressed interest, as a public member, to participate in that subcommittee. Member Worthley also identified himself as a likely other candidate to that subcommittee. Chairperson Sheehy stated that members Olsen and Worthley will be the working subcommittee.

Ms. Higashi stated and Ms. Patton confirmed that 3 counties have made inquiries.

Allan Burdick, on behalf of CSAC SB 90 Service, stated that this process is usually a last alternative for counties. Once they make the decision to file, they are hopeful that the process will move forward quickly so the counties can reduce payments.

Mr. Burdick also pointed out that this process takes precedence over test claims so counties, cities and school districts will be negatively impacted.

Ms. Higashi responded that when the process first started, the Commission virtually stopped hearing all test claims for about a year. However, since the last couple of applications, the Commission contracted with Finance to do the entire analysis, not only looking at the dollars and the budget issues but also at the programmatic issues connected to the budget. Therefore, Commission staff did not do the first level read-through but rather worked with Finance auditors as they prepared the analysis, and reviewed, approved, and issued it to the county and the Commission. She noted that it's a much different process than it used to be. When the Butte application was filed, the Commission still heard test claims at regular Commission meetings. Ms. Higashi stated that she worked about 60 hours on the Butte application, not 100 percent of her time.

Controller's AB 3000 Report. Ms. Higashi clarified that the AB 3000 report data in Item 13 consisted of excerpted data and did not include all columns reported by the State Controller. She distributed copies of the pages from which the data was excerpted.

Governor's Furlough Order. Ms. Higashi reported that Commission staff is in compliance with the Governor's furlough order. Public notice is clearly posted on the web site and administrative procedures are in place.

Legislative Analyst's Report. She also reported that the Legislative Analyst's recent report on education mentions education mandate reform. A separate report addressed realigning criminal justice programs and proposed funding local agencies for the POBOR program at \$140 per officer. She noted that the Commission amended the parameters and guidelines with a rate of \$37.25 per officer.

Next Hearing. Lastly, Ms. Higashi pointed out the tentative agendas for the March and May hearings.

## **PUBLIC COMMENT**

There was no public comment.

## **CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (action)**

### **A. PENDING LITIGATION**

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, [Behavioral Intervention Plans]
2. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700; [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]
3. *Department of Finance v. Commission on State Mandates*, Third District Court of Appeal, Case No. C056833, [Peace Officer Procedural Bill of Rights]
4. *California School Boards Association, Education Legal Alliance, and Sweetwater Union High School Dist. v. State of California, Commission on State Mandates, and John Chiang, in his capacity as State Controller*, Sacramento County Superior Court, Case No. 07CS01399, [School Accountability Report Cards, SARC]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

### **B. PERSONNEL**

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice

from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

**REPORT FROM CLOSED EXECUTIVE SESSION**

At 12:13 p.m., Chairperson Sheehy reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda, and pursuant to Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

**ADJOURNMENT**

Hearing no further business, Chairperson Sheehy adjourned the meeting at 12:13 p.m.



PAULA HIGASHI  
Executive Director