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October 14, 2008

VIA FAX AND FEDERAL EXPRESS

OAL Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814

Re: Proposed Secretary of State Emergency Regulations (2008-1009-02E)

Dear OAL Research Attorney

Ann Barnett ("Barnett"), the Auditor-Controller-County of Clerk of Kern County, objects to the proposed emergency regulation filed by the Secretary of State on October 9, 2008 regarding Post-Election Manual Tallies. Barnett is the local elections official for Kern County. It is Barnett's responsibility to conduct elections in Kern County including the November 4, 2008 general election. Barnett is an intervener and appellant in County of San Diego v. Debra Bowen (2008) 166 Cal App 4th 501, petition for review pending, the successful appeal against Bowen regarding post-election manual tallies.

Bowen fails to state specific facts demonstrating the existing of an emergency or to submit substantial evidence regarding the need for immediate action. Government Code section 11346.1(o)(2). There are no facts which demonstrate what the "serious harm to the public peace, health, safety or general welfare" if the regulations are not adopted on an urgency basis. The voting machines in Kern County, which are the subject of the proposed regulations, have been successfully used in past elections without harm, let alone serious harm to the public peace, health, safety or general welfare of the electors of Kern County. The Legislature already requires post-election manual tallies. Elections Code section 15360. Bowen has failed to demonstrate why her proposed regulations need to be adopted, let alone on an emergency basis.

Bowen also fails in her attempt to explain why the situation was not addressed through nonemergency regulations. Government Code section 11345.1(b)(2). Bowen knew of the results of her "Top to Bottom Review" prior to issuing her post-election manual tally requirements on August 3, 2007. That theoretical review is the basis of the subject regulations. When the County challenged those requirements, Bowen chose to litigate the matter in court, only submitting the proposed regulations after losing at the appellate court level. At any time during the litigation process, Bowen could have employed the "dual approach" she is using now, i.e., litigating the matter while submitting proposed regulations. Guessing wrong on the law does not justify an "emergency".

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Averting the usual regulatory procedures short cuts the process which the Fourth District Court of Appeals held was legally required and necessary. In fact, County of San Diego v. Debra Bowen (2008) 166 Cal.App.4th 501, the appellate court stated that the ambiguity of the post-election manual requirements would be resolved when they are subjected to the "exacting" procedures of the Administrative Procedures Act. 166 Cal.App.4th 501, 518, fn. 23. Attempting to shortcut the regulatory process through the guise of an emergency regulation once again prevents the development of a coherent set of rules for local elections officials.

Based on the foregoing, Barnett respectfully requests that the Office of Administrative Law denies the emergency regulation proffered by Bowen.

VERY TRULY YOURS,
B.C. BARMANN, SR., COUNTY COUNSEL

BY 
Steven L. Sanders, Deputy

CC: Pam Giarrizzo, Chief Counsel
Ann K. Barnett, Auditor-Controller County Clerk

SLS:sm
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