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October 14, 2008

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#### FROM:

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Subject: Proposed Emergency Regulations – Post Election Manual Tally  
Requirements in Close Contests

Number of Pages (not including this cover sheet): 5

#### Note:

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October 14, 2008

Office of Administrative Law  
Reference Attorney  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

Re: Proposed Emergency Regulations  
Date Submitted: October 9, 2008  
Submitting Agency: Secretary of State  
Topic: Post Election Manual Tally Requirements in Close Contests

Dear Sir or Madam:

The County of San Diego and its Registrar of Voters Deborah Seiler (collectively referred to as the "County") submit the following comments and objections to the emergency regulations proposed by the Secretary of State's Office ("SOS") which attempt to reinstate the 10% Post Election Manual Tally ("PEMT") requirements invalidated by the Court of Appeal in *County of San Diego v. Bowen*, 166 Cal. App. 4th 501 (2008). The County of Tulare and its Registrar of Voters, Rita Woodward, also join in the comments and objections set forth below.

### The SOS's Purported Finding of "Emergency" Fails to Demonstrate that the Situation Addressed by the Proposed Regulations is an Emergency

For purposes of the Administrative Procedures Act ("APA") an emergency is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. Gov't Code<sup>1</sup> § 11342.545. Section 11346.1(b)(2) requires the SOS to set forth "specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial

<sup>1</sup> Unless otherwise noted all references are to the Government Code.



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evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency." An emergency regulation may not be "based only upon expediency, convenience, best interest, general public need, or speculation. . . . If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations."

The SOS has failed to satisfy this burden of proof. First, the SOS has failed to present any facts that would support a finding that immediate action is necessary to "avoid serious harm to the public peace, health, safety, or general welfare." All counties in the State already perform a legislatively required 1% manual tally of randomly selected precincts after each election (Elec. Code § 15360) and there is no evidence that the 1% manual tally is inadequate or that a 10% manual tally is more likely to determine whether a voting system has been tampered with. In addition, adequate statutory safeguards are already in place. If fraud is suspected electors can either initiate an election contest (Elec. Code, Div. 16) or request a recount. Elec. Code §§ 15600-15673.

Second, there is no factual showing that the proposed emergency regulations are necessary to insure "the accuracy and integrity of the results in close contests" and the purported reasons that the PEMT requirements are needed are based solely on speculation and theory. There is in fact no evidence in the record that any of the voting systems subject to the PEMT requirements have ever been tampered with or compromised in an election. In fact, the audit team report prepared for the SOS identified "four general causes of discrepancy between the machine and manual counts" of votes. Of these four, three were the result of human – rather than voting system – error. These discrepancies were caused by (1) voter error, (2) elections official error, and (3) manual counting errors. In fact, errors identified through the post-election manual tally audit are in "almost all cases" the result of such errors. [http://www.sos.ca.gov/elections/elections\\_pcas.htm](http://www.sos.ca.gov/elections/elections_pcas.htm), at p. 19. Thus, it appears that security flaws are best addressed through the adoption of procedural controls – over which the Secretary of State has authority – rather than a post-election audit involving the hand counting of votes.

Next, the unsupported and speculative scenarios raised the SOS are belied by the actual results of the audits that were conducted by seven counties after the June 2008 election. While the number of precincts that were audited was very small, of the five counties that filed reports with the SOS, four of the five counties reported that the results



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were 100% accurate. The fifth county reported a discrepancy of four votes which apparently was the result of the scanning machine's inability to read "a very light mark in the voting square by the voter" and not because of any defect in the voting system. [http://www.sos.ca.gov/elections/voting\\_systems/pemtreports\\_june08.htm](http://www.sos.ca.gov/elections/voting_systems/pemtreports_june08.htm).

Finally, the SOS has created the purported need for immediate action by reason of her own inaction and failure to timely act to adopt regulations through the regular process set forth in the APA. Debra Bowen took office in January 2007. The reports prepared pursuant to Bowen's top-to-bottom review were issued more than fourteen months ago on August 3, 2007. The PEMT requirements that were invalidated by the Court of Appeal were issued nearly twelve months ago on October 25, 2007. By letter dated December 7, 2007, the County of San Diego advised Bowen that the PEMT requirements "constitute 'underground regulations' and are void because you failed to follow the procedural requirements for adopting regulations" pursuant to the APA. Bowen ignored the County's letter. As a result, on December 18, 2007, the County was compelled to commence an action in Superior Court challenging the PEMT requirements.

The Court of Appeal's decision was not an "unforeseen circumstance" and no emergency exists. *Carmen Doe v. Wilson*, 57 Cal. App. 4th 296, 306 (1997). Bowen fails to cite any reason, other than her own erroneous belief, why she could not or did not comply with the APA at any time during the last 14 months since the issuance of the reports she claims show that without the PEMT requirements the public is at risk of serious harm. The County submits that given the express language of the APA and the lack of any controlling judicial decisions it was reasonably foreseeable that the Court of Appeal would render the decision that it did and that the more prudent course of action would have been for the SOS to simply comply with the APA as required by law. In addition, while Bowen argues that before the Court of Appeal issued its decision on August 29th, she reasonably believed that the PEMT requirements were not subject to the APA, Bowen fails to say why she waited until forty days after the Court of Appeal issued its opinion before filing the proposed emergency regulations with the OAL, an action that may have alleviated or eliminated the purported need for immediate action.

**The Proposed Emergency Regulations Fail to Comply with All of the Substantive Standards Set Forth in Government Code Section 11349.1**

Section 11349.1 provides in relevant part as follows:

(d) The office shall return any regulation subject to this chapter to the adopting agency if any of the following occur:

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(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed . . . and the adopting agency fails to do any of the following:

(A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.

(B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act which is for reimbursement . . . to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

In this case it does not appear that the SOS has prepared an estimate "in accordance with instructions adopted by the Department of Finance of . . . the cost to any local agency" as required by Section 11346.5(a)(6), Section 11349.1(d)(1).

Second, even if the "estimate" by the SOS of the mandated costs to counties throughout the State is deemed to comply with instructions adopted by the Department of Finance, the SOS has grossly understated the probable cost of performing the PEMT requirements. The audits referenced by the SOS involved very small samples.

[http://www.sos.ca.gov/elections/voting\\_systems/pemtreports\\_june08.htm](http://www.sos.ca.gov/elections/voting_systems/pemtreports_june08.htm) - Alameda - 5



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precincts; Imperial – 2 precincts; Marin – 3 votes; Riverside – 5 precincts; San Mateo – 4 precincts. In reality, if, based on election night results, a statewide or federal election contest for a national office is within .5%, every county in the state would be required to perform the PEMT thereby requiring local election officials to attempt to complete a manual tally of nearly 900,000 votes within the 28 day Official Canvass period.<sup>2</sup> The statewide costs for attempting to comply with the PEMT requirements would likely exceed \$1 million.

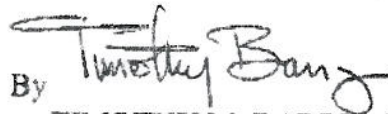
Finally, the SOS has failed to demonstrate compliance with any one of the four options set forth Section 11349.1(d)(3)(A) through (D). Therefore, regardless of the amount of the costs that counties may incur, the SOS has failed to cite any source of reimbursement and the proposed emergency regulations must be rejected.

### Conclusion

For the reasons set forth above, the Counties of San Diego and Tulare and their respective Registrar of Voters respectfully submit that there is no basis in law or in fact for adopting and approving the PEMT requirements as emergency regulations and ask the OAL to reject the proposed emergency regulations.

Very truly yours,

JOHN J. SANSONE, County Counsel

By 

TIMOTHY M. BARRY, Senior Deputy

TMB:nb

cc: Pamela Giarrizzo, Esq.

Kathleen Bales-Lange, County Counsel, County of Tulare

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<sup>2</sup> More than 9 million voters cast ballots in the February 2008 Presidential Primary. [http://www.sos.ca.gov/elections/sov/2008\\_primary/contents.htm](http://www.sos.ca.gov/elections/sov/2008_primary/contents.htm) - "Voter Participation Statistics by County."