

# CALIFORNIA NATIVE PLANT SOCIETY LITIGATION POLICY & PROCEDURES

(Approved, as amended, July 29, 2006.)  
(Revised May 23, 2014; approved as revised August 2, 2014)

## TABLE OF CONTENTS

1.CNPS LITIGATION POLICY.....	1
2.DEFINITIONS .....	1
3.CNPS LITIGATION COMMITTEE.....	2
4.PRE-LITIGATION CONSIDERATIONS AND PROCEDURES.....	3
5.PREPARATION OF “LITIGATION SUMMARY”.....	4
6.LITIGATION COMMITTEE – REVIEW PROCESS.....	6
7.CNPS BOARD OF DIRECTORS - REVIEW PROCESS.....	7
8.LITIGATION MANAGEMENT BY THE SETTLEMENT COMMITTEE.....	8
9.FUNDING.....	9
10.RETAINER AGREEMENTS.....	9
11.PUBLIC RELATIONS.....	10
12.CONFIDENTIALITY .....	10
13.LITIGATION PARTNERSHIPS .....	11
14.RECORD KEEPING AND REPORTING.....	11
15.RESOLUTION AUTHORIZING LITIGATION.....	12
APPENDIX I: RESOLUTION AUTHORIZING THE COMMENCEMENT OF LITIGATION.....	14
APPENDIX II: SUMMARY OF PROCEDURES FOR LITIGATION SPONSORS.....	16

## 1. CNPS LITIGATION POLICY

- 1.1. The California Native Plant Society ("CNPS") may use litigation as a means of carrying out its mission and achieving its goals, which include promoting adherence to, and enforcement of, federal, state and local laws, regulations, and policies that protect native plants. Any litigation that CNPS supports must be directly related to the CNPS mission and goals.
- 1.2. Although CNPS has many Chapters, CNPS is a single 501(c)(3) organization whose principle place of business is located in Sacramento, California, and whose legal affairs, including litigation, are the fiduciary responsibility of the CNPS Board of Directors. Accordingly only the CNPS Board of Directors, and not any individual Chapter of CNPS or its officers or members, has authority to enter, direct, manage, or settle CNPS litigation, or to delegate relevant aspects of such authority to others, as contemplated by the guidance and procedures set forth in these Litigation Procedures.
- 1.3. CNPS views litigation as a last resort, and encourages out-of-court settlement of lawsuits that it may participate in, provided the parties are able to negotiate terms that adequately address the reasons for CNPS' decision to litigate.
- 1.4. This Litigation Policy is solely directed at conservation litigation that CNPS is proposing to bring to protect its members' rights that relate to CNPS' native plant and plant community protection mission and goals. These procedures do not relate in any way, to any litigation or other disputes that involve non-conservation matters (e.g., employment claims or claims involving CNPS' administrative affairs).

## 2. DEFINITIONS

- 2.1. For purposes of these Procedures, the term, "litigation" is to be read narrowly. "Litigation" includes only affirmative action that will necessarily involve CNPS', or one or more of its Chapters', voluntary and formal participation in a state or federal court proceeding, or any formal act constituting the formal waiver of any right of voluntary litigation related to CNPS' mission and goals that CNPS might otherwise have the right to initiate or participate in.
- 2.2. "Litigation" includes, but is not limited to, 1) signing a retainer with an attorney formally committing CNPS or any of its Chapters to being a named plaintiff or petitioner in any court proceeding; 2) filing in a court of law any complaint or petition, amicus curiae brief (except as in Section 4.3(b)), or other legal papers claiming to be on behalf of CNPS or its Chapters, regardless of whether CNPS has retained legal counsel in the matter or not; 3) filing an application to be an intervenor in any existing lawsuit; 4) participating in formal appeals of trial court proceedings, or any other formal continuation of such proceedings, to a higher court or alternative tribunal; or 5) entering into any formal settlement or other agreement waiving CNPS' right to continue or pursue the foregoing activities.
- 2.3. Accordingly, "litigation" does not include public participation in the processes of governmental agencies by CNPS staff, Chapters of CNPS or their officers or members, with or without the formal assistance of an attorney; dialogue with adversarial parties; letter writing campaigns; community or grass roots organizing; petitioning or other communications with state, federal, and local legislators; members pursuing lawsuits on their own behalf; members or

Chapters contributing personal or appropriately available discretionary funds under their control to support lawsuits being pursued by other persons or organizations; or pursuit (“exhaustion”) of administrative-level appeals of agency action, or the filing of any documents that may otherwise be required to exhaust “administrative remedies.”

- 2.4. “Litigation Sponsor” means the CNPS member in good standing who is responsible for initiating the request that CNPS authorize litigation. Typically, the Litigation Sponsor will be the CNPS member who is, or has been, most directly involved in a dispute that has a probability of resulting in litigation. If requested by the attorney for the matter, the Litigation Sponsor and/or other members of CNPS may be required to sign a declaration to the Court so that the attorney can establish CNPS’ standing to bring the lawsuit on behalf of its members.
- 2.5. “Settlement Committee” means the group of appointed and ex-officio individuals under these Procedures that will be primarily responsible for 1) organizing and coordinating CNPS’ participation in the litigation, and 2) participating in settlement discussions with opposing parties and formulating terms of settlement for consideration and ratification by the Board. The Settlement Committee shall consist of the Litigation Sponsor, the President, and up to four (4) additional members of CNPS. The President shall be the chair of the Settlement Committee, unless she or he appoints another member of the committee as chair. It is anticipated that, in most cases, the President will appoint the Litigation Sponsor as the chair of the “Settlement Committee.” Settlement Committee appointments, and the appointment of any person as chair other than the President, shall be subject to confirmation by the Board. The Board of Directors, as CNPS’ ultimate decision making authority regarding litigation matters, may at any time remove any appointee from the Settlement Committee with or without cause.

### **3. CNPS LITIGATION COMMITTEE**

- 3.1. The CNPS Litigation Committee is a Board Committee, established as specified in paragraph B-15.d of the CNPS Bylaws.
- 3.2. The Litigation Committee serves as the Board’s primary contact for matters involving litigation. The primary purposes of the Litigation Committee are 1) to serve as the initial point of consideration of litigation that a member or Chapter may propose; 2) to assist members or Chapters in sufficiently developing information about their proposal, in the form of a Litigation Summary, so that the Board has adequate information to make an informed decision about whether to approve litigation; 3) to assist the Executive Director in tracking CNPS litigation and to provide regular reports to the Board on the status of the various litigation matters it has authorized; and 4) to prospectively develop for the Board’s consideration, proactive “impact” litigation strategies aimed at establishing or strengthening statutes or case law that protect native plants and native plant communities.
- 3.3. The Litigation Committee is composed of two ex-officio members: the CNPS President, and the CNPS Executive Director; plus up to six (6) additional persons appointed by the President, subject to individual confirmation by the Board of Directors. The Chair of the Litigation Committee shall be appointed from the Committee’s membership by the President, subject to confirmation by the Board of Directors.
- 3.4. The term of appointments to the litigation committee shall be one-year, with the appointment of committee members and the chair to be made at the second meeting

(generally March) of the elected CNPS Board of Directors each year.

- 3.5. It is the intent of the Board of Directors in adopting this policy that the President and Board should strive to recruit and appoint members to the Litigation Committee that have a strong knowledge of the laws that protect California's native plants and plant communities, and a strong personal commitment to assisting the Board in its efforts to ensure that those laws are fully and faithfully executed. To the extent possible, attorneys with relevant litigation expertise should be included in the Committee's membership.
- 3.6. The Litigation Committee reviews and makes recommendations regarding proposals for CNPS litigation, and provides legal information and procedural advice to the Board of Directors and those involved in CNPS litigation, but defers the ultimate policy decisions regarding whether to authorize litigation to the Board of Directors.
- 3.7. Chapters are encouraged to form their own, local litigation committees to facilitate communication regarding litigation between the Chapter and the CNPS Litigation Committee. Chapter litigation committees should include the chapter president, the chapter treasurer, and such other members as appointed by the Chapter.

#### 4. PRE-LITIGATION CONSIDERATIONS AND PROCEDURES

- 4.1. It is the responsibility of any person or chapter contemplating litigation to notify CNPS' Executive Director of that potential at the earliest moment possible, so that the Board of Directors may be kept apprised of ongoing developments and the potential need to allocate funding or other resources in support of a decision to engage in litigation.
- 4.2. In order to ensure that adequate information is available to the Board of Directors when the potential need to make a decision regarding litigation may arise, any member or Chapter engaging in formal administrative processes that have a reasonable probability of involving litigation (e.g., commenting on CEQA projects, development projects, land management documents or activities where litigation is probable), should copy the Executive Director on written comments or letters that may be submitted by the member or Chapter on CNPS' behalf, along with a brief statement summarizing the circumstances leading to probable litigation.
- 4.3. **Special Cases –**
  - (a) **“Notice of Intent to Sue” Letters:** the filing of a “notice of intent to sue” letter, such as the 60-day notice letter required under certain Federal Endangered Species Act claims, does not create a binding obligation on CNPS to actually follow through with a lawsuit. However, because the filing of such a letter carries with it a presumption that CNPS intends to follow through on its notice, such letters must be presented to the Litigation Committee for review and recommendation to the Executive Director as to whether the notice letter should be sent. The Executive Director may approve sending the letter, notwithstanding a negative recommendation by the Litigation Committee. Once such a letter is sent, it is expected that the Litigation Sponsor will expeditiously work to complete and present a Litigation Summary to the Litigation Committee for review and approval. If the Executive Director declines to authorize a proposed “notice of intent to sue” letter, the proponent of the Litigation may still complete and submit a Litigation Summary (including the notice letter) which shall then promptly be presented to the full Litigation Committee for consideration as provided in section 6.1, below.

(b) **Joining a new or existing amicus curae letter prepared by another entity:** CNPS may be asked by other entities to co-sign an amicus curae letter being prepared by others, or to join an Application for Joinder to co-sign an existing amicus curae letter already submitted into a court proceeding. In such cases, requests for CNPS to co-sign can be associated with short decision deadlines. In these cases, such letters must be presented to the Litigation Committee for review and recommendation to the Executive Director as to whether CNPS should sign on to the letter. At the request of the Executive Director, the Litigation Committee shall expedite their review of special cases under this section, and provide their expedited recommendation to the Executive Director within 48 hours from the time the letter was received and acknowledged by the Committee chair (or their designate) via email. The Executive Director may approve co-signing the amicus curae letter notwithstanding a negative recommendation by the Litigation Committee.

(c) **Appeals by opposing parties to CNPS-favorable opinions:** When an opposing party files an appeal to a decision favorable to CNPS, the original Litigation Sponsor must revise and resubmit the original Litigation Summary Report to the Litigation Committee for consideration of additional financial obligations or negative consequences associated with the appeal. The Executive Director may approve CNPS' continuation with the appeal notwithstanding a negative recommendation by the Litigation Committee.

- 4.4. As soon as a member or Chapter realizes that the need to engage in litigation over any given matter is probable, even if well before the time where the right to engage in litigation has been perfected (*e.g.*, the hearing of an administrative appeal), the member or Chapter shall immediately notify the Executive Director and President of that fact in writing by completing and submitting as much of the Litigation Summary (see 5.1 below) as they reasonably can under the circumstances.
- 4.5. Upon receipt of such notice of probable litigation, the Executive Director and/or President shall promptly refer the matter, and whatever support material may be provided, to the Litigation Committee for review and consideration.

## 5. PREPARATION OF "LITIGATION SUMMARY"

- 5.1. The Litigation Sponsor shall, at the earliest time that the need for litigation becomes probable, prepare a written Litigation Summary of the proposed litigation and submit it to the Executive Director and President. To the extent practicable, the Litigation Sponsor is encouraged to provide and incorporate by reference *selected, relevant* administrative documents, legal analyses, or other information that will assist the Litigation Committee and the Board of Directors in understanding CNPS' interests in the dispute.
- 5.2. The Litigation Sponsor need not know every last detail of a suit before preparing and submitting a Litigation Summary, especially where timing requires rapid consideration by the Board to meet applicable deadlines. Where the Litigation sponsor does not know the answer to, or needs the Litigation Committee's assistance in completing, any part of the Litigation Summary, that fact should be noted in the Litigation Summary:
- 5.3. The Litigation Summary shall include the following subjects, to the extent known:
  - 5.3.1. **Executive Summary:** a short (one sentence, if possible) statement of who CNPS wants to sue, on what grounds, and what native plants or plant communities would benefit from the action.

- 5.3.2.**Timing for Board Action:** state any known deadlines for the litigation to be filed (e.g., statute of limitations), and any dates by which the Board must make a decision whether to authorize the litigation to allow sufficient time for litigation documents to be researched and drafted before the expiration of any applicable limitations period.
- 5.3.3.**Rationale for the Action:** explain *why* the probable resolution of the legal claims will result in furthering CNPS' mission and goals. Does the lawsuit protect a particularly important population or plant community? Will the action set favorable precedent, or stop repeated or ongoing violations of laws that protect native plants or native plant communities? Are there any alternatives to litigation that would result in an acceptable or more reliable solution, or that would improve local public understanding and support for CNPS' concerns, if litigation is ultimately necessary?
- 5.3.4.**Desired Outcome:** state the outcomes the Litigation Sponsor would view as acceptable in the matter, including any suggested terms of compromise or settlement that may allow for resolution of the matter before a final decision is rendered by a court.
- 5.3.5.**Identification of Litigation Sponsor and Potential Settlement Committee Members:** state who is proposing the litigation (the "Litigation Sponsor"), what Chapter, if any, has formally endorsed the litigation, who is proposed to serve as the chair of the Settlement Committee (if different than the Litigation Sponsor), and up to three additional CNPS members who are proposed to serve on the Settlement Committee. To the extent available, attach any resolutions, minutes or other documentation demonstrating individual Chapter's support. The Board shall not authorize litigation in the name of any Chapter of CNPS without evidence that the board of directors of that Chapter has approved being named in the suit. The Board of Directors may authorize proposed litigation on behalf of any member of CNPS with or without Chapter support. As noted above, CNPS is a single 501(c)(3) organization, and the state CNPS Board of Directors retains ultimate authority over review and approval of any chapter litigation.
- 5.3.6.**Identification of Counsel:** provide the name and contact information for any attorney who is proposed to represent CNPS in the matter, and, a brief statement of why the Litigation Sponsor believes this individual should represent CNPS. If counsel has not been identified, please state so as the Litigation Committee may be able to assist the member or Chapter in identifying appropriate counsel for the matter.
- 5.3.7.**Statement of Aligned and Opposing Parties:** to the extent known, list all parties who would join with CNPS in prosecuting the lawsuit, and all parties, persons or entities who would either be named as adverse parties, or who foreseeably stand to be harmed if CNPS proceeds, whether they are named in the suit or not. Please be as inclusive as possible. Opposing parties include, but are not limited to, applicants for development permits, owners of land, government agencies who are in partnership or cooperation with a defendant agency or person, or other persons or entities, including other non-profit organizations, who might reasonably suffer financial, emotional, physical or reputational injury by virtue of the litigation. Accordingly, special attention should be paid to the question of whether any conflicts of interest, such as those described above, might be presented by the proposed litigation.
- 5.3.8.**Statement of Facts:** a *brief* summary (no more than one page) of the nature of the

project/proposal at issue. In short: *who* is violating the law? in regard to *what* proposed action? *What* plant or plant communities might be affected and *where*? *When* will the decision be made? And, *when* might actions on the ground be taken that could irreparably harm the plant or plant communities at risk? (note that “*why*” and “*how*” are missing: see sections 5.3.2, above, and 5.3.9, below).

**5.3.9. Legal Claims/Analysis:** provide a *short* and *readable* synopsis (again, preferably no more than one page) explaining *how* the facts relate to applicable laws, and highlighting the most significant legal claims that the lawsuit would turn on. If no formal legal analysis is available, documents such as CEQA comment letters or administrative appeal documents may be attached, but a *brief*, and *readable*, synopsis of such claims should also be provided.

**5.3.10. Potential for Adverse Consequences:** identify any known or probable adverse consequences or policy concerns that might arise if CNPS engages in litigation. Will any known CNPS cooperative ventures with public or private entities be compromised by the action? Is there a reasonable potential for legal penalties, or a retaliatory (“SLAPP”) lawsuit to be filed by opposing parties, if CNPS initiates litigation? Is there a meaningful risk of establishing unfavorable precedent by either winning, or losing, the case?

**5.3.11. Financial Commitments and Resources:** to the extent known, state the amount, if any, that CNPS would be obligated to pay, and any secured resources available to offset those amounts, including dedications of Chapter funds, if the Board decides to authorize the litigation. Copies of attorneys’ proposed retainers, estimates or other descriptions of how fees and costs will be assessed are encouraged.

## 6. LITIGATION COMMITTEE – REVIEW PROCESS

6.1. Upon receipt of a Litigation Summary the Executive Director or President shall promptly disseminate the information to the members of the Litigation Committee. Such communication need not be routed through the Chair of the Committee first.

6.2. Any member of the Litigation Committee who has a direct financial interest in CNPS’ decision as to whether to approve litigation, or the outcome of the litigation, or who has a close personal or financial relationship (*e.g.*, immediate family member, business partner, etc.) with a person who has such interest in the matter shall promptly disclose that interest to Litigation Committee, and thereafter recuse herself or himself from any participation in the Committee’s consideration of the matter. Any litigation committee member who is also the litigation sponsor, or who may serve as CNPS attorney in the matter, even if unpaid for such services, shall recuse herself or himself from participation in the Committee’s consideration of the matter.

6.3. The Litigation Committee shall consider the Litigation Summary provided, confer regarding the scope and content of the Summary and whether different or additional information is needed before presenting the matter to the Board, notwithstanding special cases addressed pursuant to Section 4.3. In reviewing the Litigation Summary, the Committee shall take note of any applicable statutes of limitations or other applicable deadlines for preserving CNPS’ and its members’ legal rights, and make every effort to complete its work with sufficient time for transmittal to the Board for consideration and action before such limitations or deadlines may expire.

- 6.4. To the extent the Committee feels more information is necessary before it can make a recommendation on the matter, the Chair of the Litigation Committee, or another member of the Litigation Committee designated by the Chair, shall work expeditiously with the Litigation Sponsor to prepare and circulate a revised Litigation Summary for the Litigation Committee's further consideration.
- 6.5. At any time that a member of the Litigation Committee feels that the Committee has, under the circumstances, compiled a sufficient Litigation Summary and whatever additional, supporting documents or information might be needed to justify a positive recommendation regarding the litigation to the Board, or to the Executive Director in cases pursuant to Section 4.3, that member may state their opinion, and call for the rest of the Litigation Committee to decide. Upon such call by any member, any other Committee member may respond with their concurrence, dissent, or request for additional information.
- 6.6. Upon a positive recommendation of a majority of the participating Litigation Committee's members, the Litigation Committee Chair, President and Executive Director shall cooperate to expedite presenting the Litigation Summary, supporting documents, and recommendation of the Litigation Committee, to the Board of Directors, notwithstanding special cases addressed pursuant to Section 4.3. The matter shall be presented to the Board along with a proposed Resolution Authorizing the Commencement of Litigation, substantially in the form set forth in Appendix I, below. Members of the Litigation Committee who are recused from voting shall not be counted toward the number of Committee members required to constitute a majority.
- 6.7. The Litigation Committee has the delegated authority of the Board to make a threshold decision that a Litigation Summary is not worthy of further consideration by the Committee and to decline to forward it to the Board. Any Board Member may request to inspect any rejected Litigation Summary, and, upon request, bring the matter to the Board for direct consideration. At such meeting, any concerned member of the Litigation Committee may address the Board to explain the Litigation Committee's rationale in declining to forward the Litigation Summary for consideration.

## **7. CNPS BOARD OF DIRECTORS - REVIEW PROCESS**

- 7.1. The Executive Director and President shall cooperate to distribute any Litigation Summary approved by the Litigation Committee, notwithstanding special cases addressed pursuant to Section 4.3, a proposed Resolution Authorizing the Commencement of Litigation (see Policy 7.5 and Appendix I, below), and any relevant supporting materials, to the Board of Directors for consideration by the Board at one of its meetings. If time permits, distribution of these materials should be at least two (2) weeks prior to such meeting, and the meeting should be a regularly scheduled meeting. For reasons of timeliness, the Board may consider such materials and approve legal action pursuant to B14 of the Bylaws, Action by Teleconference or Without a Meeting.
- 7.2. Any member of the Board who has a direct financial interest in CNPS' decision as to whether to approve litigation, or any potential outcome of the litigation, or who has a close personal or financial relationship (*e.g.*, immediate family member, business partner, etc.) with a person who has such interest in the matter shall promptly disclose that interest to the Board, and thereafter recuse herself or himself from any participation in the Board's consideration of the matter. Any Board member who is also the litigation sponsor, or who may serve as CNPS attorney in the matter, even if unpaid for such services, shall recuse

herself or himself from participation in the Board's consideration of the matter.

- 7.3. The Board's consideration of litigation shall be confidential, and in closed session. The Board may request the presence of the Litigation Sponsor, the proposed attorney of record for the case, or any other person whom they feel would be of assistance in deciding whether or not litigation should be approved. Such persons shall be excluded from all or any portion of such closed session meetings upon the request of any Board Member, to facilitate candid and open discussion by the Board regarding the proposed litigation. Board members that are recused in a matter may not attend closed session meetings in their capacity as a Board Member, but may at the Board's request, attend all or a part of such meeting in the advisory capacities described above.
- 7.4. Approval to proceed with litigation by the Board of Directors will be by simple majority of the members participating.
- 7.5. If the Board decides to proceed with an action, it shall adopt a Resolution Authorizing the Commencement of Litigation, substantially in the form set forth in Appendix I, below, and then promptly announce that decision publicly and to the Litigation Sponsor following the completion of its closed session.
- 7.6. If the Board decides not to proceed with an action, the sponsor may prepare and seek the Litigation Committee's reconsideration of a revised Litigation Summary.

#### **8. LITIGATION MANAGEMENT BY THE SETTLEMENT COMMITTEE**

- 8.1. In general, the Board of Directors will delegate authority to manage and settle litigation to the Settlement Committee for each approved litigation matter, but retains the right to assume authority to settle any legal action at any time. The Settlement Committee will provide the Board with adequate notification before concluding a settlement.
- 8.2. Following authorization of the lawsuit, the chair of the Settlement Committee, in consultation with the Settlement Committee, is authorized to monitor and direct day to day decisions regarding conduct of the lawsuit, within the financial and other limitations set forth in the Board's Resolution Authorizing the Commencement of Litigation.
- 8.3. Any major policy or strategy decision that would foreseeably and directly result in compromise or loss of CNPS' or its members' rights in the suit (e.g., a settlement of all, or a portion of the suit, or waiver of any claims for strategic or other reasons) should be made by the chair of the Settlement Committee only in consultation with the Settlement Committee, and with review and approval by the Board. However, in exigent circumstances, the Board authorizes the President to make such determinations on behalf of the Board, so long as the action taken, and the exigency justifying the need for action without the full Board, are promptly communicated by the President to the Board, and the Board promptly ratifies the action taken.
- 8.4. The Settlement Committee and its chair are authorized to notify other parties engaging in settlement discussions that they have been delegated authority to negotiate settlement terms on behalf of the Board, subject to the Board's review and ratification.
- 8.5. Any proposed settlement terms that the Settlement Committee negotiates and approves by a simple majority shall be circulated to the Board of Directors promptly for review. Having delegated, in good faith, the authority to negotiate settlement terms to its Settlement Committee for any given

matter, the Board shall not reject any terms that the Settlement Committee negotiates except under extraordinary circumstances arising from the facts of the case or the nature of the terms negotiated by the Committee.

- 8.6. In order to be binding on CNPS, all legal documents, including settlement agreements, must be minimally signed by either the Executive Director or the President.

## **9. FUNDING**

- 9.1. The CNPS Board of Directors bear a fiduciary responsibility to ensure CNPS' overall, fiscal well being. The maximum amount of funds that the Board is authorizing for a lawsuit (if such a limit is established) shall be stated in the Board's Resolution Authorizing the Commencement of Litigation, along with the source of funds, to the extent such information is known. The Board need not adopt such limits, provide for the financing of the entire litigation, or specify the particular sources of funds in its Resolution, if it chooses not to.
- 9.2. The Board may, at any time, decide to promptly terminate its participation in any lawsuit for any reason, including the litigation's ongoing economic impacts on the administration of CNPS as a whole. The Board understands that such decisions may not protect CNPS from liability for legal fees incurred prior to the time that CNPS decided to terminate the litigation.

## **10. RETAINER AGREEMENTS**

- 10.1. The laws of California require that all attorneys enter litigation retainer agreements with their clients describing, among other things, how attorneys' fees and litigation costs will be assessed to a client. In order to comply with the law and to protect CNPS' legal and financial interests, no attorney may prosecute or defend a litigation matter on CNPS behalf without such a retainer agreement. Under exigent circumstances, a retainer may be processed and entered within a reasonable time after the attorney's commencement of the lawsuit on CNPS' behalf, provided that the CNPS Board of Directors, at a minimum, has adopted a Resolution Authorizing the Commencement of Litigation authorizing the attorney to pursue the matter on CNPS' behalf.
- 10.2. The CNPS President or Executive Director, with due authorization to commence litigation by the Board, are authorized by the Board to formally enter retainer agreements with the attorneys who have been chosen to represent the organization in litigation.
- 10.3. Retainer agreements need not be complicated, but they should minimally indicate the attorneys' hourly rates, any ceiling amounts, whether CNPS or the attorney will bear responsibility for court and administrative record costs, and the extent of representation on appeal.
- 10.4. As a non-profit, public interest corporation, CNPS will most often be able to seek recovery of attorney's fees and costs in any litigation where it is the "prevailing party" under Code of Civil Procedure section 1021.5 and related statutes and legal theories. To the extent that CNPS pays attorney's fees or costs for a lawsuit, it will expect that its attorneys shall use all due diligence to recover and reimburse CNPS for whatever attorney's fees and costs it actually pays for such litigation.
- 10.5. In some cases, attorney members of CNPS may be involved in the management of, or assist CNPS'

authorized attorney in pursuing, litigation. Such work performed by attorneys within CNPS may qualify for an award of attorney's fees. Attorneys within CNPS should therefore record the time they spend on specific litigation. If such an award is made to attorneys that work for CNPS, such funds shall be segregated into a separate, litigation account dedicated for litigation purposes and managed by such attorneys, as generally required by the IRS' rules for 501(c)(3) corporations.

## **11. PUBLIC RELATIONS**

- 11.1. Press coverage has the potential to enhance, or detract from, CNPS litigation goals. The Settlement Committee should develop a media plan that promotes coverage that is favorable to CNPS and its desired outcomes.
- 11.2. The Settlement Committee shall designate a single person, usually its chair, to be the press contact for the litigation matter. Where litigation involves co-plaintiffs, a single public relations plan should be developed, and a single person should be named as the press contact who will take the lead on media inquiries.
- 11.3. Members other than the designated press contact should refrain from commenting on any CNPS litigation matter unless authorized by the designated press contact.

## **12. CONFIDENTIALITY**

- 12.1. Documents, other information and internal CNPS discussions regarding litigation matters should be kept confidential for both legal and strategic reasons.
- 12.2. Written communications regarding litigation should carry reminders that the information is confidential. Discussion of information regarding litigation should be limited to persons whose participation is necessary to the handling of the litigation. Litigation should not be discussed "socially."
- 12.3. Due to timing and other considerations, CNPS litigation matters may need to be discussed or shared by electronic means. Such communications should be carefully addressed, to avoid transmission to unintended recipients, and should state that they are confidential. Board members, Litigation Sponsors, Litigation Committee Members, and any other persons assisting CNPS with evaluating or managing litigation should be particularly careful when sending e-mails using group addressing or a "reply" function.
- 12.4. Communication with and through lawyers who have been asked to provide legal advice on specific litigation matters is attorney-client privileged, and should not be forwarded to *any* person without first consulting with and obtaining the consent of the attorney. A better method is to contact the attorney to request that she or he forward the information to the third party, so that the attorney can advise whether such communication may compromise the attorney-client privilege.

## **13. LITIGATION PARTNERSHIPS**

- 13.1. CNPS frequently enters into legal actions with other organizations or individuals. CNPS should negotiate explicit, written agreements with its litigation partners in advance of authorizing litigation, so that all organizations or persons involved understand their financial obligations and respective roles and duties with regard to the management and settlement of the suit.

#### 14. RECORD KEEPING AND REPORTING

- 14.1. Once the Board of Directors approves a legal action, the chair of the Litigation Committee shall coordinate with the chair of the Settlement Committee and the designated attorney or law firm for that suit to ensure that the CNPS Executive Director receives and maintains in the state office's files, copies of all significant litigation documents.
- 14.2. Any attorney or law firm representing CNPS in a litigation matter shall provide a copy of the fully executed litigation retainer to the Executive Director for CNPS' files.
- 14.3. Any attorney representing CNPS in a litigation matter shall provide to the Executive Director copies of all pleadings that may be filed (complaint/petition, answer/response, replication), and the major briefs or other documents that shape the litigation (opening briefs, opposition briefs, reply briefs, amicus briefs, demurrers, motions for judgment, etc.). Documents dealing with administrative aspects of the suit (lodging of record, stipulations regarding briefing schedules, extensions of time, minute orders from the court), can, but do not need to, be provided to the Executive Director.
- 14.4. For ease of handling and distribution, persons submitting documents for CNPS' record keeping purposes are encouraged to do so in electronic format. The preferred formats, in order are, Adobe Acrobat, Microsoft Word, or WordPerfect. Documents provided in electronic format shall be printed by the Executive Director and filed in hard copy, to ensure that the state office has adequate records in the event of a failure of its data storage and retrieval systems.
- 14.5. The CNPS state office files for each authorized litigation matter should minimally consist of the following documents:
  - 14.5.1. The Board's Resolution Authorizing the Commencement of Litigation.
  - 14.5.2. The Litigation Summary and supporting documents that formed the basis for the Litigation Committee and Board of Director's decision regarding the litigation.
  - 14.5.3. The attorney or law firm's fully executed retainer agreement.
  - 14.5.4. Any agreements with CNPS' co-litigants (if any) setting forth the respective parties duties with regard to funding and managing the litigation.
  - 14.5.5. Records of payment of any amounts for the litigation by the state office or CNPS' chapters, including a record of how the amounts paid compare to any funding limits that the Board may have established when approving the litigation.
  - 14.5.6. All major litigation documents filed with the court by any party or any other person (see section 14.3, above).
  - 14.5.7. Any final judgment, settlement, or other documents concluding the litigation.
- 14.6. The Chair of the Litigation Committee, in coordination with the Executive Director, the chair of each Settlement Committee, and the attorney representing CNPS in the matter, shall prepare regular reports to the Board summarizing the status of ongoing litigation matters, which should be submitted on a quarterly basis. Such summary should minimally include:

- 14.6.1. An update regarding the suit's current status;
- 14.6.2. Any important, anticipated actions or activities in the litigation (e.g., filing of briefs, trial dates, settlement meetings) that are likely to occur before the next Board meeting; and
- 14.6.3. A report on CNPS' expenditures on the suit, and any unexpected, major fees or expenses that CNPS may be required to pay before the Board's next meeting.

## **15. RESOLUTION AUTHORIZING LITIGATION**

- 15.1. The CNPS Board of Directors method of approving CNPS or any of its Chapters' formal participation in litigation shall be through the adoption of a "Resolution Authorizing the Commencement of Litigation." The resolution shall be adopted substantially in the form as set forth in Appendix I, below.
- 15.2. At a minimum, any "Resolution Authorizing the Commencement of Litigation" adopted by the Board shall specify the following information:
  - 15.2.1. That litigation is being authorized pursuant to a specified Litigation Summary as prepared by a specified Litigation Sponsor.
  - 15.2.2. A statement that the Board has determined that approval of litigation will serve to protect interests of CNPS members that are related to CNPS mission and goals.
  - 15.2.3. The Board's appointment of one to three additional members of CNPS to a Settlement Committee, and a chair for that committee (typically the Litigation Sponsor).
  - 15.2.4. A designation of the attorney or law firm that is authorized to pursue the matter on behalf of CNPS, if known at the time of approval..
  - 15.2.5. A statement of any specific financial restrictions or limitations that the Board is placing on its approval of the litigation.
- 15.3. Upon its approval by the Board, the "Resolution Authorizing the Commencement of Litigation" shall be promptly transmitted by the Executive Director and/or the President to the attorney who has been designated to represent CNPS, the Litigation Sponsor, the designated chair of the Settlement Committee, and the Litigation Committee. Such transmittal may be in made in electronic form.

APPENDIX I: RESOLUTION AUTHORIZING THE COMMENCEMENT OF LITIGATION

**California Native Plant Society Resolution No.  
[Year]-\_\_\_\_\_**

**Resolution Authorizing the Commencement of Litigation With  
Regard To [Description].**

WHEREAS, the CNPS Board of Directors has adopted Litigation Procedures that set forth criteria and a process for CNPS to formally initiate or participate in litigation; and

WHEREAS, pursuant to CNPS' Litigation Procedures, a Litigation Summary has been prepared by Litigation Sponsor \_\_\_\_\_ requesting CNPS authorization to file a lawsuit concerning [description based on Executive Summary from Litigation Summary]; and

WHEREAS, a copy of the Litigation Summary is [attached to this resolution as a matter of permanent record][or, if the Summary contains confidential information that should not be publicly disclosed for legal or strategic reasons – is contained in the CNPS state office confidential files]; and

WHEREAS, the Litigation Summary has been reviewed by the CNPS Litigation Committee, and that Committee has recommended that the Board authorize the requested litigation matter;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CALIFORNIA NATIVE PLANT SOCIETY THAT:

1 The Board hereby finds that pursuit of this lawsuit is necessary and proper in order to protect the legal rights of its members that relate to CNPS' public benefit mission and goals.

2 The Board authorizes the commencement of litigation as specified in the Litigation Summary on behalf of CNPS [and/or its \_\_\_\_\_ Chapter] to vindicate the legal rights of its members that related to CNPS' public benefit mission and goals.

3 The Settlement Committee for the litigation shall consist of [name persons]. The chair of the Settlement Committee shall be [name of person].

4 [Name and contact information for Attorney/Law Firm] is authorized to represent CNPS in this litigation matter.

5 The Board only authorizes this lawsuit on the following financial terms: [state terms or maximum amounts that CNPS Board is authorizing for suit].

1 Copies of this Resolution, upon its adoption, shall be immediately transmitted to the attorney who has been designated to represent CNPS, the Litigation Sponsor, the designated chair of the Settlement Committee, and the Litigation Committee.

2 [State any other matters that the Board may wish to have incorporated with regard to the

CNPS Litigation Policy & Procedures

August, 2014

specific litigation matter].

MOVED by Director \_\_\_\_\_, SECONDED by Director \_\_\_\_\_,

and adopted this \_\_\_\_ day of \_\_\_\_\_, by the following vote: AYES: Directors NOES: Directors

ABSTAIN: Directors ABSENT: Directors

President

ATTEST: \_\_\_\_\_  
Secretary

CNPS RESOLUTION: RES 2006\_\_\_\_\_

## APPENDIX II: SUMMARY OF PROCEDURES FOR LITIGATION SPONSORS

The above Litigation Policy covers a wide range of matters such as committee structures and governance. This Appendix is included to provide a summary of the relevant portions of this policy that individual members of CNPS should follow, if they are participating in activities that could lead to the need to file, or involve the management of, a CNPS lawsuit.

1. As a matter of general practice, send a copy of comment letters on agency proposals or environmental documents submitted on behalf of CNPS or any of its Chapters, along with a brief statement summarizing the circumstances leading to probable litigation, to the Executive Director at the state office. (Litigation Policy, section 4.2)

2. Get clearance from the Executive Director before sending any “notice of intent to sue letter” to any agency, to get approval to co-sign a new or existing amicus curae letter, or to continue engaging on a case to which CNPS is already a party when an opposing party appeals a decision favorable to CNPS. (Litigation Policy, section 4.3)

3. When the need to litigate a matter becomes probable, even if before final agency action is taken, prepare a Litigation Summary and forward it to the Executive Director and President. (Litigation Policy, section 4.4 and 5.1) A Litigation Summary Report template is attached as Appendix III. The Litigation Summary should include the following titles/topics (see Litigation Policy, section 5.3.1 to 5.3.11, for details):

- **Executive Summary**
- **Timing for Board Action**
- **Rationale for the Action**
- **Desired Outcome**
- **Identification of Litigation Sponsor and Potential Settlement Committee Members**
- **Identification of Counsel**
- **Statement of Aligned and Opposing Parties**
- **Statement of Facts**
- **Legal Claims/Analysis**
- **Potential for Adverse Consequences**
- **Financial Commitments and Resources**

4. If assigned to the Settlement Committee, or as its Chair, work with the Settlement Committee to manage the lawsuit. (Litigation Policy, section 8).

- **Refer Important Policy Decisions to the Board for approval**
- **Make sure the President or Executive Director sign all documents binding CNPS to legal representation, settlements, etc.**
- **Work with the attorney to make sure that major documents are also provided to the state office for good record keeping.**
- **Work with the chair of the Litigation Committee, President and Executive Director to prepare reports on the suit’s status and keep the Board up to date on important developments.**

### **APPENDIX III: Litigation Summary Report**

**Litigation Summary for:**

**Author:**

**Date:**

---

**I. Executive Summary**

**II. Timing for Board Action**

**III. Rationale for the Action**

**IV. Desired Outcome**

**V. Identification of Litigation Sponsor and Potential Settlement Committee Members**

**VI. Identification of Counsel**

**VII. Statement of Aligned and Opposing Parties**

**VIII. Statement of Facts**

**IX. Legal Claims/Analysis**

**X. Potential for Adverse Consequences**

**XI. Financial Commitments and Resources**

## CNPS Litigation Procedure Checklist

### for Chapter members

- 1. Sponsor notifies Chapter Board of potential litigation and obtains Chapter Board approval to proceed with CNPS Litigation Procedures.
  
- 2. Sponsor notifies CNPS Executive Director (ED) via email of potential Chapter-related litigation procedures. Sponsor email to ED must include:
  - brief summary statement of potential litigation issues (brief statement, not the Litigation Summary Report).
  - relevant documents, if any.
  
- 3. Sponsor prepares and submits Litigation Summary Report to ED and CNPS Board President, along with relevant documents as per Section 5.1 of Litigation Procedures.