

1 ANDREW L. PACKARD (Bar No. 168690)  
2 ERIK M. ROPER (State Bar No. 259756)  
3 Law Offices of Andrew L. Packard  
4 100 Petaluma Blvd. N., Suite 301  
5 Petaluma, CA 94952  
6 Tel: (707) 763-7227  
7 Fax: (707) 763-9227  
8 E-mail: Andrew@packardlawoffices.com

9 MICHAEL R. LOZEAU (Cal. Bar No. 143892)  
10 DOUGLAS J. CHERMAK (Cal. Bar No. 233382)  
11 Lozeau Drury LLP  
12 1516 Oak Street, Suite 216  
13 Alameda, CA 94501  
14 Tel: (510) 749-9102  
15 Fax: (510) 749-9103  
16 E-mail: Michael@LozeauDrury.com

17 Attorneys for Plaintiff  
18 CALIFORNIA SPORTFISHING  
19 PROTECTION ALLIANCE

20  
21  
22 **UNITED STATES DISTRICT COURT**  
23 **EASTERN DISTRICT OF CALIFORNIA**  
24

25 CALIFORNIA SPORTFISHING  
26 PROTECTION ALLIANCE, a non-profit  
27 corporation,

28 Plaintiff,

vs.

CASTLE & KING, INC., a corporation,

Defendant.

Case No. 2:06-cv-00819-FCD-DAD

**[PROPOSED] CONSENT AGREEMENT**

(Federal Water Pollution Control Act,  
33 U.S.C. §§ 1251 to 1387)

22 **WHEREAS**, Plaintiff California Sportfishing Protection Alliance (hereinafter  
23 “CSPA”) is a non-profit public benefit corporation dedicated to the preservation, protection,  
24 and defense of the environment, wildlife, and natural resources of California’s waters;

25 **WHEREAS**, Defendant Castle & King Rock and Ready Mix, Inc., erroneously sued as  
26 Castle and King Inc. (hereinafter “Defendant”) operates an approximately 2-acre industrial  
27 facility engaged in the fabrication of ready-mix concrete and the storage, receiving and  
28

1 shipping of materials related to those operations, at 105 Aegean Way, in Vacaville, California  
2 (hereinafter, “the Facility”);

3 **WHEREAS**, CSPA and Defendant collectively shall be referred to as the “Parties;”

4 **WHEREAS**, approximately 90% of the Facility is paved or covered by structures.

5 Storm water from a portion of the Facility drains directly to Ulatis Creek, while the remainder  
6 drains to the City of Vacaville storm drain system. A map of the Facility is attached hereto as  
7 Exhibit A and incorporated herein by reference;

8 **WHEREAS**, storm water discharges associated with industrial activity are regulated  
9 pursuant to the National Pollutant Discharge Elimination System (“NPDES”), General Permit  
10 No. CAS000001 [State Water Resources Control Board], Water Quality Order  
11 No. 91-13-DWQ (as amended by Water Quality Order 92-12 DWQ and 97-03-DWQ), issued  
12 pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (hereinafter “General  
13 Permit”);

14 **WHEREAS**, on January 20, 2009, CSPA provided notice of alleged violations of the  
15 General Permit by Defendant and CSPA’s intention to file suit against Defendant (the “Clean  
16 Water Act Notice”) to the Administrator of the United States Environmental Protection  
17 Agency (“EPA”); the Administrator of EPA Region IX; the Executive Director of the State  
18 Water Resources Control Board (“State Board”); the Executive Officer of the Regional Water  
19 Quality Control Board, Central Valley Region (“Regional Board”); and to Defendant, pursuant  
20 to Section 505 of the Federal Water Pollution Control Act (“Act”), 33 U.S.C. § 1365;

21 **WHEREAS**, on April 26, 2010, CSPA provided notice of alleged violations of  
22 California Health & Safety Code section 25249.5, *et seq.*, (“Proposition 65 Notice”) to  
23 Defendant and each of the appropriate public enforcement agencies;

24 **WHEREAS**, true and correct copies of the Clean Water Act Notice and the Proposition  
25 65 Notice (collectively, the “Notices”) are attached hereto as Exhibit B;

26 **WHEREAS**, Defendant denies the occurrence of the violations alleged in the Notices  
27 and maintains that it has implemented an extensive set of structural and non-structural Best  
28

1 Management Practices (“BMPs”) at the Facility since first obtaining coverage under the  
2 General Permit in 1992 and has complied at all times with the provisions of the General  
3 Permit and California Health & Safety Code sections 25249.5, *et seq.*;

4 **WHEREAS**, CSPA filed a complaint (“Complaint”) against Defendant in the United  
5 States District Court, Eastern District of California, on March 25, 2009;

6 **WHEREAS**, for purposes of this Consent Agreement, the Parties stipulate that venue is  
7 proper in this Court, and that Defendant does not contest the exercise of jurisdiction by this  
8 Court to enter this Consent Agreement;

9 **WHEREAS**, this Consent Agreement shall be submitted to the United States  
10 Department of Justice for the 45-day statutory review period, pursuant to 33 U.S.C. § 1365(c);  
11 and shall thereafter be submitted for approval by the Court, the date of which approval shall be  
12 referred to herein as the “Court Approval Date;”

13 **WHEREAS**, at the time the Consent Agreement is submitted for approval to the  
14 United States District Court, CSPA shall request a dismissal of the Complaint with prejudice  
15 and the Parties shall stipulate and request that the Court retain jurisdiction for the enforcement  
16 of this Agreement as provided herein;

17 **AND WHEREAS**, the Parties agree that it is in their mutual interest to resolve this  
18 matter without further litigation.

19 **NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE**  
20 **SETTLING PARTIES, AND ORDERED AND DECREED BY THE COURT, AS**  
21 **FOLLOWS:**

22 **I. COMMITMENTS OF DEFENDANT**

23 **1. Compliance With General Permit & Clean Water Act.** Beginning  
24 immediately, and throughout the term of this Consent Agreement, Defendant shall commence  
25 all measures needed to operate the Facility in full compliance with the requirements of the  
26 General Permit and Clean Water Act.

1           **2. Defendant’s Implementation of Specific Storm Water Best Management**  
2 **Practices.** Defendant shall complete the implementation of the all of the storm water control  
3 measures set forth in Exhibit C, attached hereto, on the implementation schedule set forth  
4 therein.

5           **3. SWPPP Amendments/Additional BMPs.** Within 30 days of mutual execution  
6 of this Consent Agreement, Defendant shall formally amend its SWPPP for the Facility to  
7 incorporate all of the relevant requirements of this Consent Agreement, as well as the revised  
8 Facility map attached hereto as Exhibit A.

9           **4. Sampling Frequency.** Defendant shall collect and analyze samples from three  
10 (3) storm events from each of the three discharge locations identified on Exhibit A (NW  
11 Outfall, NE Outfall, and Truck Driveway), as qualified in the General Permit<sup>1</sup> for sampling  
12 purposes, for the 2010-2011 Wet Season and the 2011-2012 Wet Season. In the event that  
13 EPA Benchmarks are exceeded during any of the first three storm events, one additional  
14 sampling from all three designated discharge points shall be required.

15           **5. Sampling Parameters.** All samples shall be analyzed for each of the following  
16 constituents: Total Iron, Lead<sup>2</sup>, pH, Specific Conductance (“SC”), Total Organic Carbon  
17 (TOC), and Total Suspended Solids by a laboratory accredited by the State of California, with  
18 the exception of field measurements (pH and SC) which may be conducted by a qualified  
19 individual and in accordance with manufacturer’s specifications. All samples collected from  
20 the Facility shall be delivered to the laboratory as soon as possible to ensure that sample “hold  
21

---

22           <sup>1</sup> “Qualifying Storm Events” under the General Permit are those events in which (i) the  
23 samples taken are preceded by at least three (3) working days during which no storm water  
24 discharges from the Facility have occurred; (ii) the samples are collected within the first hour that flow  
25 is observed at the Discharge Point being sampled; and (iii) the samples are collected during daylight  
operating hours.

26           <sup>2</sup> In the event that all three sampling events for the 2010-2011 Wet Season are below one half  
27 of the EPA Benchmark for lead (0.0408 mg/L), Defendant may discontinue sampling for lead in the  
28 2011-2012 Wet Season.

1 time” is not exceeded. Analytical methods used by the laboratory shall be adequate to detect  
2 the individual constituents at or below the values specified on Exhibit C. Sampling results  
3 shall be provided to CSPA within fifteen (15) days of Defendant’s receipt of the laboratory  
4 report from each sampling event pursuant to the Notice provisions below.

5 **6. Action Memorandum Trigger; CSPA Review Of Action Memorandum;**  
6 **Meet-and-Confer.** If any sample taken during the 2010-2011 and 2011-2012 Wet Seasons  
7 referenced in Paragraph 4 above exceeds the evaluation levels set forth in Exhibit D,  
8 Defendant shall prepare a written statement discussing the exceedance(s), the possible cause  
9 and/or source of the exceedance(s), and additional measures that will be taken to address and  
10 eliminate the problem and future exceedances (“Action Memorandum”). The Action  
11 Memorandum shall be provided to CSPA upon completion and in any case no later than 30  
12 days after Defendant’ receipt of the sample results at issue. Such additional measures may  
13 include, but are not limited to, further material improvements to the storm water collection and  
14 discharge system, changing the frequency of Facility sweeping, changing the type and extent  
15 of storm water filtration media or modifying other industrial activities or management  
16 practices at the Facility. Such additional measures, to the extent feasible, shall be  
17 implemented immediately and in no event later than 60 days after the due date of the Action  
18 Memorandum. Within twenty (20) days of implementation, the Facility SWPPP shall be  
19 amended to include all additional BMP measures designated in the Action Memorandum.  
20 CSPA may review and comment on an Action Memorandum and suggest any additional  
21 pollution prevention measures it believes are appropriate; however, CSPA’s failure to do so  
22 shall not be deemed to constitute agreement with the proposals set forth in the Action  
23 Memorandum. Upon request by CSPA, Defendant agrees to meet and confer in good faith  
24 regarding the contents and sufficiency of the Action Memorandum.

25 **7. Inspections During The Term Of This Agreement.** In addition to any site  
26 inspections conducted as part of the meet-and-confer process concerning an Action  
27 Memorandum as set forth above, Defendant shall permit representatives of CSPA (including  
28

1 consultants and counsel) to perform one (1) physical inspection of the Facility per Wet Season  
2 during the two-year term of this Consent Agreement, but only if Defendant's sampling results  
3 exceed EPA Benchmarks as depicted in Exhibit D. These inspections may include sampling  
4 and photographing. CSPA shall provide at least seventy-two (72) hours advance notice of  
5 such physical inspection, except that Defendant shall have the right to deny access if  
6 circumstances would make the inspection unduly burdensome and pose significant  
7 interference with business operations. In such case, Defendant shall specify at least three (3)  
8 dates within the two (2) weeks after CSPA's provision of notice upon which a physical  
9 inspection by CSPA may proceed. Defendant shall not make any alterations to Facility  
10 conditions during the period between receiving CSPA's notice and the start of CSPA's  
11 inspection that Defendant would not otherwise have made but for receiving notice of CSPA's  
12 request to conduct a physical inspection of the Facility. Nothing herein shall be construed to  
13 prevent Defendant from continuing to implement any BMPs identified in its SWPPP during  
14 the period prior to an inspection by CSPA.

15 **8. Defendant's Communications with Regional And State Boards.** During the  
16 term of this Consent Agreement, Defendant shall provide CSPA with copies of all documents  
17 submitted to the Regional Board or the State Board concerning storm water discharges from  
18 the Facility, including but not limited to all documents and reports submitted to the Regional  
19 Board and/or State Board as required by the General Permit. Such documents and reports  
20 shall be provided to CSPA pursuant to the Notice provisions herein and contemporaneously  
21 with Defendant's submission to such agencies.

22 **9. SWPPP Amendments.** Defendant shall provide CSPA with a copy of any  
23 amendments to the Facility SWPPP made during the term of the Consent Agreement within  
24 thirty (30) days of such amendment.

25 **II. MITIGATION, COMPLIANCE MONITORING & FEES AND COSTS**

26 **10.** As mitigation of the Clean Water Act violations alleged in CSPA Complaint,  
27 Defendant agrees to pay the sum of \$30,000 within seven (7) days after the Court Approval  
28

1 Date to the Rose Foundation for Communities and the Environment (“Rose Foundation”) for  
2 projects to improve water quality in Ulatis Creek or its downstream waters.

3 **11.** Defendant agrees to reimburse CSPA in the amount of \$50,000 to defray  
4 CSPA’s reasonable investigative, expert, consultant and attorneys’ fees and costs, and all other  
5 costs incurred as a result of investigating the activities at the Facility, bringing the Action and  
6 negotiating a resolution in the public interest. Such payment shall be made to the Law Offices  
7 of Andrew L. Packard Attorney Client Trust Account within seven (7) days after the Court  
8 Approval Date.

9 **12. Compliance Monitoring Funding.** In the event that any of the sampling results  
10 from the 2010-2011 Wet Season, as specified in Paragraph 4 above, exceed the EPA  
11 Benchmarks, Defendant shall pay \$5,000 to a compliance monitoring fund maintained by  
12 CSPA on or before July 1, 2011; similarly, in the event that any of the sampling results from  
13 the 2011-2012 Wet Season, as specified in Paragraph 4 above, exceed the EPA Benchmarks,  
14 Defendants agree to pay \$5,000 to a compliance monitoring fund maintained by CSPA on or  
15 before July 1, 2012. These funds shall be used to defray CSPA’s reasonable investigative,  
16 expert, consultant and attorneys’ fees and costs associated with monitoring Defendant’s  
17 compliance with this Consent Agreement. Compliance monitoring activities may include but  
18 shall not be limited to, site inspections, review of water quality sampling reports, review of  
19 annual reports, discussions with representatives of Defendant concerning the Action  
20 Memoranda referenced above, and potential changes to compliance requirements herein,  
21 preparation for and participation in meet-and-confer sessions, water quality sampling and  
22 analysis, and compliance-related activities. All such payments for compliance monitoring  
23 funds shall be made payable to the Law Offices of Andrew L. Packard Attorney-Client Trust  
24 Account. Any unused compliance monitoring funds shall be remitted to Defendant on or  
25 before December 31<sup>st</sup> of the year of its remittance to CSPA.

1 **III. DISPUTE RESOLUTION AND ENFORCEMENT OF CONSENT**  
2 **AGREEMENT**

3 **13.** With the exception of the timelines set forth above for addressing exceedances  
4 of values specified on Exhibit D and the Action Memorandum, if a dispute under this Consent  
5 Agreement arises, or either Party believes that a breach of this Consent Agreement has  
6 occurred, the Parties shall meet and confer within twenty (20) days of receiving written  
7 notification from the other Party of a request for a meeting to determine whether a violation  
8 has occurred and to develop a mutually agreed upon plan, including implementation dates, to  
9 resolve the dispute. If the Parties fail to meet and confer or the meet-and-confer does not  
10 resolve the issue, after at least seven days have passed after the meet-and-confer occurred or  
11 should have occurred, either Party shall be entitled to all rights and remedies under the law,  
12 including filing a motion with the District Court of California, Eastern District, which shall  
13 retain jurisdiction over the Action for the limited purposes of enforcement of the terms of this  
14 Consent Agreement. The Parties shall be entitled to seek fees and costs incurred in any such  
15 motion, and such fees and costs shall be awarded, pursuant to the provisions set forth in  
16 Section 505(d) of the Clean Water Act, 33 U.S.C. §1365(d), and applicable case law  
17 interpreting such provision.

18 **14. CSPA's Waiver and Release.** Upon Court approval and entry of this Consent  
19 Agreement, CSPA, on its own behalf and on behalf of its members, subsidiaries, successors,  
20 assigns, directors, officers, agents, attorneys, representatives, and employees, releases  
21 Defendant and its officers, directors, employees, shareholders, parents, subsidiaries, and  
22 affiliates, and each of their predecessors, successors and assigns, and each of their agents,  
23 attorneys, consultants, and other representatives (each a "Released Defendant Party") from,  
24 and waives all claims, which arise from or pertain to the Notices, including, without limitation,  
25 all claims for injunctive relief, damages, penalties, fines, sanctions, mitigation, fees (including  
26 fees of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed or  
27 which could have been claimed under the Notices, for the alleged failure of Defendant to  
28



1 comply with the Clean Water Act or Proposition 65 up to the Effective Date of this Consent  
2 Agreement.

3 **15. Defendant's Waiver and Release.** Defendant, on its own behalf and on behalf  
4 of those Released Defendant Parties under its control, releases CSPA (and its officers,  
5 directors, employees, members, parents, subsidiaries, and affiliates, and each of their  
6 successors and assigns, and its agents, attorneys, and other representative) from, and waives all  
7 claims which arise from or pertain to the Action, including all claims for fees (including fees  
8 of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed or  
9 which could have been claimed for matters associated with or related to the Action.

10 **16.** Upon the Court Approval Date, the Parties shall file with the Court a Stipulation  
11 and Order that shall provide that:

12 a. the Complaint and all claims therein shall be dismissed with prejudice  
13 pursuant to Federal Rule of Civil Procedure 41(a)(2); and

14 b. the Court shall retain and have jurisdiction over the Parties with respect to  
15 disputes arising under this Agreement.

16 **IV. Miscellaneous Provisions**

17 **17.** The Parties enter into this Consent Agreement for the purpose of avoiding  
18 prolonged and costly litigation. Nothing in this Consent Agreement shall be construed as, and  
19 Defendant expressly does not intend to imply, an admission as to any fact, finding, issue of  
20 law, or violation of law, nor shall compliance with this Consent Agreement constitute or be  
21 construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or  
22 violation of law. However, this paragraph shall not diminish or otherwise affect the  
23 obligation, responsibilities, and duties of the Parties under this Consent Agreement.

24 **18.** The Consent Agreement shall terminate on September 30, 2012.

25 **19.** The Consent Agreement may be executed in one or more counterparts which,  
26 taken together, shall be deemed to constitute one and the same document.

1           **20.** In the event that any of the provisions of this Consent Agreement is held by a  
2 court to be unenforceable, the validity of the enforceable provisions shall not be adversely  
3 affected.

4           **21.** The language in all parts of this Consent Agreement, unless otherwise stated,  
5 shall be construed according to its plain and ordinary meaning.

6           **22.** The undersigned are authorized to execute this Consent Agreement on behalf of  
7 their respective parties and have read, understood and agreed to all of the terms and conditions  
8 of this Consent Agreement.

9           **23.** All agreements, covenants, representations and warranties, express or implied,  
10 oral or written, of the Parties concerning the subject matter of this Consent Agreement are  
11 contained herein.

12           **24. Notices.** Any notices or documents required or provided for by this Consent  
13 Agreement or related thereto that are to be provided to CSPA pursuant to this Consent  
14 Agreement shall be hand-delivered or sent by U.S. Mail, postage prepaid, and addressed as  
15 follows or, in the alternative, shall be sent by electronic mail transmission to the email  
16 addresses listed below:

17           Bill Jennings, Executive Director  
18           California Sportfishing Protection Alliance  
19           3536 Rainier Avenue  
20           Stockton, CA 95204  
21           DeltaKeep@aol.com

22           With copies sent to:

23           Andrew L. Packard  
24           Law Offices of Andrew L. Packard  
25           100 Petaluma Boulevard North, Suite 301  
26           Petaluma, CA 94952  
27           Andrew@packardlawoffices.com  
28           Tel.: (707) 763-7227

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

And to:  
  
Michael R. Lozeau  
Lozeau Drury LLP  
1516 Oak Street, Suite 216  
Alameda, CA 94501  
Tel: (510) 749-9102  
Fax: (510) 749-9103  
E-mail: Michael@LozeauDrury.com

Any notices or documents required or provided for by this Consent Agreement or related thereto that are to be provided to Defendant pursuant to this Consent Agreement shall be sent by U.S. Mail, postage prepaid, and addressed as follows or, in the alternative, shall be sent by electronic mail transmission to the email addresses listed below:

Mr. David King  
Castle and King Rock and Ready Mix Inc.  
105 Aegean Way  
Vacaville, CA 95687

With copies sent to:

Kelly J. Trujillo  
601 Carolina Street  
Vallejo, CA 94590  
707.553.7364 (f)

Each party shall promptly notify the other of any change in the above-listed contact information.

**25.** Signatures of the Parties transmitted by facsimile shall be deemed binding.

**26.** No Party shall be considered to be in default in the performance of any of its obligations when a failure to perform is due to a "Force Majeure." A Force Majeure event is any circumstances beyond the Party's control, including, without limitation, any act of God, war, fire, earthquake, flood, and restraint by court order or public authority. A Force Majeure event does not include normal inclement weather, such as anything less than or equal to a 100 year/24-hour storm event, or inability to pay. Any Party seeking to rely upon this paragraph shall have the burden of establishing that it could not reasonably have been

1 expected to avoid, and which by exercise of due diligence has been unable to overcome, the  
2 Force Majeure.

3       **27.** If for any reason the Court should decline to approve this Consent Agreement in  
4 the form presented, the Parties shall use their best efforts to work together to modify the  
5 Consent Agreement within thirty (30) days so that it is acceptable to the Court. If the Parties  
6 are unable to modify this Consent Agreement in a mutually acceptable manner, this Consent  
7 Agreement shall become null and void.

8       The Parties hereto enter into this Consent Agreement and respectfully submit it to the  
9 Court for its approval and entry as an Order and Final Judgment.

10  
11 Dated: \_\_\_\_\_ California Sportfishing Protection Alliance

12  
13  
14 By: \_\_\_\_\_  
15 Bill Jennings, Executive Director

16  
17 Dated: \_\_\_\_\_ Castle & King Rock and Ready Mix, Inc.

18  
19 By: \_\_\_\_\_  
20 Dave King, President

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT A – Facility Site Map**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT B – Notices of Violation (CWA and Proposition 65)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT C**  
**Best Management Practices**

**EXHIBIT D**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

<b>Parameter</b>	<b>Value</b>
Total Iron	1.0 mg/l
Lead	0.0816 mg/L
Total Organic Carbon	none
pH	6.5 – 8.5
Specific Conductivity	200 µmho/cm
Total Suspended Solids	100 mg/L