UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

APR 19 2010

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Reply To: OCE-082

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Douglas M. Smith
President and CEO
R. H. Smith Distributing Co., Inc.
315 East Wine Country Road
Grandview, Washington 98930

Re: R.H Smith Distributing Co., Inc.
EPA Docket No. RCRA-10-2010-0136
Smitty's Conoco, Toppenish, Washington

Dear Mr. Smith:

Enclosed is a conformed copy of the Administrative Order on Consent ("AOC") negotiated between R. H. Smith Distributing Co., Inc. and the U.S. Environmental Protection Agency Region 10 ("EPA") in the matter referenced above.

Please contact Carlo Bertani at (206) 553-0702 if you have any questions concerning implementation of the AOC. You may also contact Deborah Hilsman, Assistant Regional Counsel, at (206) 553-1810 with any legal questions concerning this matter.

Sincerely,

Edward J. Kowalski
Director

Enclosure

cc: Marco Guske, Environmental Program Manager, Yakama Nation
Mike Blum, Washington Department of Ecology

Printed on Recycled Paper

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Ave, Suite 900
Seattle, Washington 98101

In the matter of: R. H. SMITH DISTRIBUTING CO., INC. Respondent	Docket No. RCRA-10-2010-0136 ADMINISTRATIVE ORDER ON CONSENT Proceeding under Section 9003(h) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991b(h)

I. JURISDICTION

1.1. This Administrative Order on Consent ("Order") is entered into voluntarily by R. H. Smith Distributing Co., Inc. ("Respondent") and is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 9003(h) of the Resource Conservation Recovery Act, ("RCRA"), 42 U.S.C. § 6991b(h). This authority has been delegated to the Regional Administrator, Region 10, and has been redelegated to the undersigned Director of the Office of Compliance and Enforcement.

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(206) 553-1810

1.2. This Order is issued to R. H. Smith Distributing Co., Inc. ("Respondent"), the owner and operator of Smitty's Conoco located at 102 East Toppenish Avenue, Toppenish, Washington ("facility").

1.3. Respondent consents to and agrees not to contest EPA's jurisdiction or authority to enter into or enforce this Order. Respondent agrees not to contest the validity of any terms or conditions of this Order in any action to enforce, or any action arising from, this Order.

II. STATEMENT OF PURPOSE

2. In entering this Order, the mutual objectives of EPA and Respondent are that Respondent will take the following actions to adequately protect human health and the environment: 1) develop a Site Assessment Plan for the facility; 2) submit to EPA Region 10 an approvable Corrective Action Plan ("CAP") incorporating the Site Assessment Plan that will prevent or mitigate any migration or releases of petroleum constituents from the underground storage tanks ("USTs") formerly located at the facility, including a schedule for implementing the CAP; and 3) implement the CAP at the facility as approved or modified by EPA within 30 days after the CAP is approved by EPA.

III. PARTIES BOUND

3.1. This Order shall apply to and be binding upon EPA; Respondent; Respondent's officers, directors, employees, agents, successors and assigns, heirs, trustees, and receivers; and all persons including, but not limited to, contractors and consultants, acting on behalf of Respondent.

3.2. No change in ownership or corporate status relating to the facility will in any way alter Respondent's responsibility under this Order. Any conveyance of title, easement, or other interest in Respondent's facility shall not affect Respondent's obligations under this Order. Respondent will be responsible for and liable for any failure to carry out all activities required of Respondent by the terms and conditions of this Order, regardless of Respondent's use of employees, agents, contractors, or consultants to perform any such tasks.

3.3. Respondent shall provide a copy of this Order to all contractors, subcontractors, laboratories, and consultants retained to conduct or monitor any portion of the work performed pursuant to this Order within thirty (30) days of the issuance of this Order or date of such retention, whichever occurs later, and shall condition all such contracts on compliance with the terms of this Order.

3.4. Respondent shall give written notice of this Order to any successor in interest prior to transfer of ownership or operation of the facility, and shall notify EPA at least thirty (30) days prior to such transfer.

3.5. Respondent agrees to undertake all actions required by the terms and conditions of this Order, including any portions of this Order incorporated by reference. Respondent waives any rights to request a hearing on this matter pursuant to Section 9006(b) of RCRA and 40 C.F.R. Part 24, and consents to the issuance of this Order without a hearing pursuant to Section 9006(b) of RCRA as a Consent Order issued pursuant to Section 9003(h).

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IV. FINDINGS OF FACT

4.1. Respondent is a corporation doing business in the State of Washington.

4.2. Respondent is the owner and/or operator of four USTs at the facility.

4.3. The facility is located within the external boundary of the Yakama Indian Reservation.

4.4. In June 2004, Respondent's contractor, DLH Environmental, performed a phase II environmental assessment at Smitty's Conoco and collected soil and groundwater samples. The samples were analyzed for total petroleum hydrocarbons ("TPH") in the gasoline range ("TPH-G") and diesel range ("TPH-D"), and benzene, toluene, ethylbenzene, and xylene ("BTEX"). Analytical data revealed the presence of petroleum products above the Washington Model Toxics Control Act ("MTCA") cleanup levels in both soil and groundwater. EPA uses MTCA cleanup levels as a guide for determining appropriate cleanup levels for petroleum releases in Indian Country in Washington State. MTCA cleanup levels for BTEX in groundwater are as follows: benzene 5 micrograms per liter (ug/L); toluene 1,000 ug/L; ethylbenzene 700 ug/L; and xylene 1,000 ug/L. MTCA cleanup levels for BTEX in soil are as follows: benzene 0.03 milligrams per kilogram (mg/kg); toluene 7 mg/kg; ethylbenzene 6 mg/kg; and xylene 9 mg/kg.

4.5. To further characterize the extent of contamination, in July 2005, Respondent's contractor, Noll Environmental, Inc., installed and sampled three groundwater monitoring wells at the facility. The contractor determined that groundwater on-site occurs at a depth of 11-12 feet below ground surface and the direction of flow is to the east/southeast. The results of

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groundwater sampling revealed the presence of high levels of TPH-G and BTEX above MTCA cleanup levels. The highest concentrations of petroleum constituent contamination occurred in monitoring well No. 3, at 40,000 ug/L (TPH-G), well above the MTCA level of 800 ug/L.

4.6. In 2006, Respondent hired White Shield, Inc. to take over the remediation and sampling work.

4.7. By letter dated November 20, 2006, EPA Region 10 requested that Respondent perform a site characterization and corrective action at the facility. During a meeting between EPA, Respondent, and White Shield on January 23, 2007, Respondent agreed to:

1) collect additional contaminant characterization data including soil vapor data;

2) gather additional information about groundwater flow;

3) identify potential off-site users of potable groundwater;

4) initiate risk-based corrective measures;

5) extend plume monitoring capability to the edge of the property line;

6) propose a course of action to remediate the contamination and prevent harm to human health and the environment with emphasis on groundwater which could be used as a source of drinking water; and

7) include achievable milestones for accomplishing the tasks above in a reasonably short time period.

4.8. Respondent completed only two of the seven tasks listed above: gathering information on groundwater flow, and identifying potential off-site users of potable groundwater.

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4.9. During December 2008 and January 2009, Respondent conducted three line tightness tests on the three active UST systems at the facility. The piping to Tank No. 1, the 8000-gallon regular unleaded gasoline UST, failed all three line tightness tests. The product lines associated with the 8000-gallon UST failed at the following gallon per hour levels: 0.06375, 0.02027, and 0.04333. EPA was on-site to witness the second test, and directed Respondent to take the leaking piping and its associated tank out of use. Respondent complied with this request.

4.10. In November 2009, Respondent's current contractor, Associated Environmental Group, LLC ("AEG"), removed the USTs and petroleum-contaminated soil ("PCS"), took soil samples, backfilled the excavation, and repaved the site. The PCS was removed to a depth of approximately 12 feet below ground surface, at which point, groundwater began to seep rapidly into the excavation. The groundwater within the excavation had a heavy sheen. Roughly 1500 cubic yards of PCS were removed and disposed of at Anderson Rock and Demolition Pits in Yakima, Washington, a facility licensed by the state of Washington to take soil contaminated with petroleum products. An additional two tanks were discovered during the excavation: a 500-gallon waste oil UST that was partially full and a 1000-gallon tank that had previously been closed in place and filled with concrete. Respondent assumed that the 1000-gallon tank was used for home heating purposes and therefore, was not regulated as an UST, but Respondent has no records on the tank.

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4.11. Further action is needed to complete the on-site remediation at the facility due to the extensive lateral contamination that was clearly visible inside the excavation pit on-site. Based on more recent monitoring results, groundwater is still highly contaminated with petroleum constituent contamination as well. EPA sampled the groundwater monitoring wells on October 13, 2009, and laboratory analysis confirmed that in two of the three wells that were sampled, BTEX concentrations exceeded MTCA cleanup standards. In one sample, benzene concentrations exceeded 2200 ug/L, far exceeding the MTCA cleanup standard of 5 ug/L. The off-site extent of the groundwater BTEX plume is currently unknown and needs to be delineated in order to determine whether additional remediation is necessary to protect human health and the environment. Some residents within a mile of the facility use groundwater as their main source of potable water.

V. CONCLUSIONS

Based on the Findings of Fact above, and after consideration of the administrative record, the Director of the Office of Compliance and Enforcement, EPA Region 10, has made the following conclusions of law and determinations:

5.1. Respondent is a "person" as defined in Section 9001(5) of RCRA, 42 U.S.C. § 6991(5), and 40 C.F.R. § 280.12.

5.2. At all times relevant to this Order, Respondent was the "owner" and/or "operator" of at least four "underground storage tanks," as these terms are defined in Section 9001(3), (4), and (10), of RCRA, 42 U.S.C. § 6991(3), (4) and (10), and 40 C.F.R. § 280.12, at the facility.

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5.3. There has been a release of petroleum into the environment from the USTs at the facility.

5.4. The actions required by this Order are necessary to adequately protect human health and the environment.

VI. WORK TO BE PERFORMED

Pursuant to RCRA Section 9003(h)(4), 42 U.S.C. § 6991b(h)(4), Respondent agrees and is hereby ordered to perform the following acts in the manner and by the dates specified herein. All work undertaken pursuant to this Order shall be performed in a manner consistent with Subtitle I of RCRA, 42 U.S.C. § 6991 *et seq.*, and its implementing regulations at 40 C.F.R. Part 280, and with relevant EPA guidance documents.

6.1. Within ninety (90) days of the effective date of this Order, Respondent shall develop a Site Assessment Plan for the facility.

6.2. Within one hundred twenty (120) days of the effective date of this Order, Respondent shall submit to EPA Region 10 an approvable Corrective Action Plan ("CAP") incorporating the Site Assessment Plan that will prevent or mitigate any migration of petroleum constituents released from the USTs formerly located at the facility, and a schedule for implementing the CAP.

6.3. Within one hundred eighty (180) days after the CAP is approved by EPA, Respondent shall implement the approved CAP at the facility according to the schedule in the approved CAP.

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VII. AGENCY APPROVALS/SUBMITTALS/PROPOSED CONTRACTOR/ ADDITIONAL WORK

A. EPA APPROVALS

7.1. EPA will provide Respondent with its written approval, approval with conditions, disapproval, or disapproval with comments and/or modification for any work plan, report (except progress reports), specification, or schedule submitted pursuant to or required by this Order.

7.2. Respondent shall revise any work plan, report, specification, or schedule in accordance with EPA's written comments. Respondent shall submit to EPA any revised submittals in accordance with the due date specified by EPA. Revised submittals are subject to EPA approval, approval with conditions, disapproval, or disapproval with comments and/or modifications.

7.3. Upon receipt of EPA's written approval, Respondent shall commence work and implement any approved work plan in accordance with the schedule and provisions contained therein.

7.4. Any EPA-approved report, work plan, specification, or schedule shall be construed as approved and final. Oral advice, suggestions, or comments given by EPA representatives will not constitute an official approval, nor shall any oral approval or oral assurance of approval be considered binding.

B. SUBMITTALS

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7.5. Beginning with the first full month following the effective date of this Order, and throughout the period that this Order is effective, Respondent shall provide EPA with quarterly progress reports. Progress reports are due within thirty (30) days of the end of the quarter.

7.6. All documents submitted pursuant to this Order shall be hand-delivered, sent by certified mail, return receipt requested, sent electronically via email, or sent by overnight express mail to the Project Coordinator or to other addressees she/he designates. All submittals required by this Order shall be printed on recycled paper.

C. PROPOSED CONTRACTOR/CONSULTANT

7.7. All work performed pursuant to this Order shall be under the direction and supervision of a professional engineer, hydrologist, geologist, or environmental scientist with expertise in petroleum cleanup. Respondent's contractor or consultant shall have the technical expertise sufficient to adequately perform all aspects of the work for which it is responsible. Within fourteen (14) days of the effective date of this Order, Respondent shall notify the EPA Project Coordinator, in writing, of the name, title, and qualifications of the engineer, hydrologist, geologist, or environmental scientist and of any contractors or consultants and their personnel who will be carrying out the terms of this Order. Respondent shall identify whether any contractor is on the List of Parties Excluded from Federal Procurement or Non-Procurement Programs. EPA reserves the right to disapprove Respondent's contractor and/or consultant. If EPA disapproves a contractor or consultant, then Respondent must, within thirty (30) days of receipt from EPA of written notice of disapproval, notify EPA, in writing, of the name, title, and

qualification of any replacement. EPA's disapproval shall not be subject to review under Section XVII: Dispute Resolution.

D. ADDITIONAL WORK

7.8. EPA may determine or Respondent may propose that certain tasks, including investigatory work, engineering evaluation, or procedure/methodology modifications, are necessary in addition to or in lieu of the tasks included in any EPA-approved corrective action plan, when such additional work is necessary to meet the purposes set forth in Section II: Statement of Purpose. EPA may determine that Respondent shall perform the additional work and EPA will specify, in writing, the basis for its determination that the additional work is necessary. Within thirty (30) days after the receipt of such determination, Respondent shall have the opportunity to meet or confer with EPA to discuss the additional work. If required by EPA, Respondent shall submit for EPA approval a work plan for the additional work. Such work plan shall be submitted within thirty (30) days of receipt of EPA's determination that additional work is necessary, or according to an alternative schedule established by EPA. Upon approval of a work plan, Respondent shall implement it in accordance with the schedule and provisions contained herein.

VIII. PUBLIC PARTICIPATION

8.1. Following proposed approval by EPA of the CAP including its associated schedule, EPA shall provide public notice of the proposed CAP in accordance with 40 C.F.R. § 280.67.

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8.2. EPA shall ensure that site release information and decisions concerning the proposed CAP are made available to the public for inspection upon request.

8.3. EPA shall provide public notice if implementation of the approved CAP does not achieve the established cleanup levels in the CAP, but EPA is considering terminating the CAP anyway.

IX. QUALITY ASSURANCE

9.1. Throughout all sample collection and analysis activities, Respondent shall use EPA-approved quality assurance, quality control, and chain-of-custody procedures as specified in the approved CAP.

9.2. Respondent shall follow EPA guidance for sampling and analysis contained in the document entitled "RCRA Ground-Water Monitoring: Draft Technical Guidance," November 1992, and MTCA to guide cleanup decision-making at the site. Additional applicable guidance documents include various ASTM standards such as E1903-97 (Phase II Site Assessments), E1912-98 (Accelerated Site Characterization), and E1689-95 (Developing Conceptual Site Models).

9.3. Respondent shall consult with EPA in planning for, and prior to, field sampling and laboratory analysis.

9.4. Respondent shall inform the EPA Project Coordinator in advance of the names of the laboratories that will be used and ensure that EPA personnel and authorized representatives have reasonable access to the laboratories and personnel used for analyses.

9.5. Respondent shall ensure that laboratories used for analyses perform such analyses according to EPA methods or other methods deemed satisfactory to EPA. If other methods than EPA methods are to be used, then Respondent shall submit all protocols to be used for analysis to EPA for approval at least thirty (30) days prior to the commencement of the analyses.

9.6. Respondent shall ensure that laboratories used for analysis participate in a quality assurance/quality control program equivalent to that which is followed by EPA. As part of such a program, and upon request by EPA, such laboratories shall perform analyses of samples provided by EPA to demonstrate the quality of the analytical data.

X. SAMPLING AND DATA/DOCUMENT AVAILABILITY

10.1. Respondent shall submit to EPA the results of all sampling and/or tests or other data generated by, or on behalf of, Respondent, in accordance with the requirements of this Order.

10.2. Respondent shall notify EPA at least thirty (30) days before engaging in any field activities, such as well drilling, installation of equipment, or sampling. At the request of EPA, Respondent shall provide or allow EPA or its authorized representative to take split, duplicate, or replicate samples of all samples collected by Respondent pursuant to this Order.

XI. ON-SITE AND OFF-SITE ACCESS

11.1. EPA, its contractors, its employees, and/or any other EPA representatives are authorized to enter and freely move about the facility pursuant to this Order for the purposes of, *inter alia*: interviewing facility personnel and contractors; inspecting records, operating logs,

and contracts related to the facility; reviewing the progress of Respondent in carrying out the terms of this Order; conducting such tests, sampling, or monitoring as EPA deems necessary; using a camera, sound recording, or other documentary type equipment; and verifying the reports and data submitted to EPA by Respondent. Respondent agrees to provide EPA and its representatives access at all reasonable times to the facility, and subject to Paragraph 11.2 below, to any other property to which access is required for implementation of this Order. Respondent shall permit such persons to inspect and copy all records, files, photographs, and documents, including all sampling and monitoring data that pertain to work undertaken pursuant to this Order and that are within the possession or under the control of Respondent or its contractors or consultants.

11.2. To the extent that work required by this Order, or by any approved CAP prepared pursuant to this Order, must be done on property not owned or controlled by Respondent, Respondent will use its best efforts to obtain site access agreements from the present owner(s) of such property within thirty (30) days of approval of the CAP for which site access is required. Best efforts as used in this paragraph shall include, at a minimum, a certified letter from Respondent to the present owner(s) of the property requesting access agreements granting Respondent and EPA and its authorized representatives access to the property. Any such agreement shall be incorporated by reference into this Order. In the event that agreements for access are not obtained within thirty (30) days of the effective date of approval of the CAP, Respondent shall notify EPA in writing within thirty (30) days thereafter regarding both its

efforts to obtain access and its failure to obtain the agreements. In the event that EPA subsequently obtains access to that property, Respondent shall undertake EPA-approved work on such property.

11.3. Respondent agrees to indemnify the United States as provided in Section XXI. Indemnification, for any and all claims arising from activities on property described in paragraph 11.2 above.

10.4. Nothing in this Section limits or otherwise affects EPA's right of access and entry pursuant to all applicable law.

XII. BUSINESS CONFIDENTIALITY

12. Respondent may assert a business confidentiality claim covering all or part of any information submitted to EPA pursuant to this Order. Any assertion of confidentiality must be adequately substantiated by Respondent pursuant to the requirements of 40 C.F.R. Part 2. If no such confidentiality claim accompanies this information when it is submitted to EPA, it may be made available to the public by EPA without further notice to Respondent. Physical or analytical data shall not be deemed confidential.

XIII. RECORD PRESERVATION

13. Respondent shall preserve during the pendency of this Order and, for a minimum of six (6) years after its termination, all data, records, and documents in its possession or in possession of its officers, employees, agents, contractors, and assigns which relate in any way to this Order. Respondent shall make such records available to EPA for inspection or provide

copies of such records to EPA, upon request. Respondent shall notify EPA thirty (30) days prior to the destruction of any such records and shall provide EPA with the opportunity to take possession of such records.

XIV. PROJECT COORDINATOR

14.1. Within ten (10) days of the effective date of this Order, Respondent shall designate a Project Coordinator and notify EPA in writing of the Project Coordinator it has selected.

14.2. The designated EPA Project Coordinator is Carlo Bertani who can be reached as indicated in Section XV, below.

14.3. Each Project Coordinator shall be responsible for overseeing the implementation of this Order. All communications between Respondent and EPA and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the Project Coordinators.

14.4. The parties shall provide each other with at least thirty (30) days' written notice prior to changing Project Coordinators.

XV. NOTIFICATIONS AND DOCUMENT CERTIFICATION

15.1. Unless otherwise specified, all reports, correspondence, approvals, disapprovals, notices, and other submittals relating to or required under this Order shall be in writing and shall be sent to the following:

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1810

For EPA:

Carlo Bertani, Environmental Scientist
U.S. EPA Region 10
Office of Compliance and Enforcement
Groundwater Unit; UST/LUST Program
1200 6th Ave, Suite 900, OCE-082
Seattle, WA 98101
206-553-0702
bertani.carlo@epa.gov

For Respondent:

Sue Smith
R. H. Smith Distributing Co., Inc.
315 East Wine Country Road
Grandview, WA 98930
509-882-3377 Ext. 106
sue@rhsmith.com

15.2. Any report or other document submitted by Respondent pursuant to this Order which makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Order must be certified by a responsible corporate officer of Respondent or a duly authorized representative. A responsible corporate officer means: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation.

15.3. The certification required by paragraph 15.2 above must be in the following form:

I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to evaluate the information submitted. I certify that the information contained in or accompanying this submittal is true, accurate, and complete. As to those identified portions of this submittal for which I cannot verify the accuracy, I certify that this submittal and all attachments were prepared in accordance with procedures designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those directly responsible for gathering the information, or the immediate supervisor of such persons, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature:_____
Printed Name: _____
Title: _____
Date: _____

XVI. DELAY IN PERFORMANCE/STIPULATED PENALTIES

16.1. Unless there has been a written modification by EPA of a compliance date, a written modification by EPA of an approved work plan condition, or excusable delay as defined in the "Force Majeure and Excusable Delay" provision below, if Respondent fails to comply with any term or condition set forth in this Order in the time or manner specified herein, Respondent shall pay stipulated penalties as set forth below upon written demand by EPA.

Period of Violation	Penalty Per Violation Per Day
First 7 days	$2,000
8th through 21st day	$5,000
Each day thereafter	$10,000

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16.2. Penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the day of correction of the violation. Nothing herein shall prevent the simultaneous accrual of separate violations of this Order. Penalties shall continue to accrue regardless of whether EPA has notified Respondent of a violation.

16.3. All penalties owed to the United States under this section shall be due and payable within thirty (30) days of Respondent's receipt from EPA of a written demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVII. Such a written demand will describe the violation and will indicate the amount of penalties due.

16.4. Interest will begin to accrue on any unpaid stipulated penalty balance beginning on the thirty-first (31st) day after Respondent's receipt of EPA's demand letter. Interest shall accrue at the Current Value of Funds Rate established by the Secretary of the Treasury. Pursuant to 31 U.S.C. § 3717, an additional penalty of six percent (6%) per annum on any unpaid principal shall be assessed for any stipulated penalty payment which is overdue for ninety (90) or more days.

16.5. All penalties shall be paid by cashier's check or certified check, payable to the order of "Treasurer, United States of America" and shall be delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent shall note on the check the title and docket number of this case. Respondent may also pay the penalty by wire transfer, automated clearinghouse, or on-line in accordance with instructions provided by EPA. Copies of all checks and letters forwarding the check or other documentation of payment must be sent simultaneously to the EPA Project Coordinator.

16.6. Respondent may dispute EPA's assessment of stipulated penalties by invoking the dispute resolution procedures in Section XVII. The stipulated penalties in dispute shall continue to accrue; but need not be paid, during the dispute resolution period. Respondent shall pay stipulated penalties and interest, if any, in accordance with the dispute resolution decision and/or agreement. Respondent must submit such payment to EPA within seven (7) days of receipt of such resolution in accordance with Paragraph 16.5 above.

16.7. Neither the invocation of dispute resolution nor the payment of penalties shall alter in any way Respondent's obligation to comply with the terms and conditions of this Order.

16.8. The stipulated penalties set forth in this section do not preclude EPA from pursuing any other remedies or sanctions which may be available to EPA by reason of Respondent's failure to comply with any of the terms and conditions of this Order.

16.9. No payments under this section shall be tax deductible for federal tax purposes.

XVII. DISPUTE RESOLUTION

17.1. The parties shall use their best efforts to informally and in good faith resolve all disputes or differences of opinion. The parties agree that the procedures contained in this section are the sole procedures for resolving disputes arising under this Order.

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17.2. If Respondent disagrees, in whole or in part, with any written decision by EPA pursuant to this Order (Initial Written Decision), Respondent's Project Coordinator shall notify the EPA Project Coordinator of the dispute. The Project Coordinators shall attempt to resolve the dispute informally.

17.3. If the Project Coordinators cannot resolve the dispute informally, Respondent may pursue the matter formally by placing its objections in writing. Respondent's written objections must be directed to the EPA Project Coordinator. This written notice must be mailed to such person within fourteen (14) days of Respondent's receipt of the Initial Written Decision. Respondent's written objection must set forth the specific points of the dispute, the position Respondent claims should be adopted as consistent with the requirements of this Order, the basis for Respondent's position, and any matters which it considers necessary for EPA's determination. If Respondent fails to follow any of the requirements contained in this paragraph, then it shall have waived its right to further consideration of the disputed issue.

17.4. EPA and Respondent shall have fourteen (14) days from EPA's receipt of Respondent's written objections to attempt to resolve the dispute through formal negotiations. This time period may be extended by EPA for good cause. During such time period (Negotiation Period), Respondent may request a conference with the Director of the Office of Compliance and Enforcement, EPA Region 10, to discuss the dispute and Respondent's objections. EPA agrees to confer in person or by telephone to resolve any such disagreement with the Respondent as long as Respondent's request for a conference will not extend the Negotiation Period.

17.5. If the parties are unable to reach an agreement within the Negotiation Period, EPA shall provide to Respondent its written decision on the dispute (EPA Dispute Decision). Such decision shall be incorporated into and become an enforceable element of this Order.

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17.6. Except as provided in Section XVI. Delay in Performance/Stipulated Penalties, the existence of a dispute as defined in this section and EPA's consideration of matters placed into dispute shall not excuse, toll, or suspend any compliance obligation or deadline required pursuant to this Order during the pendency of the dispute resolution process.

XVIII. FORCE MAJEURE AND EXCUSABLE DELAY

18.1. Force Majeure, for purposes of this Order, is defined as any event arising from causes not foreseen and beyond the control of Respondent or any person or entity controlled by Respondent, including, but not limited to, Respondent's contractors, that delays or prevents the timely performance of any obligation under this Order despite Respondent's best efforts to fulfill such obligation. The requirement that Respondent exercise "best efforts to fulfill such obligation" shall include, but not be limited to, best efforts to anticipate any potential Force Majeure event and address it before, during, and after its occurrence, such that any delay or prevention of performance is minimized to the greatest extent possible. Force Majeure does not include increased costs of the work to be performed under this Order or financial inability to complete the work.

18.2. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a Force Majeure event, Respondent shall contact by telephone and communicate orally with EPA's Project Coordinator or, in the event EPA's Project Officer is unavailable, the Director of the Office of Compliance and Enforcement, EPA Region 10, within forty-eight (48) hours of when Respondent first knew or should have known that the event might cause a delay. Within five (5) days thereafter, Respondent shall provide to EPA, in writing, the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; all other obligations affected by the Force Majeure event, and

what measures, if any, taken or to be taken to minimize the effect of the event on those obligations; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event any cause or contribute to an endangerment to public health, welfare, or the environment. Respondent shall include with any notice all available documentation supporting its claim that the delay was attributable to a Force Majeure. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of Force Majeure for that event. Respondent shall be deemed to have notice of any circumstances of which its contractors had or should have had notice.

18.3. If EPA determines that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of such obligation under this Order that is affected by the Force Majeure event will be extended by EPA for such time as EPA determines is necessary to complete such obligation. An extension of the time for performance of such obligation affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation, unless Respondent can demonstrate that more than one obligation was affected by the Force Majeure event. If EPA determines that the delay or anticipated delay has been or will be caused by a Force Majeure event, EPA will notify Respondent, in writing, of the length of the extension, if any, for performance of such obligations affected by the Force Majeure event.

18.4. If EPA disagrees with Respondent's assertion of a Force Majeure event, Respondent may elect to invoke the dispute resolution provision, and shall follow the time frames set forth in Section XVII. Dispute Resolution. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or

anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstance, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section. If Respondent satisfies this burden, the time for performance of such obligation will be extended any EPA for such time as is necessary to complete such obligation.

XIX. RESERVATION OF RIGHTS

19.1. EPA reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, which may pertain to Respondent's failure to comply with any of the requirements of this Order, including, without limitation, the assessment of penalties under Section 9006 of RCRA, 42 U.S.C. § 6991e. This Order shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, and/or authorities, civil or criminal, which EPA has under RCRA or any other statutory, regulatory, or common law authority of the United States.

19.2. EPA reserves the right to disapprove of work performed by Respondent pursuant to this Order and to request that Respondent perform additional tasks.

19.3. EPA reserves the right to perform any portion of the work consented to herein or any additional work as it deems necessary to protect human health and/or the environment. EPA may exercise its authority under RCRA to undertake response actions at any time. In any event, EPA reserves its right to seek reimbursement from Respondent for costs incurred by the United States. Notwithstanding compliance with the terms of this Order, Respondent is not released from liability, if any, for the costs of any response actions taken or authorized by EPA.

19.4. If EPA determines that activities in compliance or noncompliance with this Order have caused or may cause a release of regulated substances, or a threat to human health and/or the environment, or that Respondent is not capable of undertaking any of the work ordered, EPA may order Respondent to stop further implementation of this Order for such period of time as EPA determines may be needed to abate any such release or threat and/or to undertake any action which EPA determines is necessary to abate such release or threat.

19.5. This Order is not intended to be nor shall it be construed to be a permit. The parties acknowledge and agree that EPA's approval of any final work plan does not constitute a warranty or representation that the work plan will achieve the required cleanup or performance standards. Compliance by Respondent with the terms of this Order shall not relieve Respondent of its obligations to comply with RCRA or any other applicable local, State, or federal laws and regulations.

19.6. Notwithstanding any other provision of this Order, no action or decision by EPA pursuant to this Order, including, without limitation, decisions of the Regional Administrator, the Director of the Office of Compliance and Enforcement, or any authorized representative of EPA, shall constitute final agency action giving rise to any right of judicial review prior to EPA's initiation of a judicial action to enforce this Order, including an action for penalties or an action to compel Respondent's compliance with the terms and conditions of this Order.

19.7. In any action brought by EPA for a violation of this Order, Respondent shall bear the burden of proving that EPA's actions were arbitrary and capricious and not in accordance with law.

19.8. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive or other appropriate relief relating to the facility, Respondent shall not

assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been raised in the present matter.

XX. OTHER APPLICABLE LAWS

20. All actions required to be taken pursuant to this Order shall be undertaken in accordance with the requirements of all applicable local, state, and Federal laws and regulations. Respondent shall obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

XXI. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

21. Respondent agrees to indemnify and save and hold harmless the United States Government, its agencies, departments, agents, and employees, from any and all claims or causes of action arising from or on account of acts or omissions of Respondent or its officers, employees, agents, independent contractors, receivers, trustees, and assigns in carrying out activities required by this Order. This indemnification shall not be construed in any way as affecting or limiting the rights or obligations of Respondent or the United States under their various contracts.

XXII. MODIFICATION

22.1. This Order may only be modified by mutual agreement of EPA and Respondent. Any agreed modifications shall be in writing, be signed by both parties, shall have as their effective date the date on which they are signed by EPA, and shall be incorporated into this Order.

22.2. Any requests for a compliance date modification or revision of an approved work plan requirement must be made in writing. Such requests must be timely and provide justification for any proposed compliance date modification or work plan revision. EPA has no obligation to approve such requests, but if it does so, such approval must be in writing. Any approved compliance date or work plan modification shall be incorporated by reference into this Order.

XXIII. SEVERABILITY

23. If any provision or authority of this Order or the application of this Order to any party or circumstances is held by any judicial or administrative authority to be invalid, the application of such provisions to other parties or circumstances and the remainder of the Order shall remain in force and shall not be affected thereby.

XXIV. TERMINATION AND SATISFACTION

24. The provisions of this Order shall be deemed satisfied upon Respondent's and EPA's execution of an Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Rights ("Acknowledgment"). EPA will prepare the Acknowledgment for Respondent's signature. The Acknowledgment will specify that Respondent has demonstrated to the satisfaction of EPA that the terms of this Order, including any additional tasks determined by EPA to be required pursuant to this Order, have been satisfactorily completed. Respondent's execution of the Acknowledgment will affirm Respondent's continuing obligation (1) to preserve

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1810

all records, and (2) to recognize EPA's reservation of rights, in accordance with these respective sections of the Order after the rest of the Order is satisfactorily completed.

XXV. SUBMITTAL SUMMARY

25. The following is a summary of the major deadlines required by this Order. To the extent this summary is inconsistent with any other section of this Order, such section shall apply.

Section	Action	Due Date
XIV	Designate a Project Coordinator and notify EPA, in writing, of the Project Coordinator selected.	Within 10 days of the effective date of this Order.
VII	Notify EPA, in writing, of any contractor(s) or consultant(s) who will be used.	Within 14 days of the effective date of this Order.
VI	Develop Site Assessment Plan.	Within 90 days of effective date of this Order.
VI	Submit proposed Corrective Action Plan incorporating Site Assessment Plan and schedule.	Within 120 days of effective date of this Order.
VI	Implement EPA-approved Corrective Action Plan.	Within 180 days of EPA approval of the CAP according to the schedule in the approved CAP.
VII	Submit quarterly progress Reports	Beginning within 30 days of the effective date of this Order.
IX	Inform EPA Project Coordinator which laboratories will be used.	Identify in corrective action plan.

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X	Notify EPA, in writing, before engaging in any field activities.	At least 30 days before activities commence.

XXVI. EFFECTIVE DATE

26. The effective date of this Order shall be the date on which it is signed by EPA.

IT IS SO AGREED AND ORDERED:

For UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

Dated: 4/19/2010

EDWARD J. KOWALSKI
Director
Office of Compliance and Enforcement

For RESPONDENT
R. H. DISTRIBUTING CO., INC.

Dated: 3-23-10

DOUGLAS M. SMITH
President and CEO

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1810

4. Administrative Order on Consent – Step 2 (for Office Director Signature)

(includes CWA 309(a) orders, CAA 113(a) orders, FIFRA stop sale orders, SDWA 1414(g)(1) orders)

Case Name: Smitty's Conoco / R. H. Smith Distributing Co., Inc.

City/State: Toppenish, WA

CONCURRENCES				
Title:	Compliance Officer	ORC Attorney	Program Unit Manager	
Name:	Carlo Bertani	Deborah Hilsman	Peter Contreras	
Initials:	CB	DEH	PC	
Date:	04/14/2010	4/6/10	4/16/10	

If document is included, check YES. If not, check NO and explain.

	YES	NO	
Document for signature/concurrence	☑	☐	
Cover letter	☑	☐	
New case form (for docket number)	☐	☐	N/A - already assigned
Communication plan	☐	☑	HAVE A FORMED PLAN THAT WE HAVE BEEN USING
Required notice to State agency *(only for RCRA cases in authorized states, CWA 309(a) orders)*	☐	☑	Already provided
Press release requested? *(if applicable from communication plan)*	☑	☐	PRESS OFFICER ASSIGNMENT...
Write-up for OECA weekly report	☑	☐	
Case conclusion data sheet	☐	☑	WORKING...

Is facility located in Indian Country and/or a Tribal Facility (i.e., owned or controlled by a federally recognized Indian tribe)? ☒ YES ☐ NO

If **YES**, fill out and attach Addendum A: Facilities within Indian Country and Tribal Facilities.
(See previous checklist attached)

RETURN package to COMPLIANCE OFFICER for mailing.

* For documents to be **signed** by an OCE manager, attach a completed OCE Correspondence Action Request to this checklist. A blank Request is at the end of these checklists, after Appendix A.

7A. ADMINISTRATIVE ORDER ON CONSENT– Step 1 (for Respondent Signature)

Case Name: Smitty's Conoco / R.H. Smith Distributing Co., Inc.

City/State: Toppenish, WA

CONCURRENCES						
Title:	Compliance Officer	ORC Attorney	ORC SEP Attorney (if applicable)	Program Unit Manager	ORC Unit Manager	Office Director
Name:	Carlo Bertani	Deborah Hilsman	N/A	Peter Contreras	Meg Silver	Ed Kowalski
Initials:	CB	DCH		PC	MBS	EK
Date:	03/17/2010	3/17/10		3/19/2010	3/17/10	3/19/10

If document is included, check YES. If not, check NO and explain.

	YES	NO	
Document for signature/concurrence	☑	☐	AOC will be routed to Ed for Signature after Co. signs it.
Communication plan	☑	☐	See distribution list on OCE Correspondence Action Request
Press release requested? *(if applicable from communication plan)*	☑	☐	Carlo has called the Press office and will follow-up.
Penalty justification memo *(new one not required if settlement is over bottom line in prior penalty justification)*	☐	☒	N/A: Requires correction action only
SEP Justification *(memo, calculation worksheet, and PROJECT run if applicable)*	☐	☒	N/A

Is facility located in Indian Country and/or a Tribal Facility (i.e., owned or controlled by a federally recognized Indian tribe)? ☒ YES ☐ NO

If **YES**, fill out and attach Addendum A: Facilities within Indian Country and Tribal Facilities.

Also include for cases initiated with a Prefiling Letter instead of a Complaint:

New case form *(for docket number)*	☑	☐	
Required notice to State Agency *(only for RCRA cases in authorized states, CWA 309(g) cases)*	☑	☐	This facility is in Indian Country, but because WA is an authorized state, and the language in RCRA §9006(a)(2) is vague - Ecology will be copied on the AOC when it is sent to the Company for signature.
Public notice *(for all CWA, UIC, OPA Class II cases)*	☐	☑	N/A

RETURN package to ORC ATTORNEY for mailing.

Addendum A: Facilities within Indian Country[1] and Tribal Facilities

Title:	OCE Tribal Coordinator
Name:	DON DOSSETT
Initials:	[illegible]
Date:	3/22/10

Case Name: SMITTY'S CONOCO

City/State/Reservation: TOPPENISH, WASHINGTON, YAKAMA

Is this a Tribal facility[2]? ☐ YES ☒ NO

Is this a Tribal facility that is not located on a Reservation? ☐ YES ☒ NO

Was the Tribal government notified or consulted before the action was taken? ☒ YES ☐ NO

If NO, why not? _____

If YES, on what date? OCTOBER 7, 2009

Who was notified at the Tribe? (name and position) AJA DE COTEAU, ENVIRONMENTAL PROGRAM MANAGER

Method of notification/communication? EMAIL / VOICE MESSAGE / copied on draft AOC

NOTE: OECA concurrence is needed before initiating any formal enforcement action against a Tribal facility, including, but not limited to, issuing a unilateral administrative complaint, order, or citation (including field citations), or referring any enforcement matter to the Department of Justice.

OECA concurrence is not needed for administrative or compliance orders on consent and for actions such as letters and notices that contain only a notice or recitation of the violation(s), a schedule for returning the facility to full compliance, and an indication that failure to correct the violation(s) may result in a formal enforcement action. (e.g., warning letters, notices of noncompliance, notices of violation).

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1 "Indian country" is defined under 18 U.S.C. § 1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe, even if the trust lands have not formally been designated as a reservation.

2 "Tribal facility" means (1) a facility owned or managed by the government of a federally recognized Indian tribe, and (2) a facility not owned by an Indian tribe but in which a Tribal government has a substantial proprietary interest or over which a Tribal government has control.

ORC Concurrence: _____MBS_____
(UM Attorney initials)

CASE NUMBER: RCRA - 10 - 2010 - 0136
Date Entered: 03/18/2010

RCRA Docket Assignment (use this form to request a Docket number, Note: This form does not replace the CCDS Form that is required when the case is concluded to include environmental benefit & injunctive relief information.)

* **RCRA Identification Number**:

* **Case name: Smitty's Conoco**

* **Name of Respondent(s): R. H. Smith Distributing Co., Inc.**

* **Regional technical contact: Carlo Bertani / 206-553-0702**

* **Regional attorney** (name and phone no.): **Deborah Hilsman / 206-553-1810**

* **Facility Full name** (if different than respondent name): **Smitty's Conoco**

* **Facility address** (the location of the violations, site specific street address, not a P.O. Box):
102 East Toppenish Avenue, Toppenish, WA 98948

* **Small Business**: x Yes • No

(a small business or entity that employs 100 or few individual, all facilities and operations owned by the business. The numbers of employees should be considered as full time equivalents (2000 hours per year of employment).

* **Environmental Justice** (check one):

□ *Low Income* □ *Minority Population* *x Minority Population & Low Income* □ *Other*

* **Type case** (section authorizing action): **Section 9003(h)(4) of RCRA, 42 U.S.C. § 6991b(h)(4)**

* **Law/section violated**: **Section 9003(c)(4) of RCRA, 42 U.S.C. § 6991b(h)(4); 40 C.F.R. § 280.66(c)**

* **Violation type: Failure to remediate petroleum spill**

* **Relief sought** (Note all that applies)
Delineate and remediate petroleum constituent contamination in groundwater.

- **Case summary:** (a brief summary of the nature of the matter and the problem to be addressed; name of principal defendants and type and number of defendants; summary of relief requested; and other special facts or circumstances relevant to the case. ***** NOTE: WHATEVER YOU INDICATE HERE WILL BE NOTED IN THE PUBLIC RECORD FILE UNLESS YOU MARK IT SENSITIVE. ***)**
- **Smitty's Conoco has been operating as a retail gasoline station and convenience store for the past 30 years. The site was listed as having three underground storage tanks (USTs) that contained gasoline and diesel.**
- **During a Phase II Site Assessment in June of 2004, petroleum constituent contamination was found in on-site soils and groundwater, and the Smitty's Conoco was formally categorized as a Leaking Underground Storage Tank (LUST) site.**

- **In 2005, the owner of Smitty's Conoco, RH Smith Distributing Company (RH Smith), hired an environmental consultant to generate a remedial action work plan, and corrective action plan, of which neither was implemented.**
- **RH Smith continued to operate as a fueling station and convenience store, and failed to address the contamination on-site. After repeated attempts by EPA to persuade RH Smith to address the contamination on-site by implementing the corrective action plan, in late 2009, RH Smith agreed to excavate the underground storage tanks (USTs) and petroleum-contaminated soil (PCS).**
- **During the UST and PCS removal, an additional two USTs were found; neither was previously reported, nor was RH Smith aware of their existence.**
- **Approximately 1500 cubic yards of PCS was excavated and disposed of at an off-site facility.**
- **RH Smith must now remediate the contaminated groundwater and complete the remedial action in accordance with the terms and schedule set forth in the Administrative Order on Consent.**

Proposed penalty: N/A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Reply To: OCE-082

Douglas M. Smith, President and CEO
R. H. Smith Distributing Co., Inc.
315 East Wine Country Road
Grandview, Washington 98930

Re: R. H. Smith Distributing Co., Inc.
EPA Docket No. RCRA-10-2010-0136
Smitty's Conoco, Toppenish, WA

Dear Mr. Smith:

Enclosed is a conformed copy of the Administrative Order on Consent ("AOC") negotiated between R. H. Smith Distributing Co., Inc. and the U.S. Environmental Protection Agency Region 10 ("EPA") in the matter referenced above.

Please contact Carlo Bertani at (206) 553-0702, if you have any questions concerning implementation of the AOC. You may also contact Deborah Hilsman, Assistant Regional Counsel, at (206) 553-1810, with any legal questions concerning this matter.

Sincerely,

Edward J. Kowalski, Director
Office of Compliance and Enforcement

Enclosure

cc: Marco Guske, Environmental Program Manager, Yakama Nation
Mike Blum, Washington Department of Ecology
Carlo Bertani, OCE-082
Deborah Hilsman, ORC-158

Region 10 Enters into a RCRA 9003(h) Consent Order with R. H. Smith Distributing Co, Inc. Requiring Clean-up of Petroleum Contamination at Smitty's Conoco on the Yakama Reservation in Toppenish, WA

On April __, 2010, EPA finalized an administrative order on consent (AOC) with R. H. Smith Distributing Co., Inc., requiring the company to conduct soil and groundwater clean-up of petroleum releases from the underground storage tanks at Smitty's Conoco in Toppenish, Washington. The AOC requires the company to submit a corrective action plan for EPA approval within 120 days and to begin implementing the EPA-approved plan within 180 days of EPA approval. Contact: Carlo Bertani, 206-553-0702; Deborah Hilsman, 206-553-1810