

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4  
1130 North Westcott Road, Schenectady, NY 12306-2014  
P: (518) 357-2048 | F: (518) 357-2087  
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED  
7016 0340 0000 4616 6062

March 6, 2018

Arnold Feller  
d/b/a Taconic Orchards  
591 State Route 82  
Hudson, NY 12534

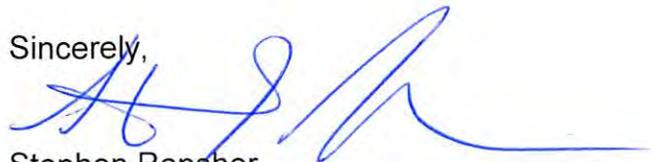
Re: Order on Consent  
R4-2018-0123-4

Dear Mr. Feller:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$1,000 1st of 5 payments of the civil penalty pursuant to Paragraph I. Your second payment of \$1,000 is due on or before June 1, 2018.

Sincerely,



Stephen Repsher  
Assistant Regional Attorney  
Region 4

Enclosure

ec: M. Leidy  
S. Whelen

**STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of Violations  
of the Environmental Conservation Law  
("ECL") Article 33, Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of  
New York ("6 NYCRR"),

**ORDER ON CONSENT**  
R4-2018-0123-4

-by-

Arnold Feller  
d/b/a Taconic Orchards  
591 State Route 82  
Hudson, NY 12534,

Respondent.

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**WHEREAS:**

**Jurisdiction**

1. The New York State Department of Environmental Conservation (Department) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to §33-0301 of the Environmental Conservation Law (ECL), among other authorities. The Department is and has been responsible for the regulation of the use, and for the enforcement of the provisions of law governing the use of pesticides in the State pursuant to ECL Article 33 and the rules and regulations promulgated thereunder at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 325.
2. Respondent, Arnold Feller (Pesticide Certification ID #P4199351), owns an agricultural business known as Taconic Orchards, located at 591 State Route 82 in the State of New York.
3. Respondent is a person as defined in ECL § 33-0101(33).

**Background**

4. On August 31, 2017, Department staff conducted an inspection at Respondent's orchard, in response to a complaint received on August 30, 2017 from New York State Department of Agriculture and Markets (NYSDAM) personnel.
5. An inspection of Respondent's records during the August 31, 2017 inspection

indicated that on August 26, 2017, an employee under Respondent's supervision conducted a pesticide application to portions of the orchard which involved a mixture of three pesticides (Imidan 70W, EPA Reg.#10163-169; Captan 80 WDG, Reg. #34704-1075; and Lannate LV, Reg. #352-384).

6. The product label for Imidan 70W includes the instruction, "Do not authorize any person who is not covered by the Worker Protection Standard (WPS) . . . . to enter a treated area for 14 days after application of this product."

7. The product labels for all three pesticides used on August 26, 2017 contain an "agricultural use" section which requires adherence to the provisions of the WPS.

8. The WPS is codified under federal regulations at 40 CFR part 170, and contains the following provisions (as relevant to the instant matter):

- a) Section 170.309(h) requires agricultural employers to "[d]isplay, maintain, and provide access to pesticide safety information and pesticide application and hazard information in accordance with §170.311 if workers or handlers are on the establishment and within the last 30 days a pesticide product has been used or a restricted-entry interval for such pesticide has been in effect on the establishment."
- b) Section 170.311(b)(1) requires that "[w]henver pesticide safety information and pesticide application and hazard information is required to be provided under §170.309(h), pesticide application and hazard information for any pesticides that are used on the agricultural establishment must be displayed, retained, and made accessible in accordance with this paragraph."
- c) Sections 170.403 and 170.503(b) require that before any worker performs any activity on an agricultural establishment where a pesticide product has been used within the last 30 days, or a restricted-entry interval for such pesticide has been in effect, the employer must ensure that the worker has been informed, in a manner that can be understood, all of the following establishment-specific information:
  - (1) The location of pesticide safety information required by §170.311(a).
  - (2) The location of pesticide application and hazard information required by §170.311(b).
  - (3) The location of decontamination supplies required by §170.509.
- d) Section 170.505(c) requires employers to "ensure that any handler who is performing any handler activity with a pesticide product that has the skull-and-crossbones symbol on the front panel of the pesticide product label is monitored visually or by voice communication at least every two hours."

- e) Section 170.507(b) requires, in relevant part, that employers provide “the personal protective equipment required by the pesticide product labeling in accordance with this section,” and “ensure that the personal protective equipment is clean and in proper operating condition.”
- f) Section 170.507(b)(10) requires the use of respirators specified by a pesticide’s product labeling, as well as the provision of fit testing and training in the use of the respirator, a medical evaluation to ensure the handler’s ability to safely wear the specified respirator, and maintenance of records documenting the completion of these requirements for a period of two years.
- g) Section 170.507(c)(2) requires employers to “ensure that, before each day of use, all personal protective equipment is inspected for leaks, holes, tears, or worn places, and any damaged equipment is repaired or discarded.”
- h) Section 170.507(d) requires employers to “ensure that all personal protective equipment is cleaned according to the manufacturer’s instructions or pesticide product labeling instructions before each day of reuse. In the absence of any such instructions, it must be washed thoroughly in detergent and hot water.”
- i) Section 170.509(a) requires employers to “provide decontamination and eye flushing supplies in accordance with this section for any handler that is performing any handler activity or removing personal protective equipment at the place for changing required by §170.507(d)(9).”
- j) Section 170.507(d)(9) requires employers to “ensure that handlers have a place(s) away from pesticide storage and pesticide use areas where they may do all of the following:
  - (i) Store personal clothing not worn during handling activities.
  - (ii) Put on personal protective equipment at the start of any exposure period.
  - (iii) Remove personal protective equipment at the end of any exposure period.
- k) Section 170.509(c)(1) requires that “Decontamination supplies must be provided at any mixing site.”

9. On August 29, 2017, three days after the August 26, 2017 pesticide application, Respondent permitted NYSDAM personnel, who were not covered by the WPS, to collect foliage samples from the treated area.

10. During the August 31, 2017 inspection, Department staff collected three foliage samples from peach trees located in areas visited by NYSDAM personnel on August 30, 2017. The samples taken by Department staff were analyzed for the presence of the three

pesticides applied on August 26, 2017. Sample analysis confirmed the presence of Imidan 70W in all three samples.

11. On September 7, 2017, Department staff conducted a follow up inspection at the Department's Region 4 headquarters at which the NYSDAM personnel who conducted the August 29 sampling at Respondent's orchard were interviewed.

12. On September 6, 2017, and September 12, 2017, Department staff also conducted further inspections at Respondent's orchard, during which Department staff interviewed both Respondent and Respondent's employee.

13. As a result of the September 6, 2017, and September 12, 2017 interviews, Department staff learned that Respondent failed to adhere to the provisions of the WPS cited above.

### **Violations**

14. New York State regulation 6 NYCRR § 325.2(b) requires that "Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department."

15. Respondent's use of Imidan 70W in contravention of its labeling directions, by allowing NYSDAM personnel to access an area treated with the pesticide with no WPS protection and before the 14-day restricted-entry interval had elapsed, is a violation of 6 NYCRR §325.2(b).

16. Respondent's use of pesticides in contravention of their labeling directions by failing to adhere to the above-cited provisions of the WPS constitutes a further violation of 6 NYCRR §325.2(b).

### **Civil Penalty**

17. ECL § 71-2907 (1) provides, *inter alia*, that "any person who violates any provisions of Article 33 of this chapter or any rule, regulation or order issued thereunder, shall be liable for a civil penalty not to exceed \$5,000 for a first violation, and an additional penalty of up to \$10,000 for each subsequent violation."

### **Waiver of Hearing**

18. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

**NOW**, having considered this matter and being duly advised, **IT IS ORDERED THAT:**

I. **Civil Penalty.** Respondent is assessed a civil penalty in the amount NINE THOUSAND DOLLARS (\$9,000). FIVE THOUSAND DOLLARS (\$5,000) of the civil penalty is due per the following payment schedule, and shall be paid by money order, company or bank check, made payable to the NYS Department of Environmental Conservation:

1. \$1,000 with the return of the signed and notarized Order;
2. \$1,000 by Friday, June 1, 2018;
3. \$1,000 by Friday, July 6, 2018;
4. \$1,000 by Friday, August 3, 2018;
5. \$1,000 by Friday, September 7, 2018;

The balance of FOUR THOUSAND DOLLARS (\$4,000) is suspended and shall not be payable, provided that Respondent fully and timely complies with the Schedule of Compliance appended to this Order, and provided that Respondent commits no further violations of ECL Article 33 or 6 NYCRR Part 325 pertaining to pesticides, for the duration of this Order.

II. **Binding Effect.** The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or controlled by it.

III. **Communications.** Except as otherwise specified in this Order, any reports, submissions, and notices herein required shall be made to:

For the Department:

Michael Leidy/Sarah Whelen  
NYS Department of Environmental Conservation  
Region 4  
Bureau of Pesticides  
1130 North Westcott Road  
Schenectady, NY 12306

For the Respondent:

Arnold Feller  
d/b/a Taconic Orchards  
591 State Route 82  
Hudson, NY 12534

IV. **Summary Abatement.** The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

V. **Indemnification.** Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns, except to the extent that any such claims arise or result from the acts or omissions by the Department, the State of New York, or its employees.

VI. **Modification.** No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee, such change to be made only upon written agreement of the parties.

VII. **Effective Date.** This Order is deemed effective on the date signed by the Department. The Department will provide Respondent a fully executed copy of this Order as soon as practicable following the effective date of this Order.

VIII. **Scope.** Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the Department or State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, its agents, its servants, its employees, its successors and its assigns; and

C. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

IX. **Review of Submitted Documentation.**

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each submittal from Respondent pursuant to this Order to determine whether it was prepared, and whether

the work performed to generate the data in the submittal was prepared, in accordance with this Order and with generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3(a). If the Department disapproves a submittal, it shall notify Respondent in writing and shall specify the reasons for disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all the stated reasons for disapproval of the initial submittal.

3(b). After receipt of a revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submittal is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by the Department to make it approvable. If Respondent does not accept such modifications, the revised submittal will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order, or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies shall be reasonable and consistent with customary engineering standards.

X. **Access.** To ensure compliance with the ECL and this Order, Respondent shall not deny the Commissioner or his duly authorized representative access at all reasonable times to inspect Respondent's New York facilities and all pesticide records for applications within the State of New York.

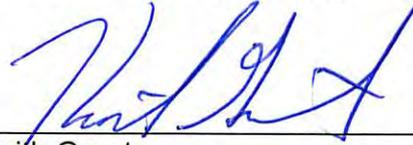
XI. **Schedule of Compliance.** Respondent shall comply with the attached Schedule of Compliance.

XII. **Termination.** The Order shall terminate two years after its Effective Date, upon Respondent's full compliance, as determined by the Department, with the terms, provisions and conditions of this Order including its Schedule of Compliance.

DATED: March 6, 2018  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:



Keith Goertz  
Regional Director  
Region 4

**CONSENT BY RESPONDENT**

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

SIGNED: *Arnold Feller*  
PRINTED: ARNOLD FELLER  
DATE: FEBRUARY 28, 2018

STATE OF NEW YORK )  
COUNTY OF Columbia ) ss.:

On the 28 day of February in the year 2018, before me, the undersigned,  
personally appeared Arnold Feller, personally known  
(Full name)  
to me who, being duly sworn, did depose and say that he resides at:  
591 State Route 82 Hudson NY 12534  
(Full mailing address)  
and who executed the above instrument.

*Cheryl E. Rogers*  
Notary Public  
Qualified in the County of:  
My Commission Expires:

**CHERYL E. ROGERS**  
Notary Public, State of New York  
Qualified in Columbia County  
#01RO6048342  
My Commission Expires Sep. 25, 2018

## **SCHEDULE OF COMPLIANCE**

- (1) **Prior to any application of pesticides for the 2018 season**, Respondent shall submit to the Department a signed and notarized Compliance Verification Affidavit (“CVA,” enclosed) certifying that the actions necessary to come into compliance with the Department’s regulatory program, and those actions specified in this document, have been completed.
  - a. Upon receipt of the CVA, the Department shall contact Respondent to schedule a follow-up inspection to confirm that all necessary actions have been fully completed.
- (2) Compliance with this Schedule shall not be a defense to subsequent violations.

The signed and notarized CVA should be addressed to:

Michael Leidy/Sarah Whelen  
NYS Department of Environmental Conservation  
Region 4  
Bureau of Pesticides  
1130 North Westcott Road  
Schenectady, NY 12306

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Violations of the  
Environmental Conservation Law (ECL) Article 33  
And Title 6 of the Official Compilation of Codes,  
Rules and Regulations of the  
State of New York (6 NYCRR),

**AFFIDAVIT**

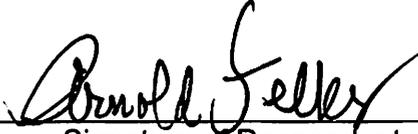
-by-

Arnold Feller  
d/b/a Taconic Orchards  
591 State Route 82  
Hudson, NY 12534,

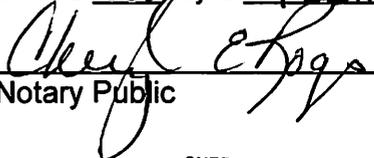
Respondent.

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I, ARNOLD FELLER, being duly sworn, do depose and say  
(Full Name)  
that I have complied with the requirements of Paragraph No. 1 of the Order on Consent's  
Schedule of Compliance (R4-2018-0123-4) effective on the date signed by the Regional  
Director.

  
Signature of Respondent

Subscribed and sworn to before me  
on this 28 day of FEBRUARY 2018

  
Notary Public

CHERYL E. ROGERS  
Notary Public, State of New York  
Qualified in Columbia County  
#01RO6048342  
My Commission Expires Sep. 25, 2018