DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville, MD 20857

9589 '05 SEP -2 P12:43

September 2, 2005

Richard A. Phillips, DVM, MAM
American College of Poultry Veterinarians
382 West Street Road
Kennett Square, PA 19348

Robert L. Owen, DVM, MS, PhD
American Association of Avian Pathologists
953 College Station Road
Athens, GA 30602

Dear Drs. Phillips, Owen, Lippert, Cigainero, and Barger:

This letter is my decision on the Petition for Stay of Action filed on August 26, 2005, requesting that I stay the September 12, 2005, effective date of the Final Decision and Order withdrawing approval of the new animal drug application (NADA) No. 140.828 for the use of enrofloxacin in chickens and turkeys. The petition was filed on behalf of the American College of Poultry Veterinarians, the American Association of Avian Pathologists, the Association of Veterinarians in Turkey Production, the Association of Veterinarians in Broiler Production, and the Association of Poultry Primary Breeder Veterinarians (petitioners).[1] For the reasons set forth below, I have determined that the criteria for granting a stay in 21 CFR 10.35(e) have not been met. I am, accordingly, denying your petition for a stay.

Under the regulations, a stay is appropriate when four conditions are met: (1) the petitioner will suffer irreparable injury if a stay is not granted; (2) the petitioner's case is not frivolous and is being pursued in good faith; (3) the petitioner identified sound public policy grounds for a stay; and (4) the delay from the stay is not outweighed by public health or other public interests. 21 CFR 10.35(e). I find that your petition does not satisfy any, let alone all, of these criteria, for the following reasons.

Irreparable injury. Your petition for a stay states that you will suffer irreparable injury because there are no viable alternatives to enrofloxacin and your members, therefore, will not be able to treat poultry in a way that protects the health of poultry and the humans who eat them. Petition at 5-6. First, although your petition does not reference the record, Petition at 5, I reviewed the evidence submitted by the participants on the alleged human health and other benefits of the product and determined that the evidence would not have been sufficient, even if relevant. Final

[1] The petition does not provide addresses for the Association of Veterinarians in Turkey Production, the Association of Veterinarians in Broiler Production, and the Association of Poultry Primary Breeder Veterinarians.

2000N-1571

PDN 3

Decision at 108-119. Moreover, the removal of a treatment option, even a very effective one, does not constitute an injury to your associations or their members. As the Supreme Court recognized in *United States v. Rutherford*, the Federal Food, Drug, and Cosmetic Act's (FDCA) drug approval standards do not take preferences for particular treatments into account. 442 U.S. 544 (1979) (terminally ill cancer patients not entitled to unapproved treatment despite their preference for it). Furthermore, the record does not establish a lack of available alternatives. Final Decision at 111-112.

Your petition also states that the immediate implementation of the order will result in severe, incompensable economic harm to poultry producers because their already purchased enrofloxacin stocks cannot be used and because their flocks may suffer from increased mortality. Petition at 6. The irreparable injury standard, however, makes clear that the injury must run to the petitioner and must be concrete, not threatened. 21 CFR 10.35(e)(1). The allegations of economic harm are not claimed to affect your associations or their members. Moreover, these economic injuries alleged are neither certain, substantiated, nor significant. These alleged economic injuries do not rise to the level of irreparable injuries.

Finally, your petition states that there is "reason to believe" that the immediate implementation of the order will have a chilling effect on companies' willingness to develop new drugs for poultry industry. Petition at 7. This alleged injury is both unsubstantiated and speculative. It is not the type of injury that can support the issuance of a stay, within the meaning of 21 CFR 10.35(e)(1).

Good faith pursuit of case. Although FDA regulations allow interested parties to participate in administrative proceedings, your organizations were not participants in the administrative proceeding and your petition does not state that any of your organizations will be seeking judicial review. Thus, there is no basis for determining that your case is not frivolous and is being pursued in good faith.

Public policy in support of a stay. The petition asserts that sound public policy considerations support a stay. These considerations appear to relate to petitioners' belief that the United States Court of Appeals for the District of Columbia will require re-review by the agency because the Final Decision did not contain a risk-benefit analysis that factored in the alleged human health benefits attributable to enrofloxacin. Petition at 9-11. While the Final Decision concludes that a risk-benefit analysis was not appropriate as a matter of law, Final Decision at 93-107, it nonetheless contains a review of Bayer's and Animal Health Institute's cost-benefit and risk-benefit evidence. Final Decision at 108-119. The Final Decision concludes that, if cost-benefit and risk-benefit evidence were admissible, this evidence would not be adequate to show that enrofloxacin has been shown to be safe as required § 512 of the FDCA. *Id.* Because it is not clear that another review would change the results, I conclude that the petition does not identify any sound public policy considerations that support a stay.

Public health considerations militating against a stay. The petition states that the public health does not outweigh a stay. Neither the fact that the product remained on the market during the five-year adjudication process, Petition at 11, nor the declining incidence of domestically-acquired *Campylobacter* infections, *id.*, are sufficient to show there is no public health interest in

implementing the withdrawal. Despite your assertion to the contrary, FDA has determined, as the Final Decision makes clear, that there are real adverse human health effects of enrofloxacin's use in poultry. Final Decision at 119-120. *Campylobacter* infections are a major cause of foodborne illness in the United States, Final Decision at 19, and the proportion of those patients whose infections are resistant to treatment with fluoroquinolones has increased significantly, from 13% in 1997 to 19% in 2002, Final Decision at 42-44. As set out in the Final Decision, the implications of treatment failure can be very serious, especially in vulnerable populations (*e.g.*, the young, elderly, and immune-compromised). Final Decision at 53-63. The failure of treatment prolongs the duration of *Campylobacter* infections and may increase the risk of complications. *Id.* In addition, the increasing ineffectiveness of fluoroquinolones against *Campylobacter* may lead physicians to stop using fluoroquinolones to treat enteric infections empirically (*i.e.*, based on symptoms before the infective agent has been identified though laboratory tests), even though no other empiric treatment is available for enteric infections. *Id.* at 63-64. Thus, you have not established that a stay of the effective date will not harm the public health.

Temporary stay. I also deny your request that I stay this action until such time as a motion has been filed in the D.C. Circuit for a stay pending judicial review and the court has had an opportunity to rule on that motion.

For the reasons set forth above, I hereby deny the petition for a stay of the effective date of the Order withdrawing approval of enrofloxacin for use in poultry.

Sincerely,

Lester M. Crawford, DVM, PhD
Commissioner of Food and Drugs

cc: Docket 2000N-1571