

UNITED STATES OF AMERICA  
BEFORE THE FOOD AND DRUG ADMINISTRATION  
DEPARTMENT OF HEALTH AND HUMAN SERVICES

4198 '02 APR 15 P3:38

In the Matter of:

**Enrofloxacin for Poultry:  
Withdrawal of Approval of  
New Animal Drug Application  
NADA 140-828**

**FDA DOCKET: 00N-1571**

**RESPONDENT BAYER CORPORATION'S OBJECTIONS TO CVM'S § 12.85  
SUBMISSION AND MOTION TO COMPEL ADDITIONAL SUBMISSION**

Respondent Bayer Corporation, holder of the New Animal Drug Application (NADA 140-828) that is the subject of the within hearing hereby lodges its objections to CVM's submission to the Dockets Management Branch pursuant to 21 C.F.R. § 12.85 and moves to compel CVM to submit to the Dockets Management Branch additional relevant portions of the administrative record of this proceeding and other documents.

CVM's submission obligations under § 12.85 are two-fold. First, CVM is required under § 12.85(a)(1) to submit "relevant portions of the administrative record of the proceeding." Second, under § 12.85(a)(2), CVM is required to submit "all documents in the director's files containing factual information, whether favorable or unfavorable to the director's position, which relate to the issues involved in the hearing."

As relates to CVM's § 12.85(a)(1) obligations, Bayer objects that CVM has not made an adequate submission of relevant portions of the administrative record of the proceeding and hereby moves to compel submission of additional relevant materials reasonably believed to be in CVM's possession and a part of the administrative record.

As relates to CVM's § 12.85(a)(2) submission, Bayer reserves its right to object to any of CVM's submitted documents on appropriate grounds, including but not limited to, relevance, materiality, reliability, or repetition at such time as any such documents are submitted by CVM as written evidence. The rules as currently comprised are designed to allow participants to "evaluate the more particularized record" developed as participants designate documents as "written evidence," rather than forcing them "to respond to irrelevant evidence as a precaution," which would be the case if all § 12.85 submissions were automatically admitted into evidence. 43 Fed. Reg. 51970 (Nov. 7, 1978). This process is contemplated by 21 C.F.R. § 12.94(c) as well as the Scheduling Order in this matter allowing Motions to Strike Testimony/Exhibits.

Bayer also has some objections to certain documents in CVM's § 12.85 submission which are incomplete or illegible. Bayer will work with CVM's counsel to address these without burdening the Administrative Law Judge.

**Objection Based On § 12.85(a)(1)**

Upon review of CVM's § 12.85 submission, Bayer believes that CVM has not met its obligation to submit "relevant portions of the administrative record of the proceeding" as required by § 12.85(a)(1). Certainly no portion of CVM's submission has been specifically designated by CVM as the administrative record of the proceeding. Although there appear to be *portions* of the administrative record interspersed with CVM's § 12.85(a)(2) submission of documents in the director's files containing factual information which relate to the issues involved in the hearing, the record is at best incomplete. For example, CVM has only produced a fraction of NADA 140-828. Specifically, CVM's document G-822 is the FOI Summary for NADA 140-828 and document G-823 is the environmental assessment for NADA 140-828. Conspicuously absent are any NADA materials from CVM which discuss the issue of, or

concerns about, development of antimicrobial resistance and efficacy of enrofloxacin or any INAD materials that relate to the issue of antimicrobial resistance. Additionally, only limited documentation is included concerning the Joint CVM/CDER advisory committee meeting and Part 15 hearing, both held in 1994. Bayer has reason to believe that there were discussions at CVM (both internally, within FDA, with CDC and USDA, and with other third parties) taking place beginning in 1993 relating to the approval of fluoroquinolones (to include both sarafloxacin and enrofloxacin) which discuss the potential for antimicrobial resistance development and demonstrate that CVM was aware of, and in fact considered, the potential for development of antimicrobial resistance before approving enrofloxacin for use in chickens and turkeys.

Specifically, Bayer believes that the following categories/descriptions of documents are part of the administrative record, are relevant, and are therefore required to be submitted<sup>1</sup> by CVM under § 12.85(a)(1):

- NADA 140-828 (excluding the CM&C sections, and including only sections pertaining to efficacy and antibiotic resistance, including studies and evaluations and memoranda concerning same);
- CVM's Internal Technical Reviews (efficacy, safety, environmental, and human food safety) of NADA 140-828;
- INAD 4586 and INAD 4368;
- The files from and documents relied on by the "Fluoroquinolone Working Group" ("FQWG") chaired by Andrew Beaulieu. Although CVM submitted to the docket the

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<sup>1</sup> Subject to appropriate confidentiality procedures for trade secrets and confidential commercial information under 21 C.F.R. § 514.11, 12.

FQWG report (G-818), a presentation by FQWG members (G-809), and an FQWG Document List (G-812), to Bayer's knowledge, neither the files of the FQWG nor the documents relied on by the FQWG in their work have been submitted by CVM;

- Minutes memoranda or other documents relating to any CDER meetings discussing antimicrobial resistance issues relevant to this hearing, including but not limited to meetings in or around August 1993 which led to the Joint VMAC/Infectious Disease public hearings;
- Documents relevant to resistance issues that were considered before any fluoroquinolone (sarafloxacin and enrofloxacin) was approved for use in chickens and turkeys;
- Any relevant documents from CVM's central files in the Document Control Unit or documents that should have been filed there but were not.

CVM should be required to submit to the docket all resistance-related documents which are part of the administrative record which demonstrate what CVM considered in the process of approving fluoroquinolones (sarafloxacin and enrofloxacin) for use in chickens and turkeys.

### ARGUMENT

**1. The Subject Documents Are Part Of The Administrative Record, Are Relevant, And Should Be Submitted.**

CVM should be compelled to submit the subject documents that demonstrate what facts and evidence CVM considered prior to approval of fluoroquinolones (including sarafloxacin and enrofloxacin) relating to the issue of antimicrobial resistance, because such documents are a part of the administrative record of this proceeding and are relevant.

**a. The Subject Documents Are Part Of The Administrative Record.**

“Administrative record” is defined under 21 C.F.R. § 10.3 to mean “the documents in the administrative file of a particular administrative action on which the Commissioner relies to support the action.”

Here, Bayer contends that CVM is in possession of additional documents in the administrative file on which CVM relied to support the administrative action approving fluoroquinolones for use in chickens and turkeys (including approval of NADA 140-828). As such, those documents are part of the administrative record of the proceeding and should be submitted.

**b. The Subject Documents Are Relevant To The Issues In This Hearing.**

CVM’s burden in this hearing is to demonstrate that it has new evidence not contained in Bayer’s New Animal Drug Application, or not available to FDA until after the application was approved, showing that enrofloxacin is not shown to be safe. 21 U.S.C. § 360b(e)(1)(B).

Given this burden on CVM, it is axiomatic that any “new evidence” to be addressed by CVM in this hearing must be compared to whatever information was contained in the NAD and INADs as well as other information in CVM’s possession at the time of approval. Thus, documents in possession of CVM that demonstrate what facts and data related to the issue of antimicrobial resistance were available to CVM for consideration at the time of the fluoroquinolone applications and approvals are relevant to this proceeding and should be submitted as part of the administrative record.

**2. The Subject Documents Contain Factual Information Which Relate To The Issues And Should Be Submitted.**

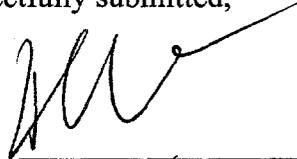
Even if CVM takes the position that some or all of the subject documents are not part of the administrative record of the proceeding subject to production under § 12.85(a)(1), such

documents are subject to production under § 12.85(a)(2). It cannot be disputed that if CVM considered the issue of antimicrobial resistance development prior to approving sarafloxacin and enrofloxacin, that would be a fact relevant to the issues involved in this hearing. Therefore, any such documents are independently subject to production under § 12.85(a)(2).

**CONCLUSION**

Upon consideration of the foregoing, Bayer requests that CVM be required to submit to the docket all antimicrobial resistance-related documents which are part of the administrative record and which demonstrate what CVM considered in the process of approving New Animal Drug Application 140-828 for enrofloxacin.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

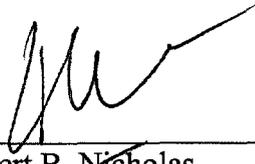
I hereby certify that a copy of Bayer's Objections to CVM's § 12.85 Submission and Motion to Compel Additional Submission was mailed this 15th day of April, 2002, via first-class mail, postage pre-paid to:

Kent D. McClure  
Animal Health Institute  
1325 G Street, N.W., Suite 700  
Washington, D.C. 20005

Brian Jensen  
Royal Danish Embassy  
Food, Agriculture and Fisheries Division  
3200 Whitehaven Street, N.W.  
Washington, D.C. 20008

I hereby certify that a copy of Bayer's Objections to CVM's § 12.85 Submission and Motion to Compel Additional Submission was e-mailed and also mailed, postage pre-paid, this 15th day of April, 2002 to:

Nadine R. Steinberg, Esquire  
Food and Drug Administration  
Office of General Counsel (CGF-1)  
5600 Fischers Lane, Room 7-77  
Rockville, MD 20857

  
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Robert B. Nicholas

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**ORDER**

UPON CONSIDERATION of the Bayer's Objections to CVM's § 12.85 Submission and Motion to Compel Additional Submission, it is hereby

ORDERED that CVM must submit to the Dockets Management Branch:

- NADA 140-828 (excluding the CM&C sections, and including only sections pertaining to efficacy and antibiotic resistance, including studies and evaluations and memoranda concerning same);
- CVM's Internal Technical Reviews (efficacy, safety, environmental, and human food safety) of NADA 140-828;
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- Documents relevant to resistance issues that were considered by CVM before any fluoroquinolone (sarafloxacin and enrofloxacin) was approved for use in chickens and turkeys;
- Any relevant documents from CVM's central files in the Document Control Unit or documents that should have been filed there but were not.

DATED this the \_\_\_\_ day of April, 2002.

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Daniel J. Davidson  
Administrative Law Judge