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BY FACSIMILE TRANSMISSION

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Ms. Michele M. Leonhart
Deputy Administrator
ATTN: Mr. James Crowley
Office of the Deputy
Administrator
Drug Enforcement Administration
700 Army Navy Drive
Arlington, VA

Dear Mr. Crowley and Ms. Leonhart:

I received yesterday afternoon the Order granting in part Dr. Craker's Request to Respond to Offficially Noticed Evidence and Motion for Reconsideration, and the Order changing the effective date of the Final Order from February 13, 2009 to April 1, 2009. We appreciate the DEA's decision to allow further consideration of evidence and of the issues raised in our Request, and we will file the appropriate documentary evidence, as indicated in your order.

However, we are concerned about the finality of the January 14 Order for purposes of preserving federal court jurisdiction should we ultimately seek judicial review of the agency's final action. Because DEA has clearly indicated it will accept additional evidence in this matter, because it has noted that Dr. Craker's request and motion remain pending, because it has changed the effective date of the original order, and because it referenced our concerns for the appeal process in its Order of February 9, 2009, it appears to us that DEA intends that its January 14 Order no longer be considered a "final determination" for purposes of judicial review under 21 U.S.C. § 877. But we are concerned that because only the effective date of the January 14 Order has been changed, that Order could still be considered a final order. Because the Order is still extant, and simply has a new effective date, it is theoretically possible that no new order will be entered, and the January 14 Order will be the final agency order, with an effective date of April 1, 2009, or some date thereafter.[1] And our right to appeal is tied not to the effective date, but to the notice date, which is now January 14, and, if no new "final order" is issued, will remain January 14.

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[1] This concern stems from cases such as *Fry v. DEA*, 353 F.3d 1041, 1044 (9th Cir. 2003), in which the respondent sought to re-open the proceedings after a final decision had been published in the Federal Register. The court noted: "'When the [agency] reopens a proceeding for any reason and, after reconsideration, issues a new and final order ... that order – even if it merely reaffirms the rights and obligations set forth in the original order – is reviewable on its merits.'" But that assertion leaves open the question of what order is reviewable if the agency allows the submission of responsive evidence, but does not issue a new and final order, and simply assigns a new effective date to the order it already issued.

See 21 U.S.C. § 877 (an aggrieved person may obtain review "upon petition filed with the court . . . within thirty days after *notice* of the decision"(emphasis added)).

While we believe that the chances are small that a court would conclude that the January 14 Order remained a final order after the agency's February 9 Order allowing us to submit additional evidence, the consequences of such a conclusion would be very serious as it would cut off our client's appellate rights. Nor would even a simple statement from DEA that the January 14 Order is not "final" be effective, since 21 U.S.C. § 877's time limits are jurisdictional, and courts have held that an agency's characterization of its own action is not determinative. *John Doe, Inc. v. DEA*, 484 F.3d 561 (D.C. Cir. 2007).

Therefore, we ask that DEA vacate and withdraw the January 14 Order, pending the proceedings set out in the February 9 Order. This step will ensure that at the end of these proceedings, any order DEA issues will be indisputably "final" for judical review purposes.

Because the appellate clock is running, I ask that you notify me that you have vacated and withdrawn the January 14 Order by 10:00 a.m. on Friday, February 13, 2009. If I have not heard from you by then, and if the Order is not vacated, we will be forced to file a petition for review with the appropriate appellate court to protect our client's rights. Because we believe that such parallel litigation is not necessary, and not in the interests of either party or judicial economy, we strongly wish to avoid it. We hope you agree.

Sincerely,

Julie M. Carpenter