(Cross-posted at the Center for Progressive Reform blog.)

The Bush administration's last-minute ESA (non)consultation rule is getting almost as much attention now as it did during the comment period. Then, the administration reportedly received more than 300,000 comments, the vast majority of them negative. Those objections were, of course, quickly swept under the proverbial rug so the administration could finalize its rule significantly cutting back on the application and scope of the consultation process. Now, Congress and the administration are rushing to figure out how to return the consultation process to its prior state.

Yesterday, the Washington Post ran a "mission accomplished" headline: Obama Reverses Bush Rule on Protection of Endangered Species. Not so fast. Although President Obama took a significant step toward that end today, the job is not yet complete. It would be a mistake for environmental advocates to stop pushing.

What the President did yesterday was to issue this memo to the heads of federal agencies. It directs the Departments of Interior and Commerce, which authored the objectionable Bush rule, to review that rule "to determine whether to undertake new rulemaking procedures" with respect to ESA consultation. Pending that review, the memo "request[s] the heads of all agencies to exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices involving the FWS and NMFS." The Bush rule allows federal agencies to bypass the old consultation procedures (which were more protective of listed species) but does not mandate that they do so. Obama has now directed them not to take the new shortcut.

There's no question this is a very good step, and an essential one to make sure that bad projects aren't rushed through consultation in the short run, before the Bush rule can be fully expunged. But it's not the end of the story, as the Post headline would have it.

Why not? I don't mean to pick on that headline writer. It sure looks like a done deal. After all, the President, who ultimately controls most of the executive branch has now made it clear that he wants all agencies to use the old procedures until the Bush rule can be fully evaluated.

But two caveats remain. First, the bad Bush rule is still on the books. It could be revived immediately by another stroke of the pen. That's not a serious concern right

now, given the presence of a president who has solidly taken the side of protected species in this conflict. The outcome of the review he just ordered does not seem to be in doubt — before the election, candidate Obama declared his disagreement with the Bush rules. But complex rulemakings frequently take years, even entire presidencies, so it's way too soon to breathe easy.

The second caveat is that it's very difficult to maintain close control of the many federal agencies, and the many far-flung offices of those agencies, from the White House. Unfortunately, the memo's effectiveness depends upon that kind of strong centralized control. Like most modern communications from the President to the executive branch, it is explicitly not enforceable by the courts. If agencies choose to ignore it, they can be called on the carpet by the President or his enforcers at the White House. But Presidents have many demands on their time and attention. Right now, this is a high-profile matter, and all federal agencies are likely to be on their best behavior. Soon, though, attention will inevitably turn to other matters — health care, the economy, etc. Mission-oriented agencies will return their focus to their primary missions. Some of them will inevitably resent the delays and loss of autonomy associated with consultation. History tells us that even in pro-environment administrations, there are plenty of agencies which would prefer to ignore their environmental responsibilities. It will happen in this administration too. The Bureau of Reclamation, the Department of Transportation, the Army Corps of Engineers, the Federal Energy Regulatory Commission, or some other agency with a legitimate, and in its view urgent, mission, will skip the old-fashioned consultation process. When that happens, as long as the Bush rule is on the books, environmental interests will have no remedy unless they can grab the attention of the White House or a cabinet officer away from competing demands. Those odds are a lot longer than they would be if the 1986 rules were back on the books, and all the environmental plaintiffs had to do was get a court to enforce them.

The Bush consultation rule still needs to be eliminated as quickly as possible. The best option for that is the 2009 omnibus spending bill. The House-passed version of that bill includes a provision that would authorize the administration to immediately throw out the Bush consultation rule, together with a separate Bush rule that limited consultation requirements for federal projects affecting polar bears. (The entire omnibus bill as passed by the House is here; the relevant section is 429, beginning at p. 540.) The Senate is currently debating its version of the spending bill. Opponents of the consultation rider are working vigorously to remove it.

Should the spending bill not do the job, Representative Nick Rahall (D-W.Va.) has

introduced a resolution to reverse the Bush consultation rule under the Congressional Review Act. Movement on the resolution is on hold while the spending bill, which is further along in the pipeline, works its way through the process.

If Congress does not manage to pass either measure, the Bush rule will have to be removed through the conventional administrative law process. Hopefully, the Departments of Interior and Commerce are setting to work on that right away, as the President has directed. And if they drag their feet perhaps they'll get a push from the courts, where environmental groups and states have filed a number of challenges to the Bush rule, and which could enjoin implementation of the Bush rule or order it set aside.

UPDATE 3/5: Over at NRDC's Switchboard, Andrew Wetzler reports that a Senate vote is likely today on an amendment seeking to strip the consultation rule provision from the spending bill. As he points out, this is a crucial vote for restoring the ESA as quickly and cleanly as possible.

UPDATE #2, 3/6: By a vote of 52-42, the Senate rejected an amendment proposed by Alaskan Senators Lisa Murkowski (R) and Mark Begich (D) that would have removed the consultation rule provision. The LA Times has the story here.

UPDATE #3, 3/10: The fat lady has finally sung. The Senate passed the omnibus spending bill today with the ESA provision intact. Obama is expected to sign it shortly, and no doubt the Bush consultation rule will be withdrawn shortly thereafter.