or concerns and submit substantive evidence during the public notice phase of the permit evaluation process and again to provide comments if the District Engineer is reconsidering the application because the Division Engineer determines that the appeal had merit. Further, the President's plan did not contemplate nor recommend the administrative appeal of permit issuances. These decisions are considered valid reflections of the public interest since they have already undergone rigorous review, with input from numerous agencies and the general public, and these decisions may be elevated by some Federal agencies pursuant to Section 404(q) Memorandum of Agreement. Expanding the appeal process to permit issuance decisions would also significantly expand the potential number of appeals since the Corps annually issues approximately 10,000 standard permits nationwide. Opening these decisions to administrative challenge would have severe adverse effects on the overall efficiency and cost of the regulatory program. Furthermore, judicial review is available to affected third parties.

VI. Unauthorized Activities

As a general rule, jurisdictional determinations made in the context of an enforcement case can not be administratively appealed under this rule. We are concerned that the public interest in expeditious and efficient resolution of an enforcement action should not ordinarily be delayed by administrative appeals of jurisdictional determinations made for purposes of that enforcement action. However, the District Engineer, in his or her discretion, is authorized by this rule to make exceptions to this general rule, and to allow the administrative appeal of a jurisdiction determination made in the context of an enforcement action if the District Engineer believes that the interests of justice, fairness, and administrative efficiency would be served thereby.

In certain cases involving unauthorized activities, the Corps will afford the responsible party the opportunity to apply for an after-the-fact permit. In many instances this approach obviates the need for a formal enforcement action and expedites the restoration of the affected wetland. The use of this after-the-fact permit approach can, however, be affected by statute of limitations complications. Further, engaging in an Administrative Appeal regarding an activity involving an enforcement case might raise issues regarding application of Statute of Limitations with respect to potential enforcement actions.

Consequently, we propose to amend 33 CFR 326.3(e) to include a new subparagraph (v). This new provision would require those parties alleged to have engaged in an unauthorized activity to sign a statute of limitations tolling agreement prior to filing an after-the-fact permit application. Subsequent to acceptance of an after-the-fact permit application by the Corps, an applicant may appeal a jurisdiction determination and/or a denial of an after-the-fact permit. Such tolling agreement would state that, in exchange for the Corps' considering the appeal of a jurisdictional determination or the after-the-fact permit application, or both, the party would agree that the statute of limitations would be tolled until one year after the final action has been taken on a jurisdictional determination appeal or the after-the-fact permit decision has been made (whichever is later), or one year after any succeeding administrative appeal of an after-the-fact permit decision has been finalized. Such tolling agreement would also state that permit applicants will not raise a statute of limitations defense in any subsequent enforcement action brought by the United States, with respect to the unauthorized activity for the period of time in which the statute of limitations is tolled. A party should only be required to sign one tolling agreement regardless of the number of appeals sought involving a single unauthorized activity. For example, a party sings a tolling agreement to appeal a jurisdictional determination, then applies for and receives an after-the-fact permit decision, and then appeals the permit decision, the tolling agreement will remain in effect until one year after the date that the after-the-fact permit decision has been made final.

Although we are planning to consolidate and propose revisions to the Corps Regulatory Program Regulations at 33 CFR Parts 320–330, within the next year, it is important that we make this minor amendment in conjunction with this proposed rule on administrative appeals to avoid creating undue confusion among the regulated community. This confusion would stem from the fact that, even if we were to make the proposed change to subparagraph (v), we would still have to include a provision in the administrative appeals regulation requiring that every applicant who applies for an after-the-fact permit prior to the effective date of subparagraph (v), sign a tolling agreement prior to filing an administrative appeal. This provision is necessary to address those parties that apply for after-the-fact permits between now and the effective date of subparagraph (v). If we were to wait until we revise 33 CFR Parts 320–330 to propose subparagraph (v), then this group of after-the-fact permit applicants would only increase in number, further contributing to the confusion that this provision could create.

VII. Exhaustion of Administrative Remedies

In *Darby* v. *Cisneros,* 113 S.Ct. 2539 (1993), the Supreme Court recently held that persons subject to Federal agency regulation need not exhaust administrative remedies before filing a lawsuit in Federal District Court, unless a statutory or regulatory provision requires such exhaustion. In response to *Darby* v. *Cisneros,* the Corps is including § 331.12 in this proposed rule to make it explicit that persons dissatisfied with jurisdictional determinations or permit decisions must avail themselves of the administrative appeals process(es) proposed in this rule and received a final agency decision prior to seeking redress in the Federal courts.

VIII. Application of Rule to Prior Regulatory Decisions

We are proposing that when the final administrative appeals process is adopted that certain actions completed prior to the effective date of the final regulation be allowed to be appealed in accordance with this regulation. We believe that it would be appropriate to accept administrative appeals of final jurisdictional determinations and permit denials, that were transmitted in writing to an affected party one year prior to the effective date of the final regulation, if the affected party submits a request for appeal (RFA) to the Corps within 60 days of the effective date of the final rule.

It should be noted by potential appellants of prior regulatory decisions that the criteria for appeal must be met, or the request for appeal will be rejected by the Corps. Additionally, if large numbers of RFAs are received under this provision, an RO may delay the initiation of processing an RFA for up to 6 months after the implementation date of these regulations, if necessary.

IX. Environmental Documentation

We have made a preliminary determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment, because the Corps prepares appropriate environmental documentation, including an Environmental Impact Statement (EIS)