

Congress of the United States
Washington, DC 20515

April 14, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Administrator Jackson and Assistant Secretary Darcy:

In December 2010, the Environmental Protection Agency and Corps of Engineers (collectively, the “Agencies”) sent draft “Clean Water Protection Guidance” to the Office of Management and Budget for regulatory review. The intent of the document is to describe how the Agencies will identify waters subject to jurisdiction under the Federal Water Pollution Control Act of 1972 (more commonly known as the “Clean Water Act”) and implement the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *United States v. Rapanos (Rapanos)* concerning the extent of waters covered by the Act. Further, this document would supersede guidance that the Agencies previously issued in 2003 and 2008 on determining the scope of “waters of the United States” subject to Clean Water Act programs.

In our view, this “Guidance” goes beyond clarifying the scope of “waters of the United States” subject to Clean Water Act programs. Rather, it is aimed, as even the Agencies acknowledge, at “increas[ing] significantly” the scope of the Clean Water Act’s jurisdiction over more waters and more provisions of the Clean Water Act as compared to practices under the currently applicable 2003 and 2008 guidance. (“Guidance,” at 1.)

It appears that the Agencies intend to expand the applicability of this “Guidance” beyond section 404 to all other Clean Water Act provisions that use the term “waters of the United States,” including sections 402, 401, 311, and 303. Moreover, the Agencies intend to “alleviate the need to develop extensive administrative records for certain jurisdictional determinations” (“Guidance,” at 1), thereby shifting the burden of proving the jurisdictional status of a “water” from the Agencies to the regulated community, and thus making the provisions of this “Guidance” binding on the regulated community.

In light of the substantive changes in policy that the Administration is considering with this “Guidance,” we are extremely concerned that this “Guidance” amounts to a *de facto* rule instead of mere advisory guidelines. Additionally, we fear that this “Guidance” is an attempt to

short-circuit the process for changing agency policy and the scope of Clean Water Act jurisdiction without following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act.

This "Guidance" would substantively change the Agencies' policy on waters subject to jurisdiction under the Clean Water Act; undermine the regulated community's rights and obligations under the Clean Water Act; and erode the Federal-State partnership that has long existed between the States and the Federal Government in implementing the Clean Water Act. By developing this "Guidance," the Agencies have ignored calls from state agencies and environmental groups, among others, to proceed through the normal rulemaking procedures, and have avoided consulting with the States, which are the Agencies' partners in implementing the Clean Water Act.

The Agencies cannot, through guidance, change the scope and meaning of the Clean Water Act or the statute's implementing regulations. If the Administration seeks statutory changes to the Clean Water Act, a proposal must be submitted to Congress for legislative action. If the Administration seeks to make regulatory changes, a notice and comment rulemaking is required.

We are very concerned by the action contemplated by the Agencies, and we strongly urge you to reconsider the proposed "Guidance."

Thank you for your attention to this matter.

Sincerely,



Bob Gibbs
Member of Congress



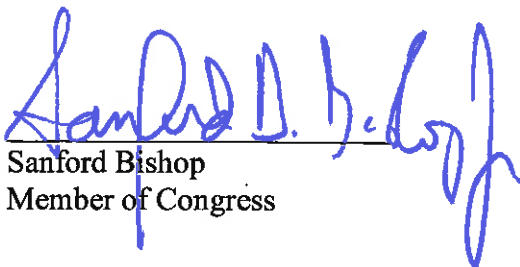
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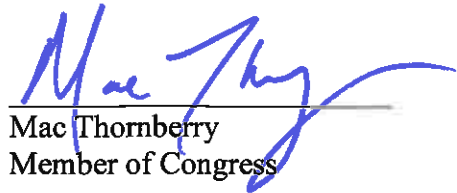
Nick Rahall
Member of Congress

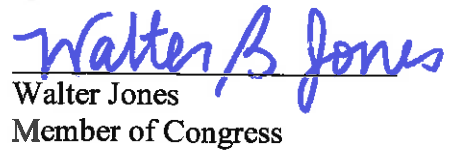


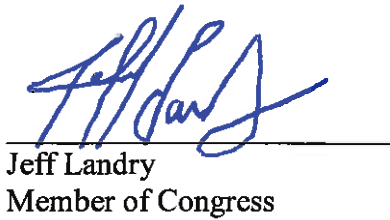
Sanford Bishop
Member of Congress



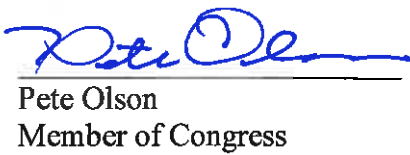
David McKinley
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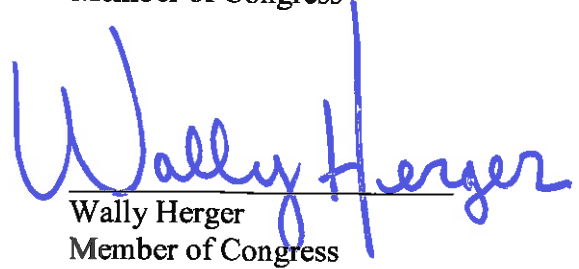

Mac Thornberry
Member of Congress

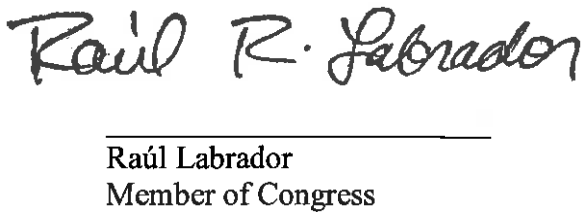

Walter Jones
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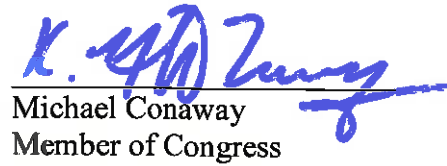

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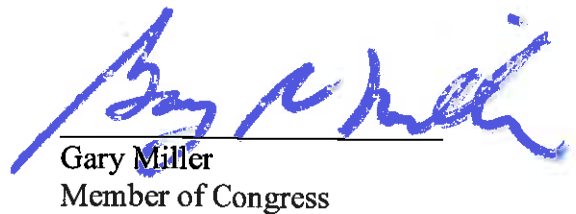

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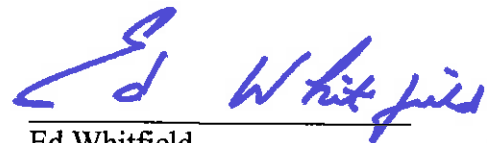

Sam Graves
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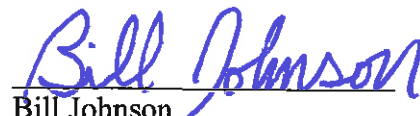

Tim Murphy
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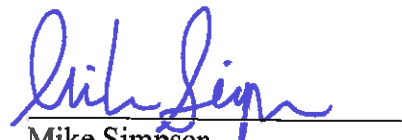

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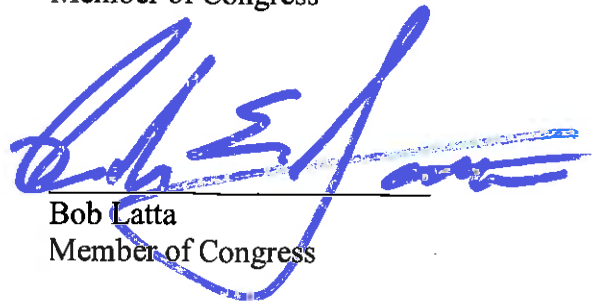
Adam Kinzinger
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Jaime Herrera Beutler
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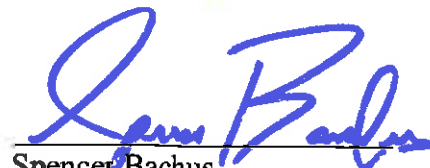
Tom Cole
Member of Congress



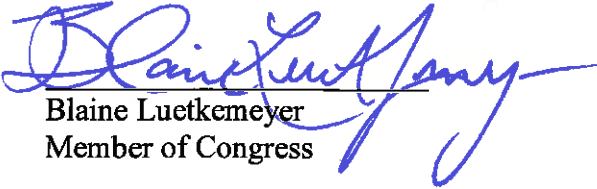
Bob Latta
Member of Congress

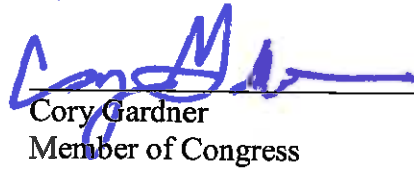


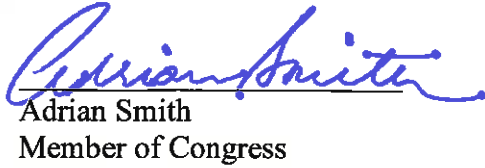
Austin Scott
Member of Congress




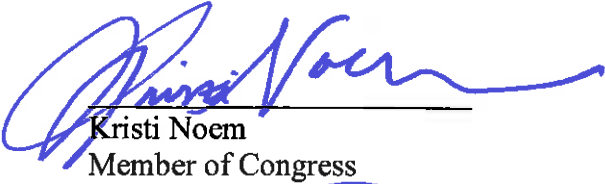
Spencer Bachus
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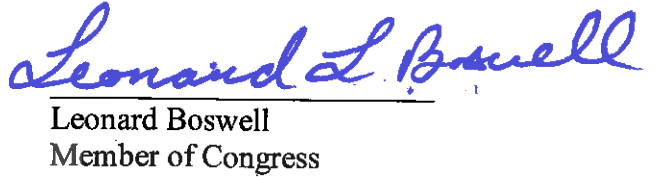

Blaine Luetkemeyer
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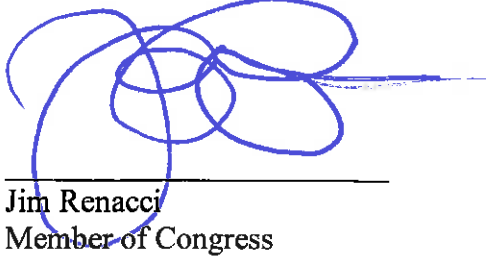

Cory Gardner
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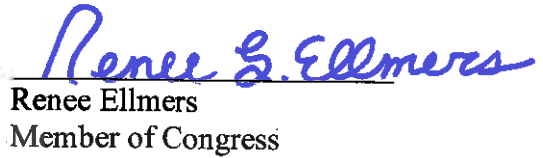

Adrian Smith
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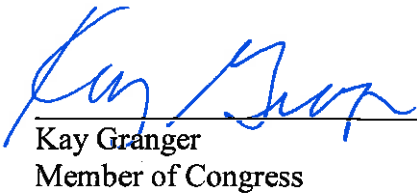

John Shimkus
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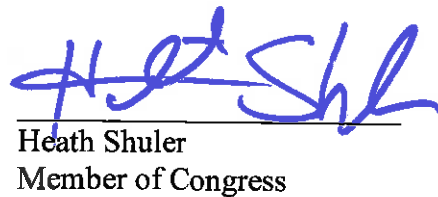

Kristi Noem
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Leonard Boswell
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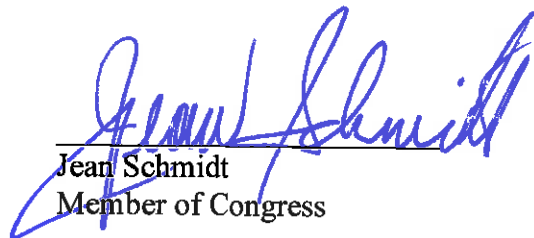

Jim Renacci
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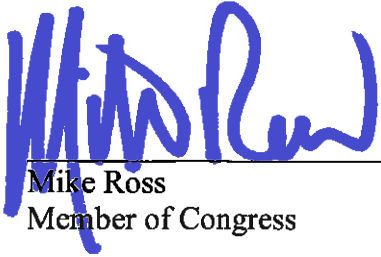

Jean Schmidt
Member of Congress



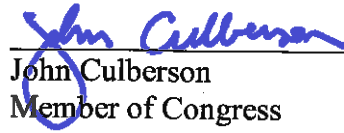
Howard Coble
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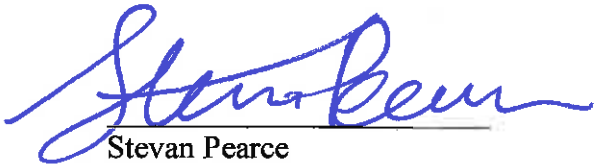
Lou Barletta
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Mike Ross
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John Culberson
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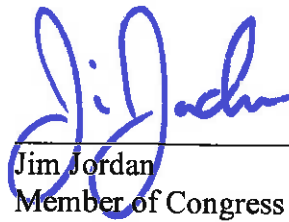
Stevan Pearce
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Todd Rokita
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Steve Chabot
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Jim Jordan
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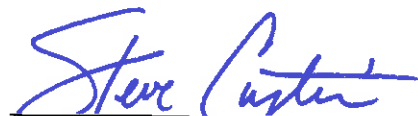
Scott DesJarlais
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Frank Wolf
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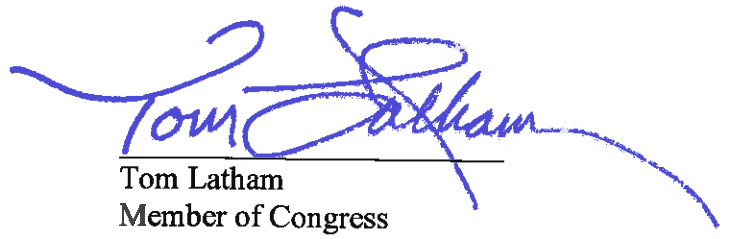


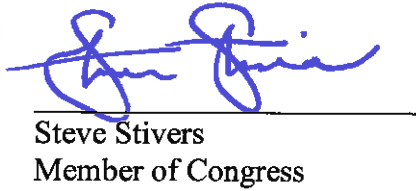
Geoff Davis
Member of Congress

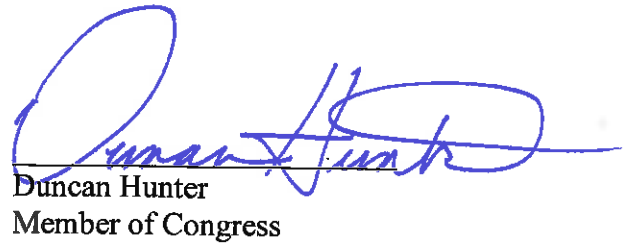


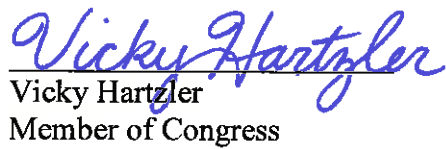
Steve Austria
Member of Congress

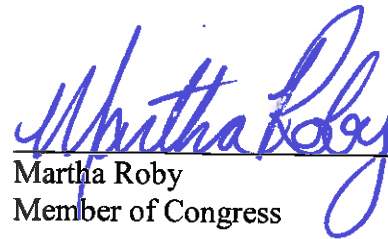

Shelley Berkley
Member of Congress

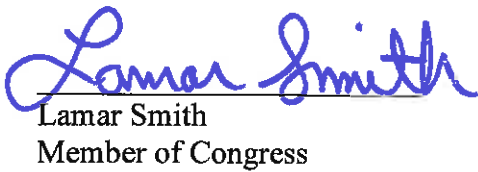

Tom Latham
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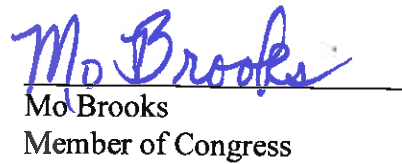

Steve Stivers
Member of Congress

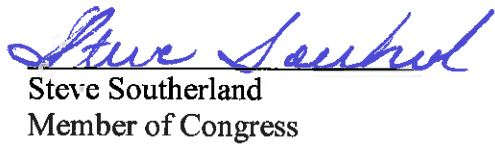

Duncan Hunter
Member of Congress

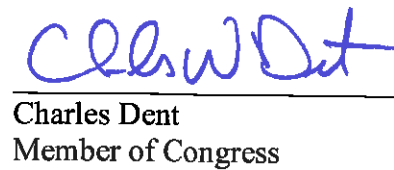

Vicky Hartzler
Member of Congress

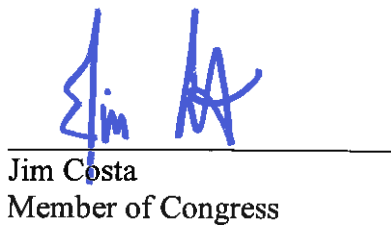

Martha Roby
Member of Congress

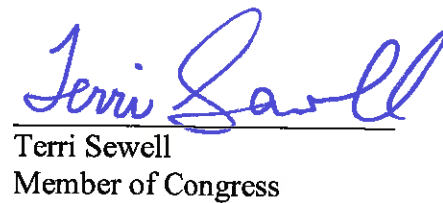

Lamar Smith
Member of Congress

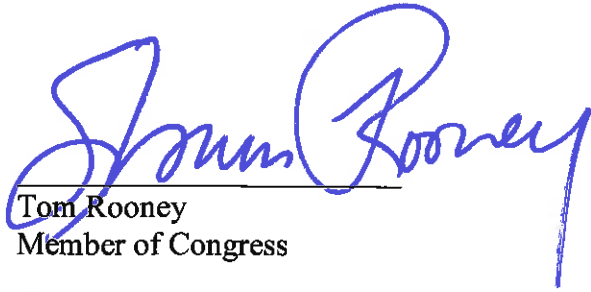

Mo Brooks
Member of Congress

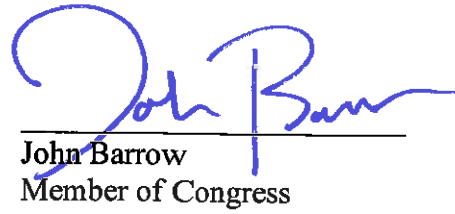

Steve Southerland
Member of Congress

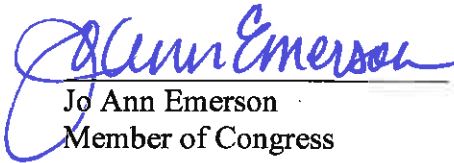

Charles Dent
Member of Congress

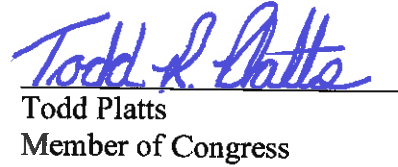

Jim Costa
Member of Congress


Terri Sewell
Member of Congress

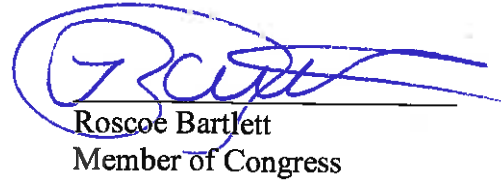

Tom Rooney
Member of Congress

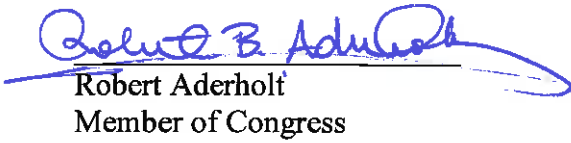

John Barrow
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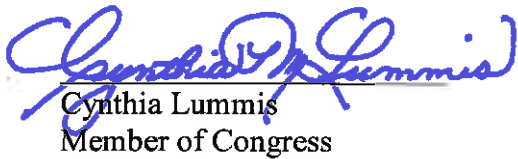

Todd Platts
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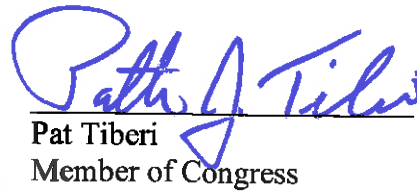

Charles Boustany
Member of Congress

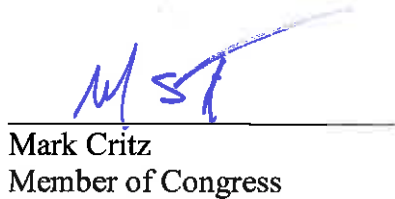

Roscoe Bartlett
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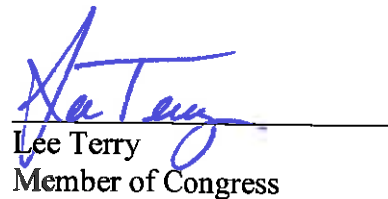

Robert Aderholt
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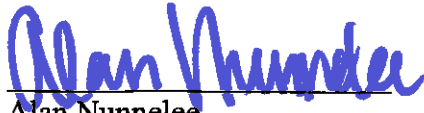

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Mark Critz
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Alan Nunnelee
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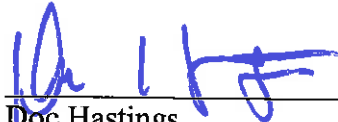
Larry Bucshon
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Devin Nunes
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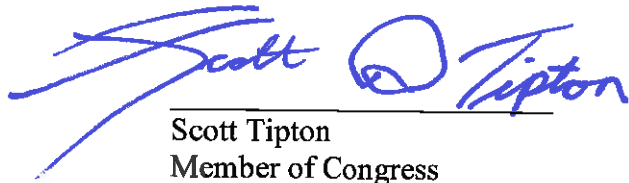
Diane Black
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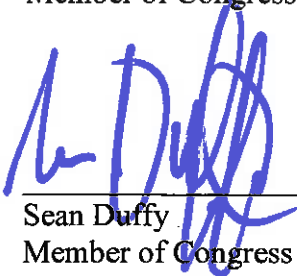
Doc Hastings
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Phil Roe
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Scott Tipton
Member of Congress




Sean Duffy
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Jason Altmire
Member of Congress



Jim Matheson
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Bobby Schilling
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Mike Pompeo
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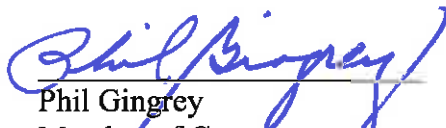

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Chuck Fleischmann
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C.W. Bill Young
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Steve LaTourette
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Brian Bilbray
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David Scott
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Doug Lamborn
Member of Congress


Jerry Costello
Member of Congress

Marsha Blackburn
Member of Congress

Dean Heller
Member of Congress

Kenny Marchant
Member of Congress

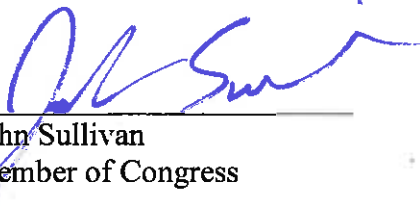
Ken Calvert
Member of Congress



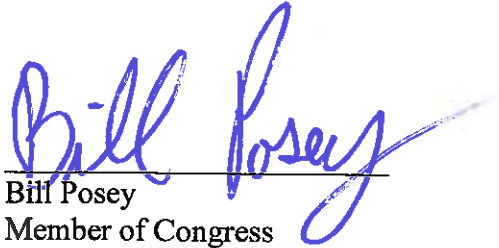
Joe Wilson
Member of Congress



Mike McIntyre
Member of Congress



John Sullivan
Member of Congress



Bill Posey
Member of Congress



Bill Flores
Member of Congress



Denny Rehberg
Member of Congress



Candice Miller
Member of Congress



Erik Paulsen
Member of Congress



Steven Palazzo
Member of Congress



Bill Owens
Member of Congress



Michael Turner
Member of Congress



Ralph Hall
Member of Congress



Sandy Adams
Member of Congress



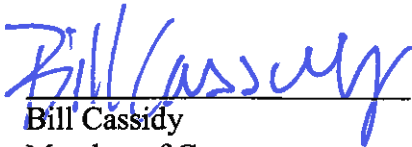
Ann Marie Buerkle
Member of Congress



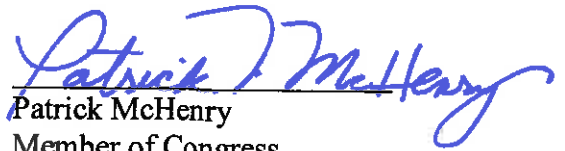
Dan Benishek
Member of Congress



Robert Hurt
Member of Congress



Bill Cassidy
Member of Congress



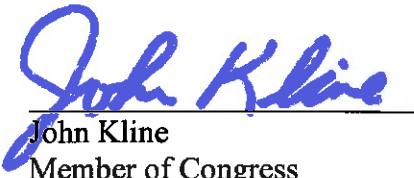
Patrick McHenry
Member of Congress



Aaron Schock
Member of Congress



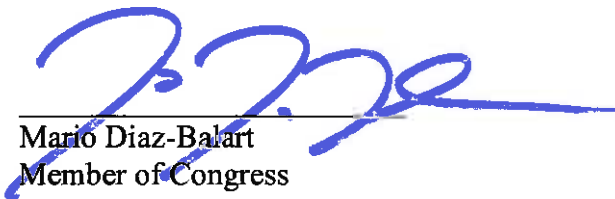
Bob Goodlatte
Member of Congress



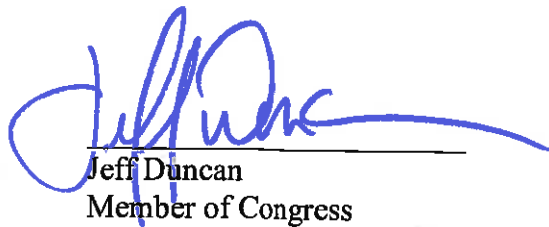
John Kline
Member of Congress



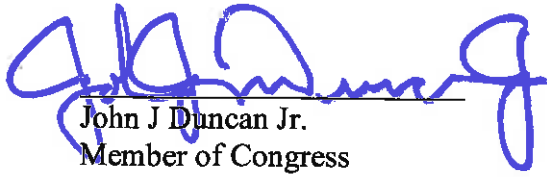
Tom Reed
Member of Congress



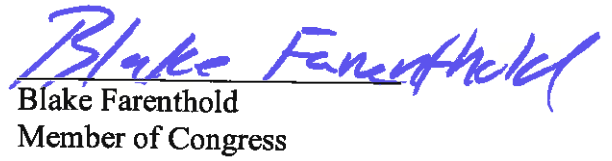
Mario Diaz-Balart
Member of Congress



Jeff Duncan
Member of Congress



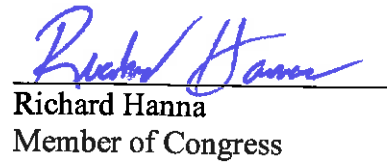
John J. Duncan Jr.
Member of Congress



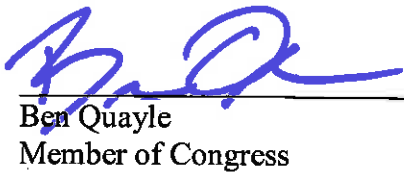
Blake Farenthold
Member of Congress



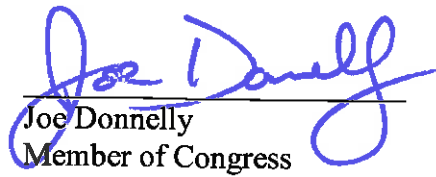
Buck McKeon
Member of Congress



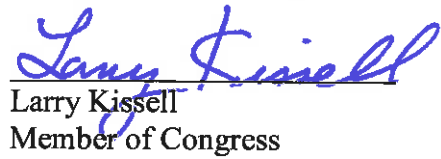
Richard Hanna
Member of Congress



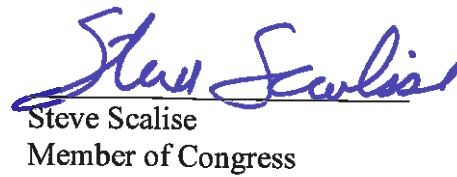
Ben Quayle
Member of Congress



Joe Donnelly
Member of Congress



Larry Kissell
Member of Congress



Steve Scalise
Member of Congress

CC:

Nancy Sutley, Chair, White House Council on Environmental Quality (CEQ)

Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB