

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



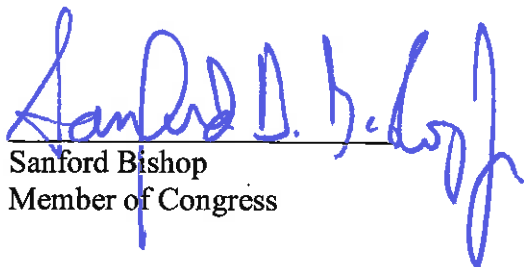
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Member of Congress



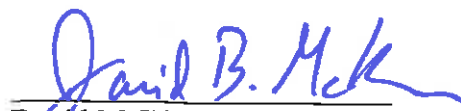
John Mica
Member of Congress



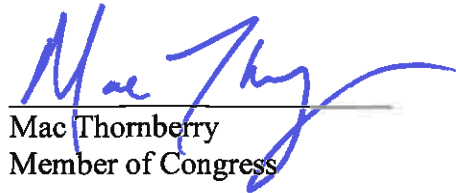
Nick Rahall
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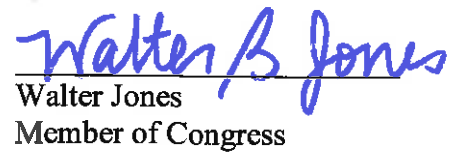


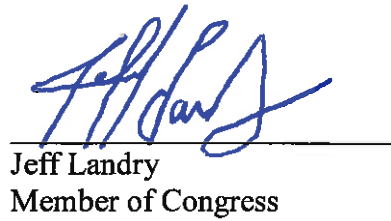
Sanford Bishop
Member of Congress



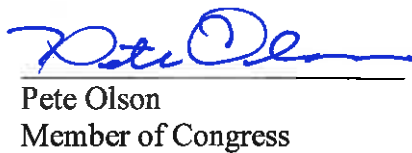
David McKinley
Member of Congress

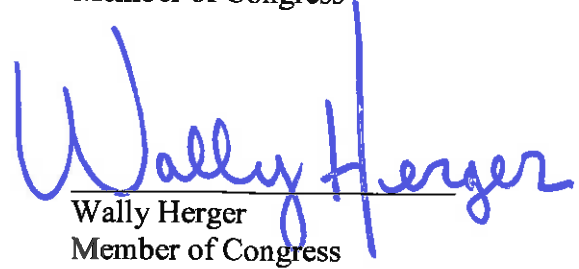

 Mac Thornberry
 Member of Congress

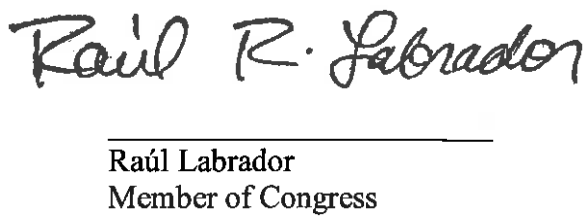

 Walter Jones
 Member of Congress

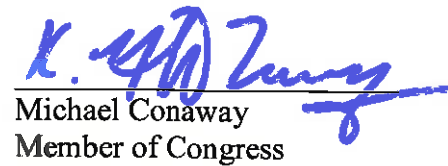

 Jeff Landry
 Member of Congress


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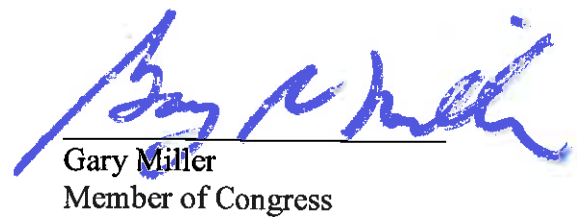

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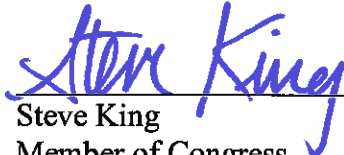
Mike Rogers (AL)
Member of Congress

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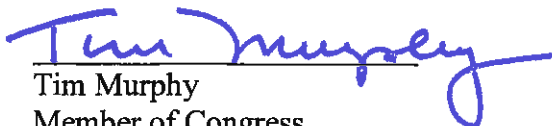
Glenn Thompson
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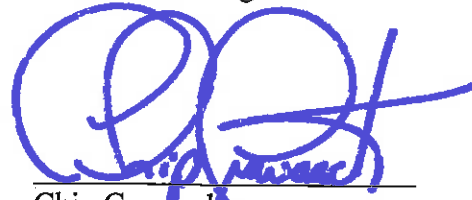

 Steve King
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 Francisco Canseco
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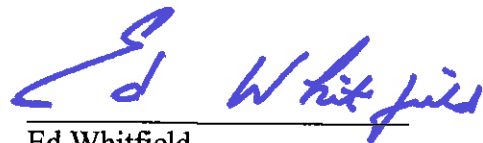

 Sam Graves
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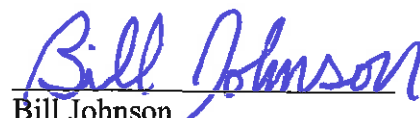

 Tim Murphy
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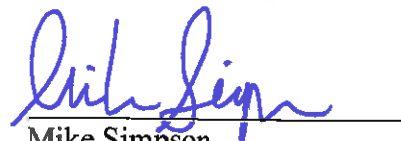

 Collin Peterson
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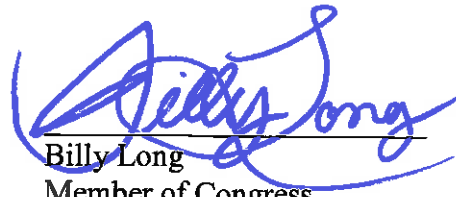
Stephen Fincher
Member of Congress



Lynn Westmoreland
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Frank Lucas
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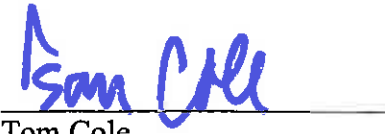
Billy Long
Member of Congress



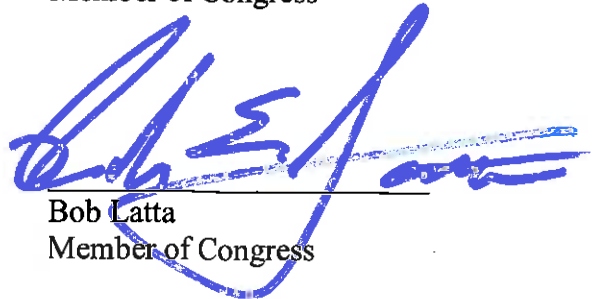
Adam Kinzinger
Member of Congress



Jaime Herrera Beutler
Member of Congress



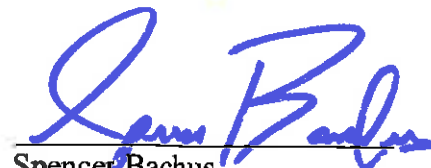
Tom Cole
Member of Congress



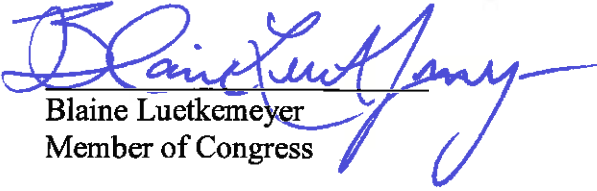
Bob Latta
Member of Congress



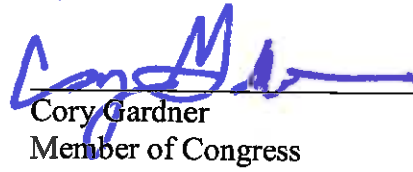
Austin Scott
Member of Congress



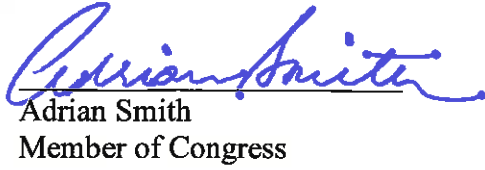
Spencer Bachus
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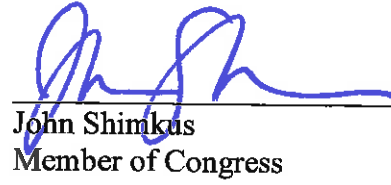
Blaine Luetkemeyer
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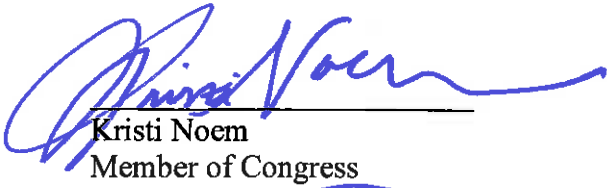
Cory Gardner
Member of Congress



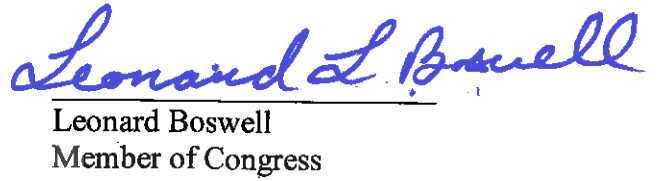
Adrian Smith
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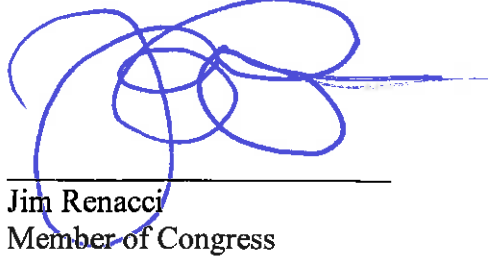
John Shimkus
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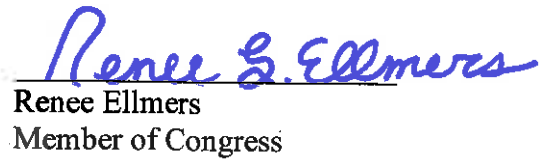
Kristi Noem
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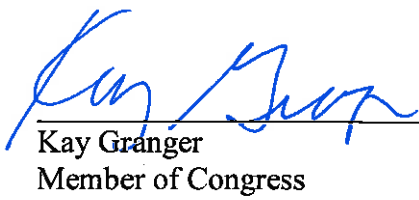
Leonard Boswell
Member of Congress



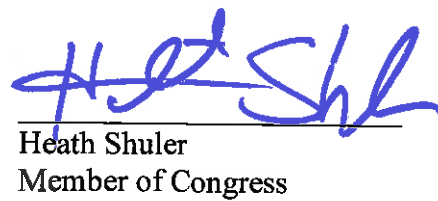
Jim Renacci
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Renee Ellmers
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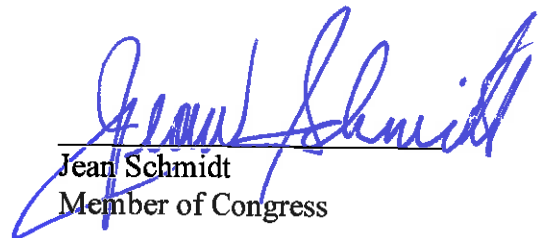
Kay Granger
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Heath Shuler
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Mike Coffman
Member of Congress



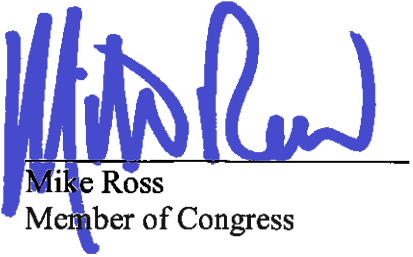
Jean Schmidt
Member of Congress



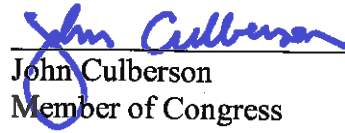
Howard Coble
Member of Congress



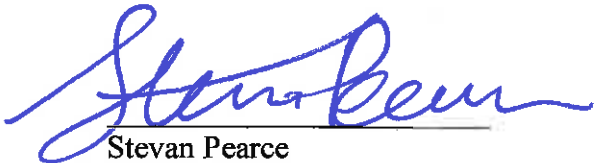
Lou Barletta
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Mike Ross
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John Culberson
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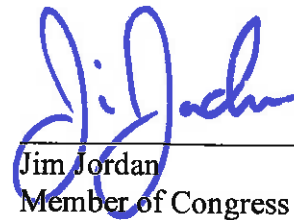
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Todd Rokita
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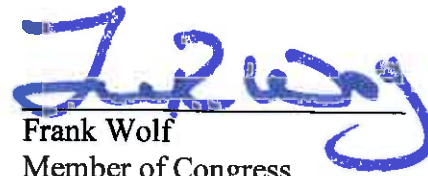
Steve Chabot
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Jim Jordan
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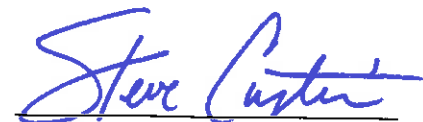
Scott DesJarlais
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Frank Wolf
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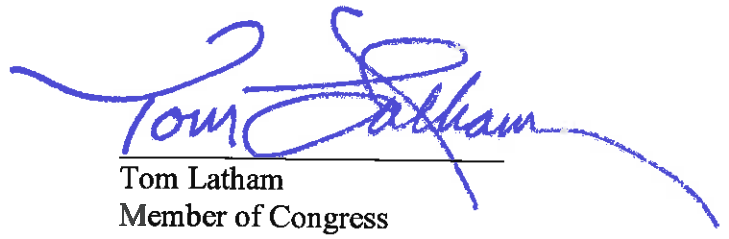


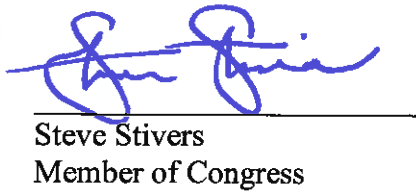
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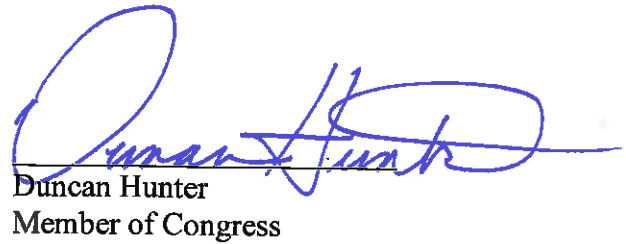


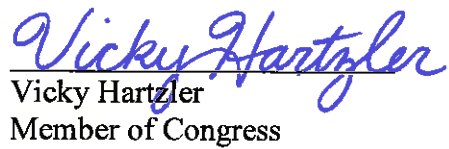
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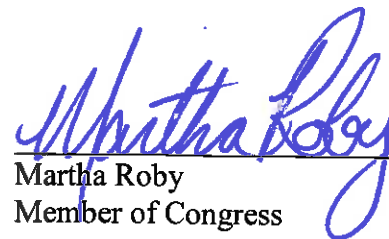

Shelley Berkley
Member of Congress

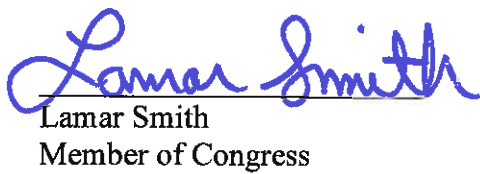

Tom Latham
Member of Congress

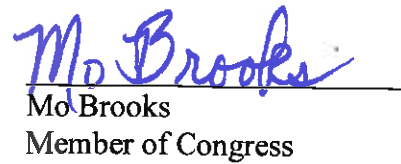

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Member of Congress


Duncan Hunter
Member of Congress

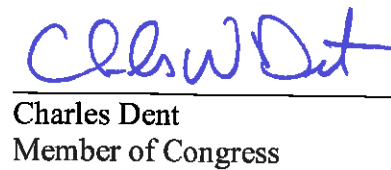

Vicky Hartzler
Member of Congress

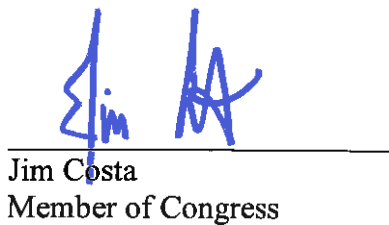

Martha Roby
Member of Congress

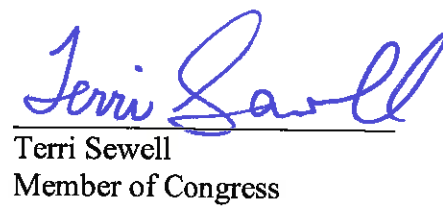

Lamar Smith
Member of Congress

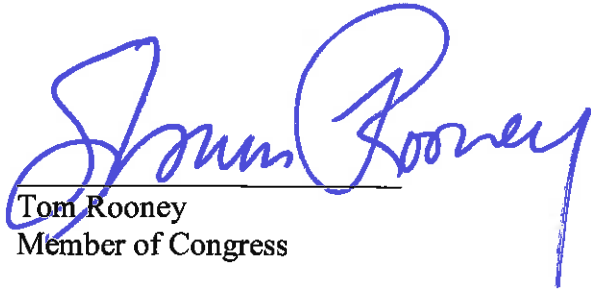

Mo Brooks
Member of Congress


Steve Southerland
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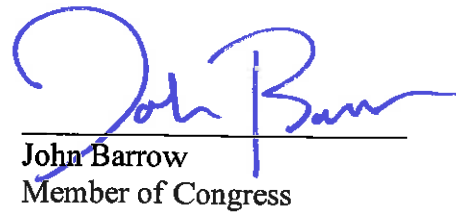

Charles Dent
Member of Congress


Jim Costa
Member of Congress

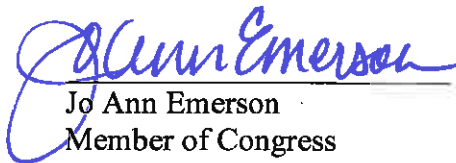

Terri Sewell
Member of Congress



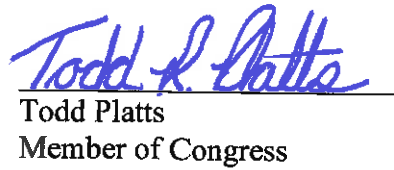
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John Barrow
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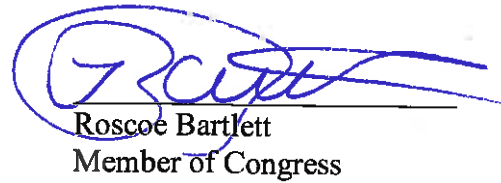
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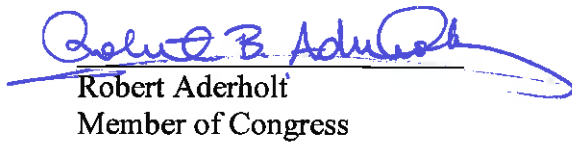
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Charles Boustany
Member of Congress



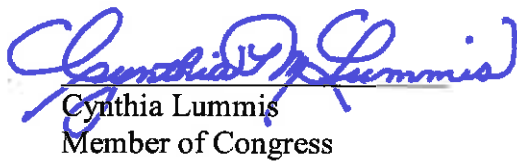
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Member of Congress



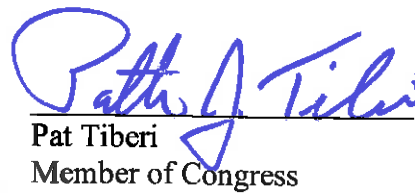
Robert Aderholt
Member of Congress



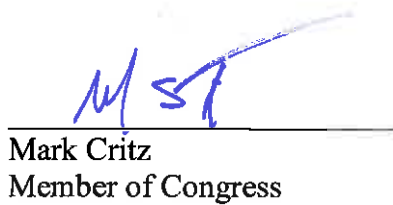
Lynn Jenkins
Member of Congress



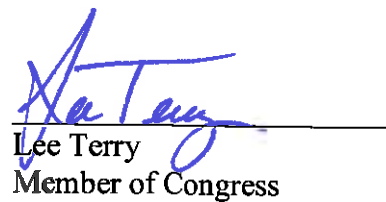
Cynthia Lummis
Member of Congress



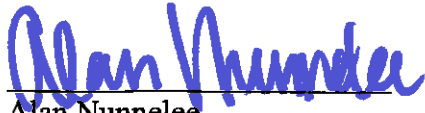
Pat Tiberi
Member of Congress



Mark Critz
Member of Congress



Lee Terry
Member of Congress



Alan Nunnelee
Member of Congress



Tim Griffin
Member of Congress



Randy Neugebauer
Member of Congress



Dan Boren
Member of Congress



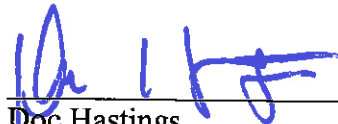
Larry Bucshon
Member of Congress



Devin Nunes
Member of Congress



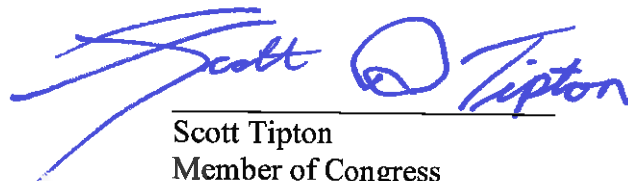
Diane Black
Member of Congress



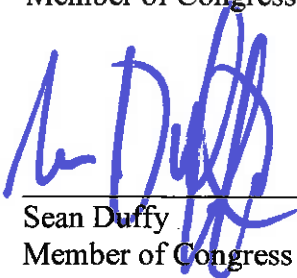
Doc Hastings
Member of Congress



Phil Roe
Member of Congress



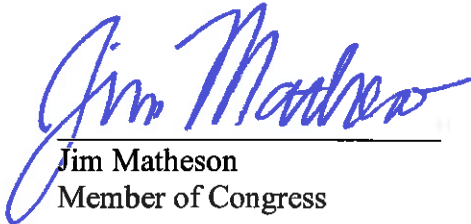
Scott Tipton
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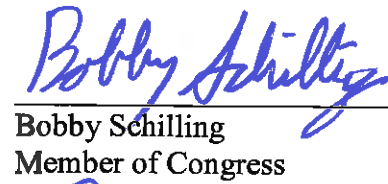
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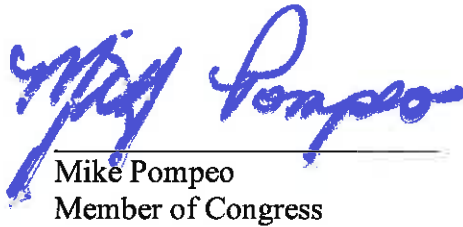
Jason Altmire
Member of Congress



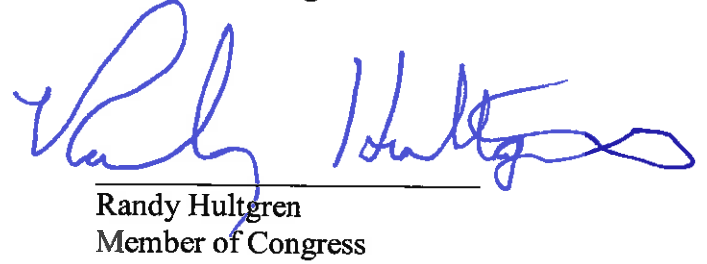
Jim Matheson
Member of Congress



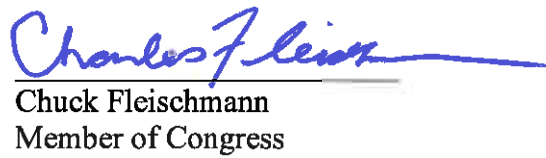
Bobby Schilling
Member of Congress



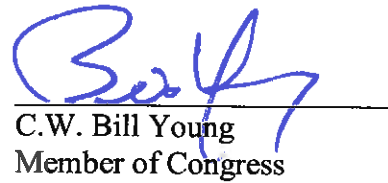
Mike Pompeo
Member of Congress



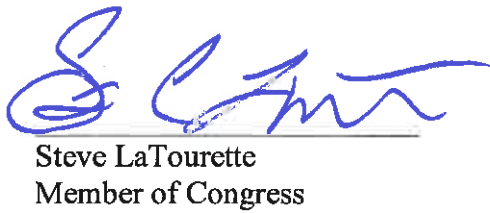
Randy Hultgren
Member of Congress



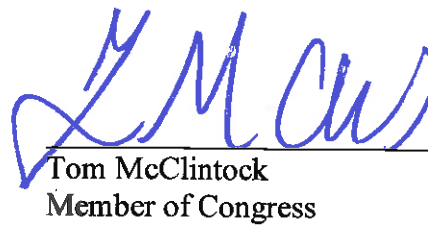
Chuck Fleischmann
Member of Congress



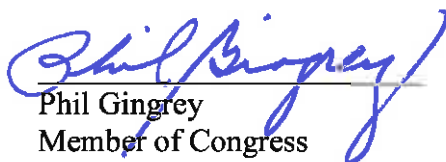
C.W. Bill Young
Member of Congress



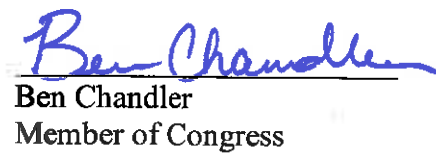
Steve LaTourette
Member of Congress



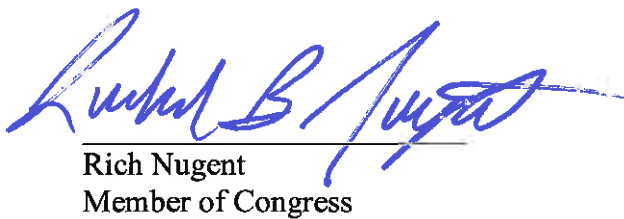
Tom McClintock
Member of Congress



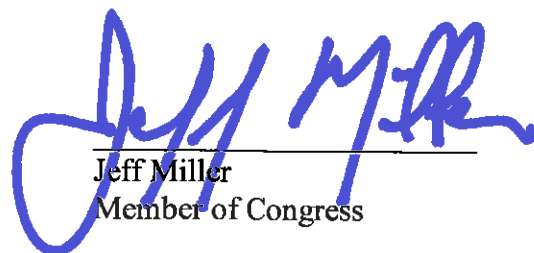
Phil Gingrey
Member of Congress



Ben Chandler
Member of Congress



Rich Nugent
Member of Congress



Jeff Miller
Member of Congress



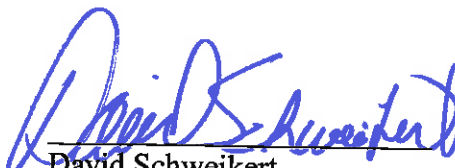
David Rivera
Member of Congress



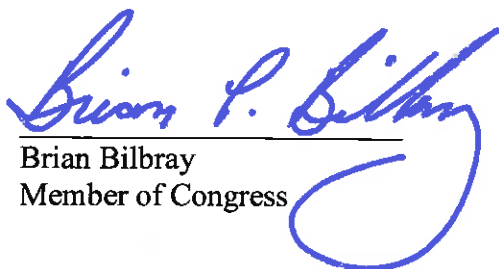
Ileana Ros-Lehtinen
Member of Congress



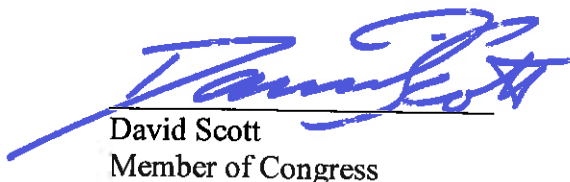
Todd Young
Member of Congress



David Schweikert
Member of Congress



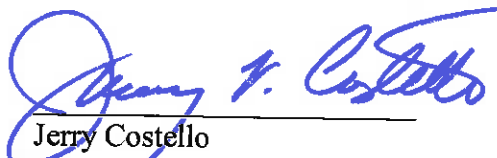
Brian Bilbray
Member of Congress



David Scott
Member of Congress



Doug Lamborn
Member of Congress



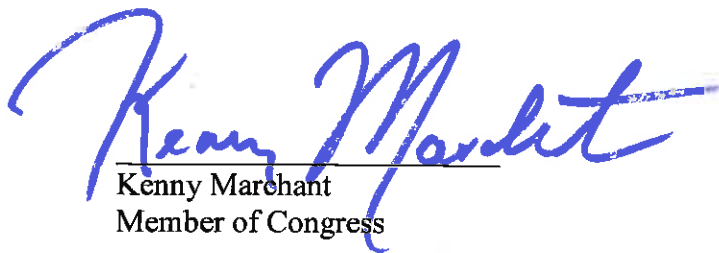
Jerry Costello
Member of Congress



Marsha Blackburn
Member of Congress



Dean Heller
Member of Congress



Kenny Marchant
Member of Congress



Ken Calvert
Member of Congress



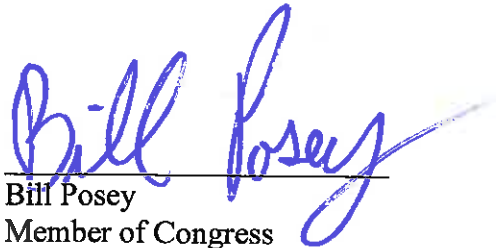
Joe Wilson
Member of Congress



Mike McIntyre
Member of Congress



John Sullivan
Member of Congress



Bill Posey
Member of Congress



Bill Flores
Member of Congress



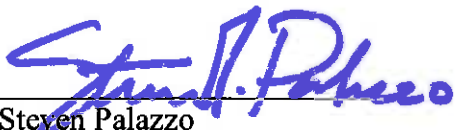
Denny Rehberg
Member of Congress



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

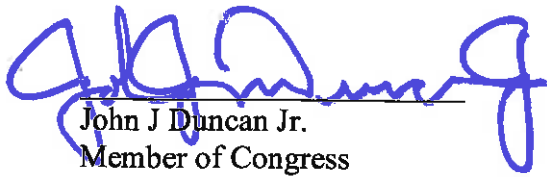
Bob Goodlatte
Member of Congress

John Kline
Member of Congress

Tom Reed
Member of Congress

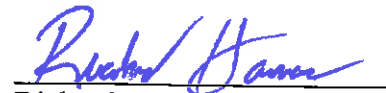
Mario Diaz-Balart
Member of Congress

Jeff Duncan
Member of Congress

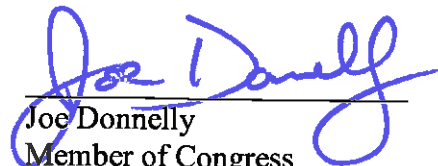

John J. Duncan Jr.
Member of Congress


Blake Farenthold
Member of Congress

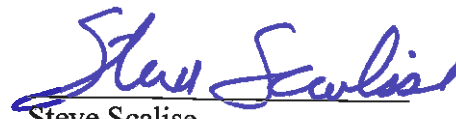

Buck McKeon
Member of Congress


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