

**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



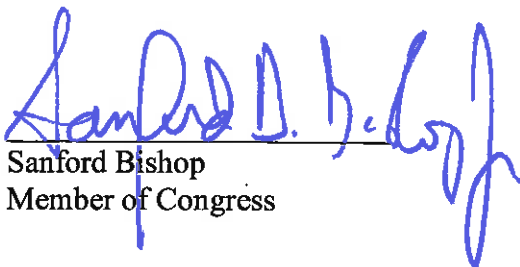
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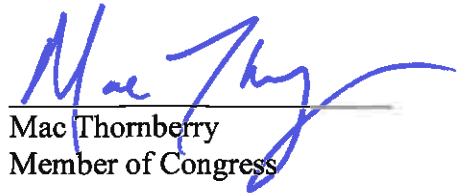
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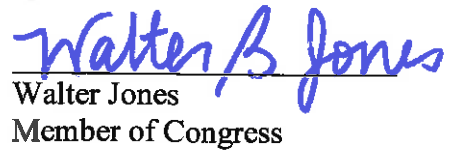


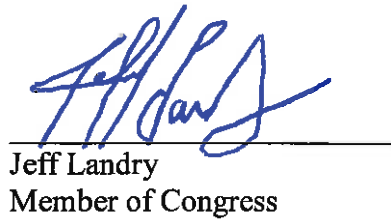
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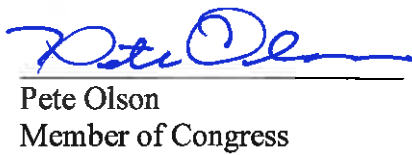
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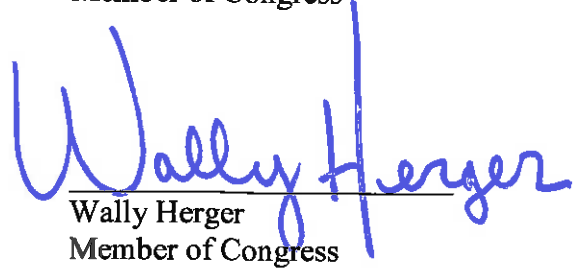
  
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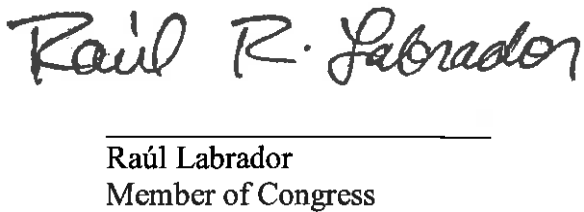
  
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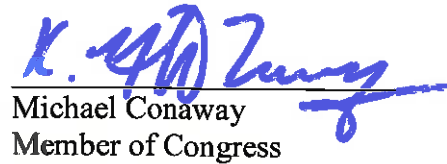
  
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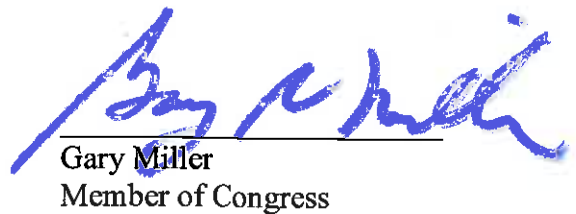
  
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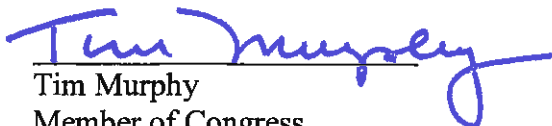
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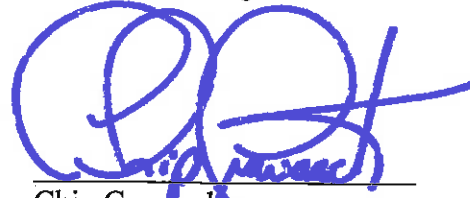
  
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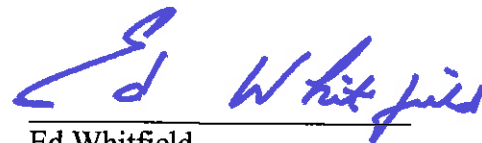
  
Sam Graves  
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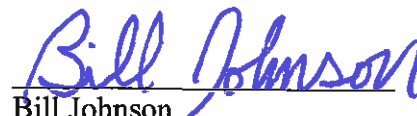
  
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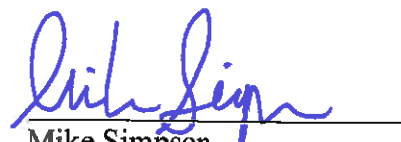
  
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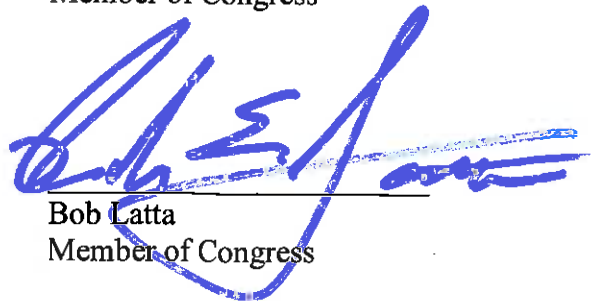
Adam Kinzinger  
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Jaime Herrera Beutler  
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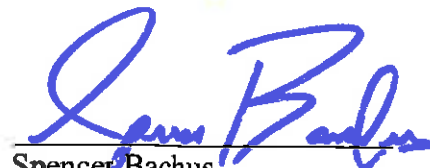
Tom Cole  
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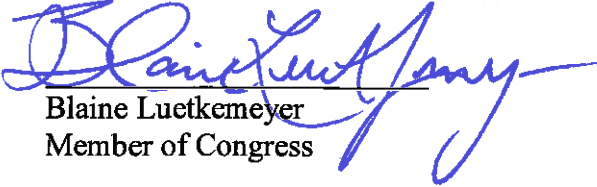
Bob Latta  
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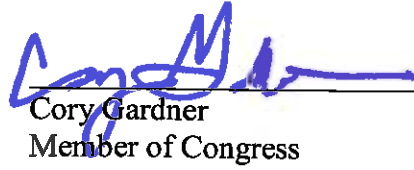


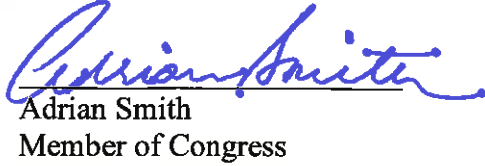
Austin Scott  
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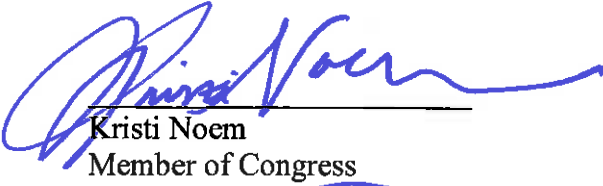
Spencer Bachus  
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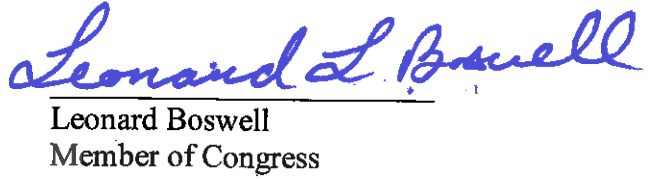
  
Blaine Luetkemeyer  
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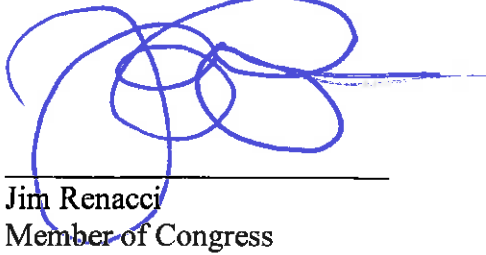
  
Cory Gardner  
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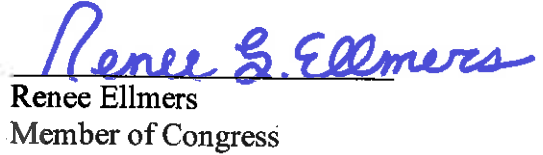
  
Adrian Smith  
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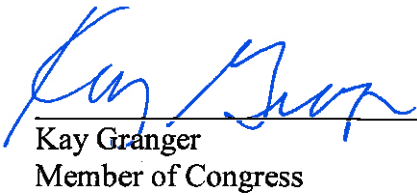
  
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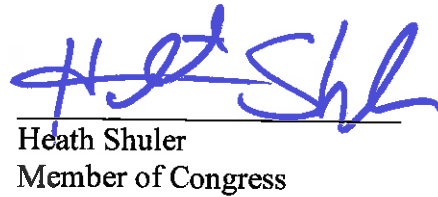
  
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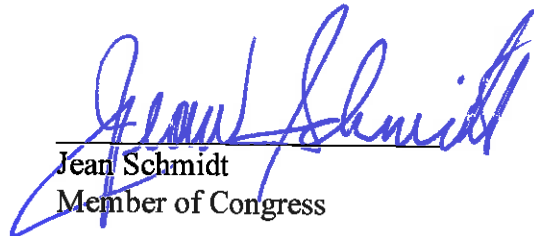
  
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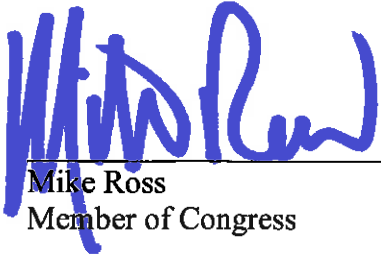
  
Jean Schmidt  
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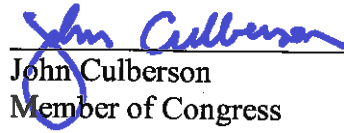
Howard Coble  
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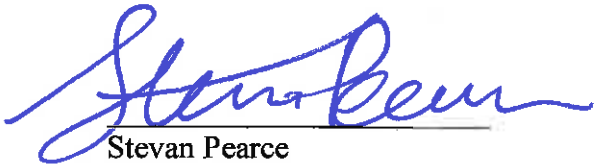
Lou Barletta  
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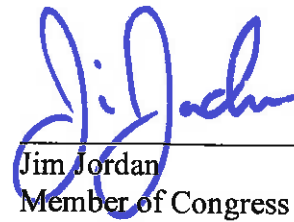
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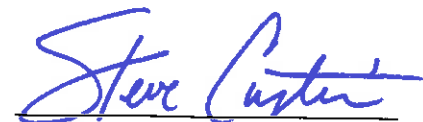
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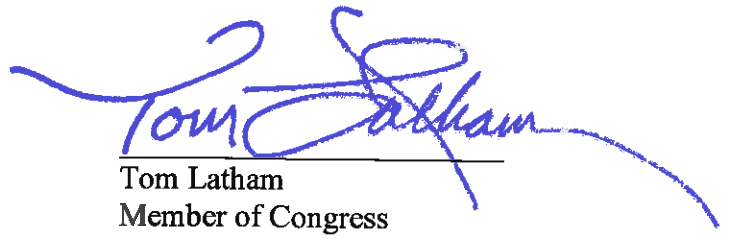
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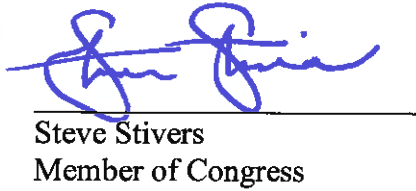


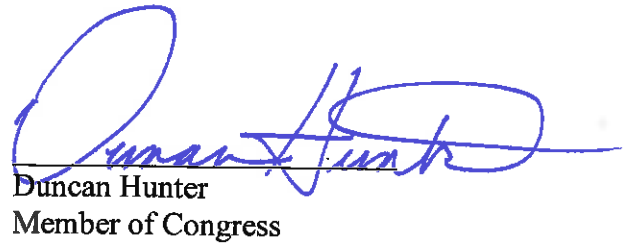
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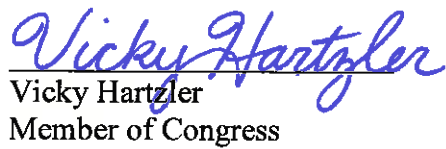


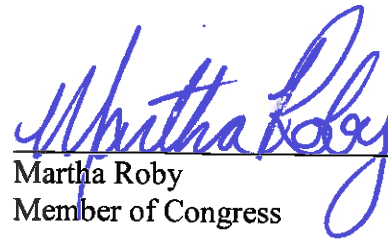
  
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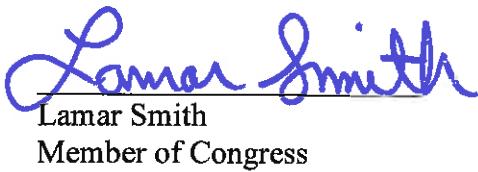
  
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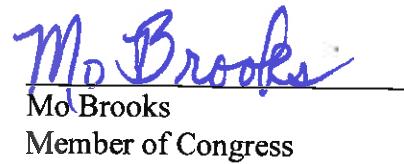
  
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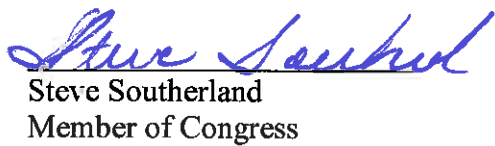
  
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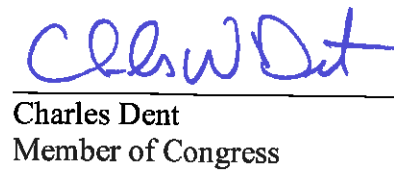
  
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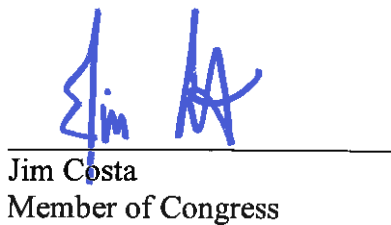
  
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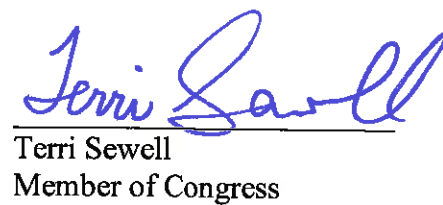
  
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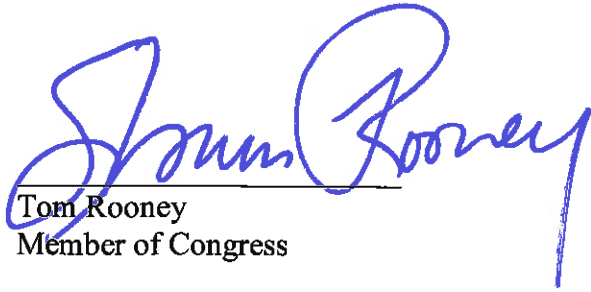
  
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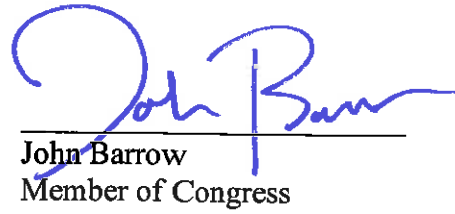
  
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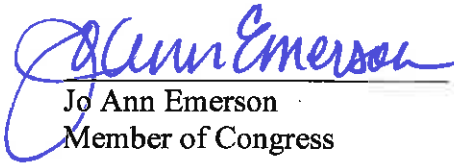
  
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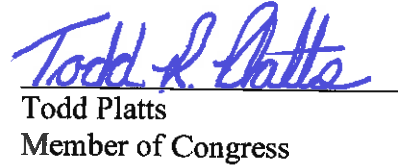
  
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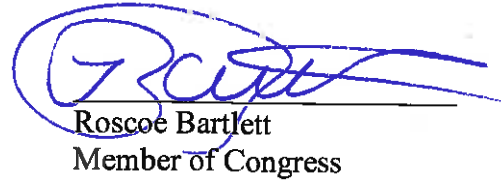
  
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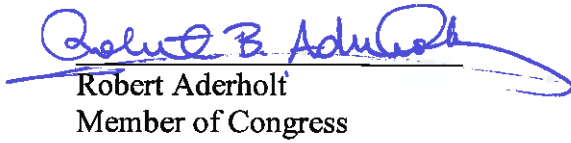
  
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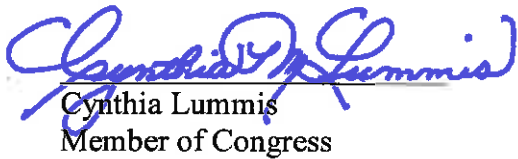
  
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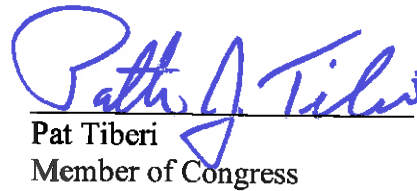
  
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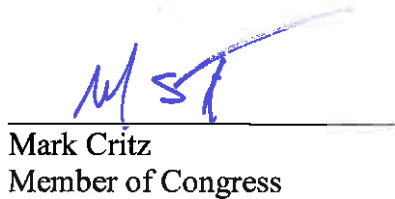
  
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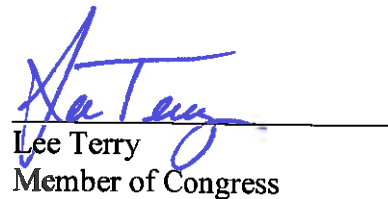
  
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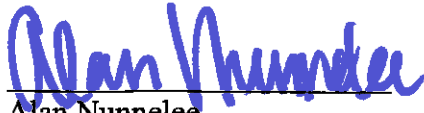
  
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Randy Neugebauer  
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Dan Boren  
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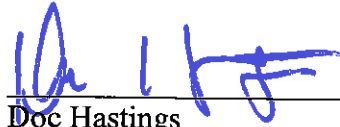
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Devin Nunes  
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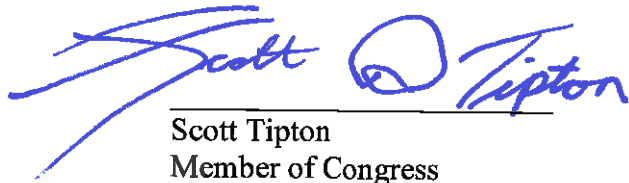
Diane Black  
Member of Congress



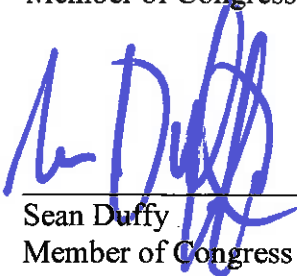
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Phil Roe  
Member of Congress



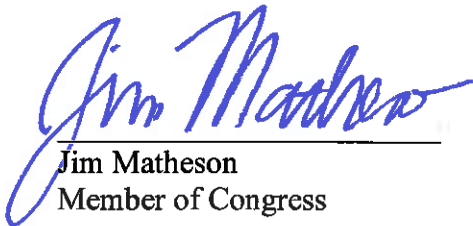
Scott Tipton  
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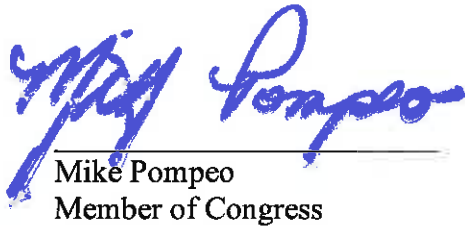
Sean Duffy  
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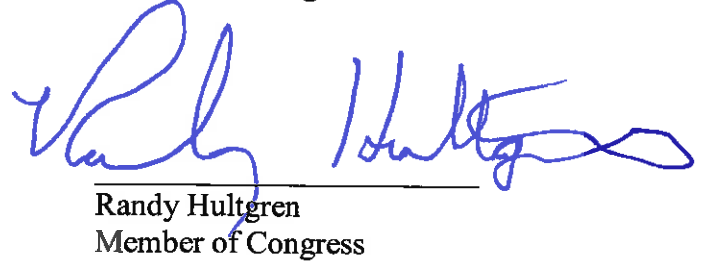


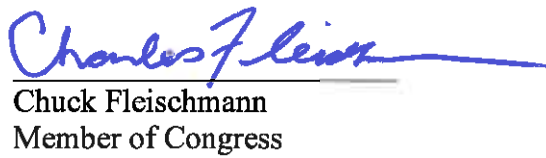
Jason Altmire  
Member of Congress

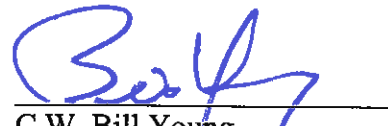
  
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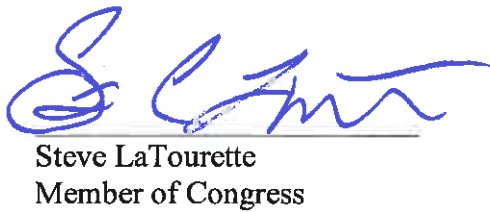
  
Bobby Schilling  
Member of Congress

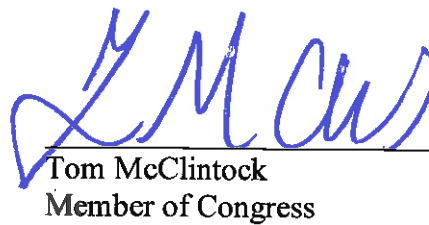
  
Mike Pompeo  
Member of Congress

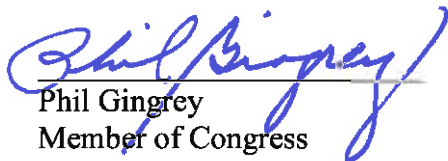
  
Randy Hultgren  
Member of Congress

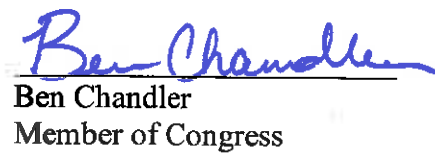
  
Chuck Fleischmann  
Member of Congress

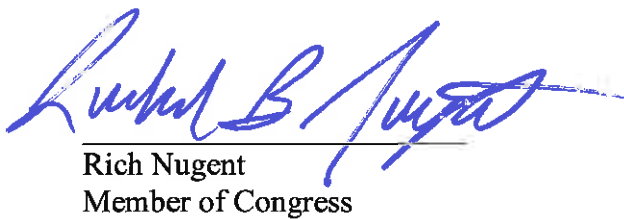
  
C.W. Bill Young  
Member of Congress

  
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

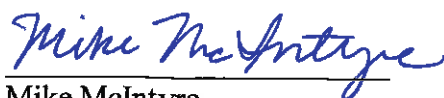
Dean Heller  
Member of Congress

Kenny Marchant  
Member of Congress

Ken Calvert  
Member of Congress



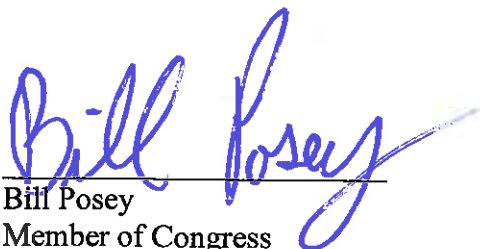
Joe Wilson  
Member of Congress



Mike McIntyre  
Member of Congress



John Sullivan  
Member of Congress



Bill Posey  
Member of Congress



Bill Flores  
Member of Congress



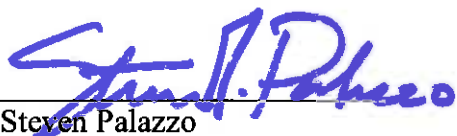
Denny Rehberg  
Member of Congress



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



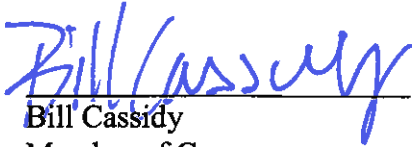
Ann Marie Buerkle  
Member of Congress



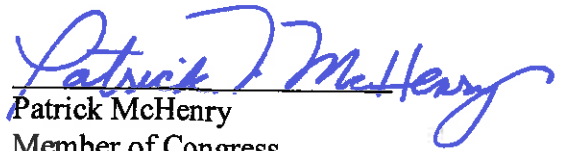
Dan Benishek  
Member of Congress



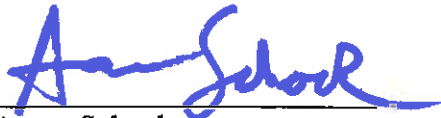
Robert Hurt  
Member of Congress



Bill Cassidy  
Member of Congress



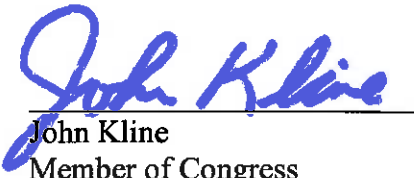
Patrick McHenry  
Member of Congress



Aaron Schock  
Member of Congress



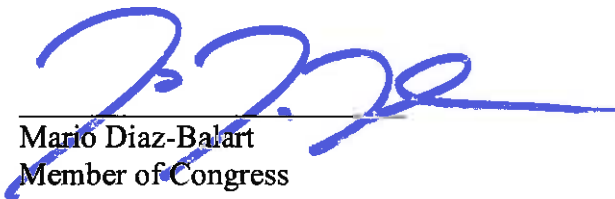
Bob Goodlatte  
Member of Congress



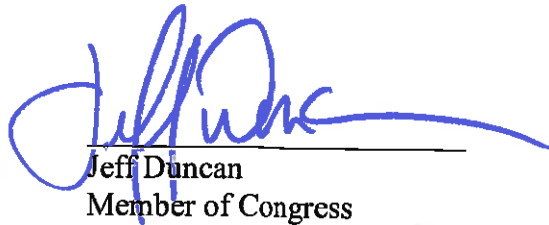
John Kline  
Member of Congress



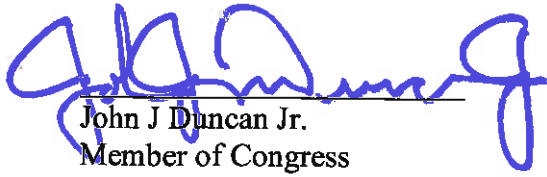
Tom Reed  
Member of Congress



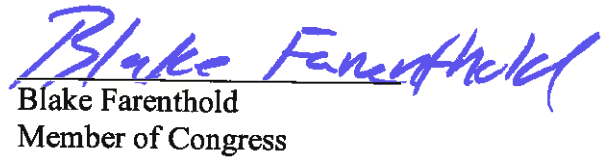
Mario Diaz-Balart  
Member of Congress



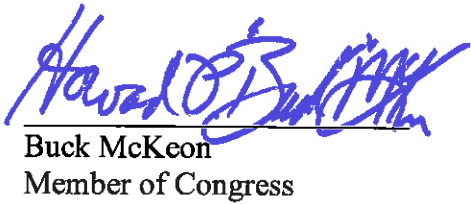
Jeff Duncan  
Member of Congress



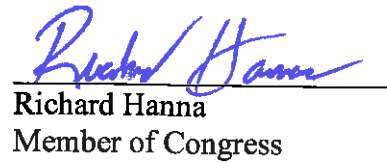
John J. Duncan Jr.  
Member of Congress



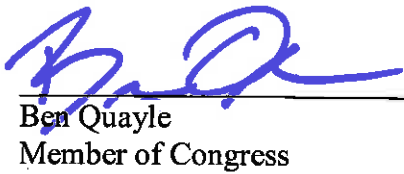
Blake Farenthold  
Member of Congress



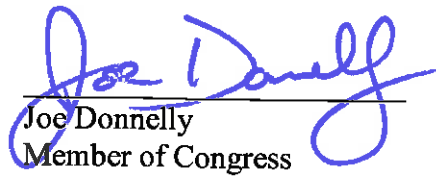
Buck McKeon  
Member of Congress



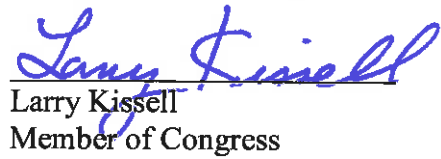
Richard Hanna  
Member of Congress



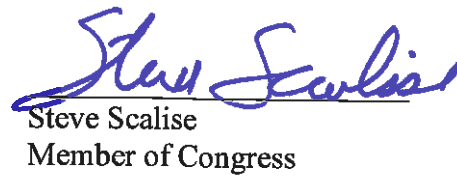
Ben Quayle  
Member of Congress



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