



Committee on Natural Resources U.S. House of Representatives

Chairman Doc Hastings

A LESS SECURE FUTURE FOR RURAL SCHOOLS:

*An Investigation into the Obama Administration's
Questionable Application of the Sequester
to the Secure Rural Schools Program*

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Executive Summary

Secure Rural Schools payments help provide rural counties with funds for teachers, schools, police officers, emergency services, and infrastructure. These payments are necessary because the federal government has failed to live up to its promise to actively manage our forests and provide a stable revenue stream for rural counties containing National Forest land.

The decision to retroactively apply the sequester to these funds and demand repayment from rural counties is another example of the Obama Administration going out of its way to make the spending cuts as “painful as possible.” The automatic fiscal year 2013 budget cuts included as part of the Budget Control Act of 2011, known as the “sequester,” should not have been used as a tool to score political points on the backs of rural schools and communities.

The Majority’s oversight investigation found:

- The Forest Service disbursed FY 2012 SRS money (Title I and Title III) in full with full knowledge the pending FY 2013 sequester.
- Attorneys in the USDA Office of General Counsel had determined in February 2013 that sequestration would not apply to the Title I and Title III money already disbursed because sequestration would apply only to money actually in the SRS accounts on the date sequestration began.
- The White House Office of Management and Budget overruled USDA’s interpretation, leaving USDA and the Forest Service scrambling in March 2013 to figure out how to make up the shortfall and justify the decision to apply the sequester to the Title I and III money already paid to states.
- USDA then chose to implement the sequester in a way that ensured all states and counties receiving SRS money – not just those receiving Title II money – felt the impacts of sequestration.
- OMB ordered USDA to sequester \$17.4, which took money away from rural schools and other vital services in 41 states and Puerto Rico.

Background about the SRS Program and Committee's Oversight

Summary of SRS Program

Under federal law passed in 1908, the U.S. Forest Service has historically shared 25% of all the timber revenues with rural counties containing National Forest land to compensate them for the large amounts of federal land that cannot be taxed. Since that time, these "25% payments" have provided counties with much-needed funding for essential services such as education and infrastructure. However, by the late 1990s timber harvests dramatically declined due to federal overregulation and frivolous lawsuits, prompting Congress in 2000 to pass the Secure Rural Schools and Community Self-Determination Act (SRS).

SRS was created to provide "transition payments" over a six-year period – in lieu of the 25% payments – while Congress worked to increase timber production, or rural counties found an alternative source of revenue. Payments are calculated using a formula based on an average of historic payment levels, the amount of national forest land in the county, and the per capita personal income in each county. Authorized use of the payments is divided into three titles:

- Title I: 85% of the SRS county payment is divided between schools and roads.

The counties are then given the option of using the remaining 15% of the payment to either divide between Title II and Title III, or return funds to the Treasury.

- Title II: Established Resource Advisory Committees (RACs) composed of five people representing diverse interests that are tasked with approving various forest health and other resource-related projects on federal land or on private land that would benefit adjoining federal land.
- Title III: No more than 7% of the payment can be used for "county projects" such as: search and rescue, community service work camps, easement purchases, forest-related educational opportunities, fire prevention and community planning, and community forestry.

SRS payments were also authorized for 18 counties in Western Oregon containing forest lands managed by the Bureau of Land Management (BLM) – known as the "O&C Lands" (named after the Oregon and California Railroad Company to which the lands were

granted and later revested to the federal government) – that were similarly affected by declining forest management and revenues. Payments to these counties are distributed by the BLM within the Department of the Interior.

Though originally authorized for six years, SRS has since been extended several times, including under the Moving Ahead for Progress in the 21st Century Act (“MAP-21”)¹ covering the 2012 SRS payments made in January 2013. Most recently SRS was reauthorized with a one-year extension for fiscal year 2013 as part of H.R. 527, the “Helium Stewardship Act of 2013.” The authorization ended on September 30 and the last payments are expected to be distributed by February of this year (SRS payments have always been disbursed in the following fiscal year: i.e., the FY12 payment was distributed early in FY13).

In September 2013, the House passed H.R. 1526, the “Restoring Healthy Forests for Healthy Communities Act.” If enacted, H.R. 1526 would begin restoring timber harvests on federal lands in order to increase timber revenues and the corresponding 25% payments. Passage of this bill would enable counties to bypass the constant question of whether Congress can fund an extension of SRS payments. H.R. 1526 included an extension of SRS payments for FY 2014 to serve as a transition to restored federal timber harvest.

The Senate has so far failed to take up consideration of H.R. 1526 or any other meaningful legislation to restore sustainable forest management and produce revenues for these rural communities. In the absence of action from the Senate and Obama Administration, the Committee continues to exercise oversight of the SRS program to ensure that counties are able to fully utilize these funds to provide for critical community services as Congress intended.

The Sequestration Decision and Impacts on the SRS Program

On January 15, 2013² Secretary Vilsack announced that the Department of Agriculture would pay the full funding amount of over \$323 million to the 41 states and Puerto Rico that were due to receive SRS payments under Titles I and III; the Department of Agriculture did not disburse any payments under Title II at that time. This announcement was made even as the automatic FY1203 budget cuts required by the Budget Control Act of 2011, known as “sequestration,” were set to go into effect on March

¹ P.L. 112-141.

² Available at: <http://www.fs.fed.us/news/2013/releases/01/schoolfunding.shtml>

1.³ Curiously, as the Department of Agriculture was moving forward with the full payment amount for national forest counties, the BLM had informed the O&C counties in February 2013 that it would be reducing their SRS payments by 10% due to the impending sequester.

After distributing the Title I and III SRS payments, the Forest Service announced on March 19 that it would retroactively apply sequestration to the SRS program and distributed letters to states requesting the return of \$17.9 million in funds that had already been paid out. The letters gave Governors the option either to return a portion of the funds they received, or to have the Forest Service withhold the sequestered amount from Title II payments that were to be distributed by September 2013.

In August 2013, the states were informed of the amount that would be withheld from their Title II payments or the amount that the states would need to repay to the Forest Service to cover sequestration. Of the states that received SRS payments (including Puerto Rico), 13 states did not receive Title II funds and owed the Forest Service approximately \$400,000; 25 states had Title II funds sequestered for a total of \$17.4 million, four of which had Title II funds less than the sequestered amount and owed the Forest Service approximately \$200,000 in addition to their withheld Title II funds. For information about the specific dollar amounts for each state, please see Appendix A.

To summarize, the Obama Administration complied with the law to make a SRS payment authorized in *FY 2012*, but then acted to retroactively apply the *FY2013* sequester to payments that had already been disbursed with the full knowledge that sequestration was set to take effect. This action demonstrates an obvious attempt of the Administration to make the sequester appear as “painful as possible.”

Committee’s Document Requests go Unanswered

The Committee sent document request letters on May 20, 2013 to OMB Director Sylvia Burwell and to Forest Service Chief Tom Tidwell.⁴ Those letters sought records regarding any documents and discussions concerning the decision and legal justification to

³ The Budget Control Act of 2011 required automatic spending cuts of approximately \$1.2 trillion to begin on January 2, 2013, if a broad deficit-reduction agreement developed by the Joint Select Committee on Deficit Reduction was not enacted into law. The January 2 deadline was extended to March 1 by the American Taxpayer Relief Act to give the Joint Select Committee more time to develop an agreement. However, the deadline passed without such an agreement and sequestration went into full effect on March 1, 2013.

⁴ Available at: <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=335221>.

sequester the SRS funds, any alternatives considered, any edits to press releases or talking points, and the decision to impose penalties and interest payments. The Committee also sought from the Forest Service records concerning the announcement on January 15, 2013 that the SRS Title I and III funds would be disbursed in full, and a detailed list identifying actions taken in response to sequestration by the Forest Service for detailees, grants, and training courses or conferences. Both OMB and USDA were given a deadline of June 3 to provide the requested documents.

The deadline passed with none of the requested documents being provided. Follow-up letters were sent on July 18 reiterating the original demands. Secretary Tom Vilsack of the USDA was included as a recipient on the follow-up letter to the Forest Service. Another follow up letter was sent on July 31 to USDA and OMB providing a final opportunity to voluntarily comply.⁵

On August 2, USDA General Counsel Ramona Romero wrote on behalf of USDA and provided a narrative summary of the USDA's legal position and justification. She explained that although the SRS funds are derived from FY 2012 receipts, the disbursement itself occurred in FY 2013, and therefore constituted FY 2013 budget authority. She further explained USDA had decided to "implement the sequestration in the most equitable and least disruptive manner possible, the Forest Service determined that each State should take the same percentage reduction to SRS payments." Her explanation raised questions regarding the amount of discretion USDA had and whether the USDA could have avoided some of the pain had it not applied sequestration across the board.

In a separate letter dated August 2, Forest Service Chief Tidwell provided a list of actions taken in response to sequestration, noting that the Forest Service has not requested the return of any grant moneys, or detailees, and that 124 conferences and training sessions paid for by the Forest Service in the first half of FY 2013 were not affected by the sequester.

OMB also responded on August 2, providing one page of narrative information about the sequester decision. On August 9, OMB provided copies of six guidance memoranda concerning sequestration that were publicly available on the Internet.

None of the responses, however, included internal emails or other documents that would shed light on the inner workings of the Obama Administration or how the decision to apply the sequester was made or how it was implemented.

⁵ Available at: <http://naturalresources.house.gov/uploadedfiles/hastingsletters07-31-13.pdf>.

Lack of Cooperation Prompts Subpoenas

Having received no internal communications or documents from either OMB or USDA that would help explain the rationale behind the sequestration of the SRS funds, subpoenas issued by Chairman Hastings were served on Secretary Vilsack and Director Burwell on September 4, 2013.⁶ Both subpoenas requested the following information:

- All records concerning any legal analysis or policy alternatives prepared or considered in connection to the retroactive sequestration of SRS funds;
- All communications regarding the retroactive sequestration of SRS funds;
- All records, including drafts and any edits thereto, of any press releases, talking points, or communicative documents regarding the retroactive sequestration of SRS funds;
- All records concerning proposed penalties on states for failure to repay the sequestered SRS funds;

Additionally, the subpoena for the USDA sought a fifth category of information:

- All records concerning the timing of the decision to disburse the SRS money to the states.

Both subpoenas established a September 18 deadline for compliance. On September 9, both OMB and USDA sent a letter offering staff briefings instead of the requested documents. The deadline for the subpoenas passed, and having received no documents, the Committee sent two further letters on September 19 stating that Secretary Vilsack and Director Burwell were in violation of the subpoenas.⁷

It was not until the end of September – four months after the original document requests were sent and two weeks after the subpoena deadline had passed – that the Administration began turning over internal documents.

⁶ Available at: <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=347606>.

⁷ Available at: <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=350360>.

On September 26, 2013, OMB provided the first response to the subpoenas consisting of 159 pages. USDA responded on September 30 providing 808 pages of which over 600 were publicly available documents, including multiple copies of original demand letters the Forest Service sent to the states.

Letters were sent to USDA and OMB on November 5, 2013, requesting they inform the Committee about any scheduling conflicts that would prevent Secretary Vilsack and Director Burwell from attending a hearing planned for November 20, 2013. USDA responded on November 8 stating that more documents would arrive soon. On November 12, USDA provided a response consisting of 241 pages. Neither USDA nor OMB identified any scheduling concerns. Hearing no objection from the USDA or OMB, the Committee on November 13, 2013, sent formal invitations to Secretary Vilsack and Director Burwell and issued an official public announcement for a hearing on November 20. Only after this official action was taken and announced did USDA and OMB staff assert the witnesses were unavailable that date.

In response to commitments by both OMB and USDA to complete their responses to the subpoenas, the hearing was postponed on November 18.⁸ Since the postponement of the hearing, OMB has provided four further responses totaling 1,148 additional pages. USDA provided an additional 1,195 pages over the course of four more productions. Since the January 14, 2014 hearing was publicly noticed, USDA has made a further document production and made additional documents available for inspection by Committee staff on January 13, 2014.

However, USDA has refused to make available for inspection an unknown number of documents, including internal Office of General Counsel memoranda, and has not provided a privilege log identifying such documents in violation of the subpoena. OMB has also not fully complied with the terms of the subpoena by continuing to withhold certain internal documents without even making them available for inspection and also refusing to provide a privilege log.

Formal invitation letters for the January 14, 2014 hearing were sent to OMB Deputy Director Brian Deese, Forest Service Chief Tom Tidwell, USDA General Counsel Ramona Romero, and USDA Undersecretary for Natural Resources and Environment Robert Bonnie. USDA on behalf of Ms. Romero and Mr. Tidwell, and OMB on behalf of Mr. Deese have informed the Committee that these invited witnesses would not appear at the hearing.

⁸ See <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=361925>.

Preliminary Findings

The Committee's oversight investigation has identified significant questions about how the decision to apply the sequester to the SRS payments was made, including questions about why the USDA made full payments to states despite the threat of sequestration looming, the legal authority for applying the sequester to the SRS money and why legal advice from USDA attorneys apparently was rejected, and how the Administration's desire to be consistent in applying the sequester across agencies caused economic harm and confusion that could have been avoided.

The Timing of USDA's SRS Payments to States and Internal Confusion about how DOI and USDA Applied the Sequester to the SRS Program

On January 15, 2013, the USDA announced the Forest Service would be disbursing over \$323 million to 41 states and Puerto Rico.

It remains unclear whether the Forest Service or USDA considered the 2012 SRS payments to be subject to possible sequestration – or exempt from sequestration – when they were made in January 2013. If the Forest Service or USDA did think the SRS payments would later be subject to sequestration, it is unclear why then the full payments were disbursed in January with the possibility of sequestration looming. No internal USDA or Forest Service documents, or OMB documents, have been provided to explain the timing of the January announcement and what the Forest Service's views were on sequestration leading up to that decision.

However, OMB and USDA have provided copies of some internal emails and emails between OMB staff and USDA and Forest Service officials that provide some insights into *what* happened – if not fully explaining *why* it happened that way.

Two weeks after the Forest Service made its announcement, an OMB budget official sent an email to a senior Forest Service official that OMB considered the recently made SRS payments subject to sequestration.

For example, on January 30, Kathleen Cahill, a program examiner at OMB, notified the Acting Director of Planning, Budget and Accountability of the Forest Service, Barbara Cooper, that “[b]ased on a lot of discussions and research over here, the [SRS] payments

being made in 2013 for 2012 are sequesterable.”⁹ Ms. Cooper responded that the Forest Service was “working on the impacts of sequestration” and that “the funding to cover the reduction could come from the Title II funds” but that it “would take a decision by the Chief.”¹⁰

The inability of the USDA and Forest Service to arrive at a conclusive approach toward dealing with the impacts of possible sequestration until after the funds were disbursed – and OMB’s desire to apply the sequester consistency with other agencies beyond the SRS program – was a consistent theme uncovered by the Committee’s investigation.

OMB itself had not always been of the mind that the sequester would apply to the SRS program. OMB staff initially thought the sequester would not apply to the 2012 SRS payments even if it could apply to the SRS program in general, because sequestration would apply only at the Treasury Department program, project, and activity account level with FY 2013 budget authority, and the 2012 SRS payments were thought to be covered by 2012 budget authority. The Congressional Budget Office had even scored the 2012 SRS payments as being included in the budget authority for 2012 when Congress reauthorized the SRS program in 2012.

In an internal email sent January 18, an OMB official wrote: “The main question now is: Are these payments from 2012 [budget authority]? I think they are but can you please confirm that. If it is 2012 [budget authority], then the money is not sequesterable but the 2013 [budget authority] is sequesterable in these accounts. Makes sense?”¹¹

In fact, OMB has advised the Department of the Interior in August 2012 that the SRS program would not be subject to sequestration because it was covered by 2012 budget authority.¹²

⁹ January 30, 2013 email at 2:23 PM from Kathleen Cahill, OMB to Barbara Cooper, Forest Service; courtesy copy Susan Spear, Forest Service, Kathleen Graham, USDA, Kathryn Lynn, Forest Service, Leslie Barrack, USDA; Sequestration issues.

¹⁰ January 30, 2013 email at 12:47 PM from Barbara Cooper, Forest Service to Kathleen Cahill, OMB; courtesy copy Susan Spear, Forest Service, Kathleen Graham, USDA, Kathryn Lynn, Forest Service, Leslie Barrack, USDA; RE: Sequestration issues.

¹¹ January 18, 2013 email at 9:30 am from James Hurban to Paul Balsarak and Daniel Schory; courtesy copy to Tricia Hall and Linda Smith (BLM); re :Sequestration Question on Secure Rural Schools.

¹² August 17, 2012 email at 2:31 pm from James Hurban (OMB) to Tricia Hall (DOI) re: Question on SRS PPA disconnect.

OMB, however, later reversed course after the Forest Service had made its payments. At some point in the process OMB concluded instead that sequestration would apply to 2012 SRS payments made in 2013 because staff there determined based on the specifics of MAP-21 that the budget authority to make those payments became effective in the year it was spent, 2013, as opposed to the year the money was authorized by Congress to be spent.¹³

With OMB having concluded that sequestration would apply to the 2012 SRS payments recently disbursed by USDA, an OMB official expressed concerns in a February 1 email string about USDA's decision and the apparent inconsistency with how BLM was handling its SRS money:

I'm troubled by this. I am well aware that I signed off on the USDA SRS apportionment (albeit with considerable misgivings) but I did not think they would obligate it this soon. What is USDA's plan in the event that the sequester order is issued? I would prefer the BLM if USDA hadn't already obligated the lion's share of the funds already. I don't think it makes sense to use two different approaches though.¹⁴

Ms. Cahill of OMB responded, stating:

Forest Service was fully aware that the account was sequesterable but they took our guidance to act as normal and ran with it. They did not seek my guidance prior to issuing the payments. They say how they will handle it will be covered in the operating plan and that the money can come out of the title they have not distributed. However, I have extreme misgivings about this.¹⁵

OMB staff further questioned whether the USDA had made a mistake in paying out the full amount when it did or whether it took a risk that sequestration would not later be applied to the SRS payments. The Committee has not been provided documents that would explain the Forest Service's position on this question.

¹³ January 28, 2013 email at 11:06 am from Jenny Murray to Patrick Locke, Art Stigile, Jessie LaVine, Gail Zimmerman, Teresa Tancre, and Judy Thomas; re: Secure Rural Schools in MAP-21.

¹⁴ February 1, 2013 email at 3:25 pm from Janet Irwin to Daniel Schory; courtesy copy to Kathleen Cahill, Craig Crutchfield, James Hurban; and Adrienne Lucas; Re: Secure Rural Schools and Sequestration Question.

¹⁵ February 1, 2013 email at 3:30 pm from Kathleen Cahill to Janet Irwin, Daniel Schory; courtesy copy to Craig Crutchfield, James Hurban; and Adrienne Lucas; Re: Secure Rural Schools and Sequestration Question.

In a February 4 email discussing the different approaches between the Forest Service and BLM, an OMB official wrote: “Ultimately, what it comes down to is ... [the Forest Service] made an error.”¹⁶

Ms. Cahill promptly responded: “The Forest Service did not make an error. That is not the appropriate word. They opted to pay in full, knowing sequestration could happen. That is not an error.”¹⁷

Legal Advice Contrary to Ultimate Decision

There was also considerable confusion within USDA and the Forest Service about OMB’s directive, between OMB and the Department of the Interior about the Forest Service’s discretion, and questions all around about the legal authority concerning the application of the sequester in the first place and then to cover any sequestered amounts with remaining funds that had not yet been disbursed.

It appears the Forest Service believed that if sequestration occurred, it would not affect money already paid out to states, or if it did, they would not have to demand repayment later. OMB staff questioned the Forest Service’s action compared to the Department of the Interior’s: “The main reason they are treating them differently is the Forest Service opted to follow their normal operations without consulting with DOI or OMB. They made a decision to pay in full, and I hope with the understanding that sequestration could happen.”¹⁸

The Department of the Interior also seemed confused about the Forest Service action. A senior DOI official wrote to OMB’s director of Congressional affairs on February 5 that: “Let’s be clear – we agree with OMB to withhold funds pending sequester – the amount we withhold is a judgment call. The FS release of monies is really not the

¹⁶ February 4, 2013 email at 2:23 pm from Daniel Schory to Kathleen Cahill; courtesy copy to James Hurban; re: Secure Rural Schools and Sequestration Question.

¹⁷ February 4, 2013 email at 2:23 pm from Kathleen Cahill to Daniel Schory; courtesy copy to James Hurban; re: Secure Rural Schools and Sequestration Question.

¹⁸ February 4, 2013 email at 2:30 pm from Kathleen Cahill to Janet Irwin and Daniel Schory; courtesy copy to Craig Crutchfield; James Hurban; Adrienne Lucas; and Jennifer Hoef; re: Secure Rural Schools and Sequestration Question.

determining factor in what we should do. We are being prudent and withholding a portion ... Forest Service was not paying attention – that is there problem.”¹⁹

In Forest Service emails sent on February 4 and 5, Forest Service staff asserted that “at the time of the sequester a decision would be made regarding the need to return sequestered funds based on available balances and other considerations.”²⁰

It also appears that USDA and OMB attorneys were analyzing, should sequestration occur, whether the Anti-Deficiency Act would excuse USDA if it failed to seek the return of money already paid to states. According to a February 6 email, OMB advised:

USDA/FS should consult with counsel about the definition of PPA (program, project, activity) to see if the sequester of payments already made can come from unspent funds in Title II. If not, there would be a “not at fault” ADA violation (the agency acted in good faith at the time.) OMB is also consulting with their counsel since other agencies have similar situations. [Kathleen Cahill] hopes agencies’ and OMB counsel can reach agreement. ***Still to be determined at OMB is whether payments that have been fully obligated can be pulled back. An interesting political issue.***²¹ (Emphasis added)

Similarly, USDA staff stated in an email sent on February 6 that the SRS “payments may need to be pulled back,” but because “the balance of the payments comes from prior year collections . . . it is not clear whether these would be subject to an obligation limitation in the current year, or the following year.”²²

¹⁹ February 5, 2013 email at 6:21 pm from Pam Haze to Christopher Mansour and Kristen Sarri; courtesy copy to Patrick Wilkinson; re: FW: O&C SRS payments.

²⁰ February 4, 2013 email at 4:31 PM from Susan Spear, Forest Service, to David Lippold, USDA; courtesy copy Marianne Okal, USDA, Kathleen Graham, USDA, Sarah Scanlon, USDA, Tim Decoster, Forest Service, Elaine Kohrman, Forest Service; 2013 Sequester Planning; Attachment: FY13_5PercentSequesterTemplate_All_FS_020413.docx.

²¹ February 6, 2013 email at 7:27 am email from Kathleen Graham to Mike Young, Don Bice, Chris Zehren, David Lippold, Marianne Okal, and Jeremy West; re: OMB on SRS sequestration.

²² February 6, 2013 email at 9:40 AM from Chris Zehren, USDA, to Mike Young, USDA, Don Bice, USDA, Diem-Linh Jones, USDA, David Lippold, USDA, Sid Clemans, USDA, Jim Staiert, USDA, Mark Smith, USDA; courtesy copy Sarah Bohl, USDA, Anna Johnson, USDA, Daniel Kuske, USDA, Judith Labiner-Wolde, USDA, Esther Lin, Joanna Rogers, USDA, Jeremy West, USDA, Scott Williams, USDA, Kent York, USDA; Sequestration [sic] Planning Dot Points; Attachment: OMB Sequestration – USDA 2-6-13 (PAD).docx.

An OMB Congressional affairs staffer followed up with the director to ask: “So, where does this leave us since FS wasn’t paying attention?”²³

As the sequestration plans for SRS were being developing, OMB’s Cahill sent an email to Forest Service staff on February 6 seeking answers to a number of questions regarding the possible impact of sequestration of SRS funds already paid out and whether the Forest Service could use Title II to pay for the entire sequester.²⁴

Ms. Cooper of the Forest Service followed up on February 8 to request, on behalf of the USDA’s Office of General Counsel, that Ms. Cahill provide “OMB’s written determination that Secure Rural Schools funds are subject to sequestration.” Ms. Cooper added that conversations were ongoing with the USDA’s attorneys and that a response was in the works, but that leadership in the Forest Service and the USDA’s Office of Budget and Program Analysis (OBPA) would need to be engaged first.²⁵

Ms. Cahill provided OMB’s written justification for applying the sequester to SRS in an email later that day.²⁶

Having analyzed OMB’s arguments, USDA’s legal staff came to a different conclusion and believed sequestration would not apply to the SRS program because the payments had been made before the sequester order was given by OMB.²⁷ A senior USDA attorney even characterized the interactions with OMB as “Madness” and advised, “OMB is saying that for any funds already disbursed in FY 2013, we have to recoup that money from the recipients even though the sequestration law is quite clear that the sequester order applies to the

²³ February 5, 2013 email sent at 6:25 pm from Allie Neill to Kristen Sarri; re

²⁴ February 6, 2013 email at 1:44 pm from Kathleen Cahill to Janet Irwin and Craig Crutchfield; courtesy copy to Adrienne Lucas, Daniel Schory, Jennifer Hoef, and Scott Anchin; re Secure Rural Schools talking points. See also, February 6, 2013 email at 1:49 PM from Kathleen Cahill, OMB to Susan Spear, Forest Service; courtesy copy Kathryn Lynn, Forest Service, Kathleen Graham, USDA, Adrienne Lucas, USDA; re: Impact of Sequestration on Secure Rural Schools.

²⁵ February 8, 2013 email at 9:08 AM from Barbara Cooper, Forest Service to Kathleen Cahill, OMB; courtesy copy Susan Spear, Forest Service, Kathryn Lynn, Forest Service; FW: Impact of Sequestration on Secure Rural Schools.

²⁶ February 8, 2013 email sent at 9:18 pm from Kathleen Cahill to Barbara Cooper; courtesy copy to Susan Spear and Kathryn Lynn; re: Impact of Sequestration on Rural Schools.

²⁷ February 11, 2013 email sent 4:01 pm from Diem-Linh Jones to Mike Young and Don Bice, re: FW Impact of Sequestration on Secure Rural Schools.

amounts in the account at the time of sequestration.”²⁸ In the meantime, senior level meetings occurred between the Office of General Counsel and Office of Budget and Program Analysis to discuss OMB’s position.²⁹

Then in a February 14 email, Ms. Cooper, responded to OMB’s questions for more information by saying that she had “conferred with OGC” and that OGC advised that sequester reductions would not need to occur at the program, project, or activity level, affecting instead only budgetary resources maintained at the account level, as identified in the President’s budget, at the time sequestration occurred.³⁰ Further, Ms. Cooper stated that sequestration would not apply to money already disbursed to states under SRS:

The [Forest Service] will not be using Title II of SRS to cover reductions for Titles I and III, because the funds for Titles I and III have already been disbursed. Because those funds will not be in the SRS account on March 1st, they will not be subject to sequestration and need not be covered by Title II allocations (or by any other budgetary resources that might remain in the SRS account).³¹

A few minutes after this email was sent, a follow-up email was sent stating “HOLD” and that “additional developments” had occurred on the afternoon of February 14.³²

Internal USDA emails reviewed by Committee staff indicate the response to OMB was sent prematurely. In one email, a senior OGC attorney wrote, “Oh, geez. The FS just provided OMB with the written response below, which is counter to what David [Grahn, an

²⁸ February 12, 2013 email sent at 9:35 AM from Benjamin Young, Jr. to Ramona Romero and others OGC; re: Important OMB Sequestration Issue.

²⁹ February 13, 2013 email sent at 2:44 pm by Adam Hermann to Elin Dugan and Benjamin Young, Jr.; re: Impact of Sequestration on Secure Rural Schools.

³⁰ February 14, 2013 email at 2:28 PM from Barbara Cooper, Forest Service to Kathleen Cahill, OMB; courtesy copy Susan Spear, Forest Service, Kathryn Lynn, Forest Service, Kathleen Graham, USDA; RE: Impact of Sequestration on Secure Rural Schools.

³¹ *Id.*

³² February 14, 2013 email at 2:34 PM from Barbara Cooper, Forest Service to Kathleen Cahill, OMB; courtesy copy Susan Spear, Forest Service, Kathryn Lynn, Forest Service, Kathleen Graham, USDA; RE: Impact of Sequestration on Secure Rural Schools.

associate general counsel for food programs] is trying to do!!”³³ and another OGC attorney stated, “FS jumped the gun and blew it.”³⁴

On February 27, Ms. Cahill of OMB sent an email seeking clarification and an update as about the Forest Service’s plans for applying the sequester to SRS funds.³⁵ Kathleen Graham of the OBPA responded that an update would be coming the morning of February 28 as a “number of OSEC meetings on this subject took place [the] afternoon [of February 27].”³⁶

The Committee also has not been given copies of any internal documents concerning the development of the legal advice by USDA attorneys between February 14 and 27 about their review of OMB’s position, describing what occurred at meetings with the Secretary’s Office, or whether an email was ever sent to OMB on February 28.

More Confusion and the Choice to Apply the Sequester as Broadly as Possible

By the end of February and the beginning of March, USDA staff appear resigned to OMB getting its way and having the sequester apply to the SRS program.

According to USDA emails, a meeting between the Secretary, the Natural Resources Conservation Service, and the Forest Service occurred on February 28 in which the Secretary directed staff to use the “7 percent interchange authority” to solve the sequestration issues for SRS.³⁷ Under the interchange authority, the Secretary would be able to move funds between accounts within an agency up to 7 percent to make up for the SRS money paid to states.

³³ February 14, 2013 email sent at 7:40 PM from Elin Dugan to Benjamin Young, Jr.; re: FW: SRS accounting.

³⁴ February 14, 2013 email sent 12:53 PM from Benjamin Young, Jr. to David Grahn; re: FW: SRS accounting.

³⁵ February 27, 2013 email at 5:32 PM from Kathleen Cahill to Barbara Cooper, Forest Service; courtesy copy Susan Spear, Forest Service, Kathryn Lynn, Forest Service, Kathleen Graham, USDA; RE: Impact of Sequestration on Secure Rural Schools.

³⁶ February 27, 2013 email at 5:42 PM from Kathleen Graham, USDA to Kathleen Cahill, OMB, Barbara Cooper, Forest Service; courtesy copy Susan Spear, Forest Service, Kathryn Lynn, Forest Service; RE: Impact of Sequestration on Secure Rural Schools.

³⁷ March 1, 2013 email at 11:00 AM from Diem-Linh Jones to Marianne Okal, USDA, Kathleen Graham, USDA, Leslie Barack, USDA, Nicole Pollard, USDA; courtesy copy David Lippold, USDA; FW: Sample Transfer Letters.

However, the interchange authority for the Forest Service has been repealed by Congress in 2012 as part of a continuing resolution on appropriations, putting a halt to consideration of this option before it got off the ground.³⁸

USDA and the Forest Service then renewed their focus on using the unspent Title II money as a way to make up the shortfalls in Title I and Title III funding due to sequestration. As discussed in the February 6 email from Ms. Cooper of the Forest Service, Chief Tidwell would be authorized to make this decision.³⁹

According to an internal USDA timeline for implementing the sequester that was distributed on March 4, the Forest Service was planning on March 5 to notify all field units to “desist spending Title II funding for Secure Rural Schools. This funding will be needed for the sequestered amount for Title I, II, and III.”⁴⁰ According to the same timeline, the Forest Service was planning to notify states on March 4 that \$16.7 million⁴¹ in SRS money was subject to sequester: “Whereas Title I and Title III funds have already been outlayed, the entire sequestered amount for SRS will come from Title II. This will be an approximately 50% reduction in Title II money. Funding will be proportionally reduced for all states.”⁴²

According to an internal OMB email, USDA reached out to OMB on March 7 seeking advice for implementing the sequester based on concerns by Secretary Vilsack about the “equity” of this approach:

USDA is concerned because not all counties would get Title 2 payments (counties with small payments have the ability to select to participate in that Title). Therefore counties that only get Title 1 and 3 payments might be able to avoid any sequester hit, while counties that selected Title 2 payments will be hit disproportionately harder. Secretary sees this as an equity problem. The FY 2012 Interior appropriations act prohibits the use of the Secretary’s 7

³⁸ March 1, 2013 email at 9:50 AM from Kathleen Graham, USDA to Don Bice, USDA; courtesy copy Diem-Linh Jones, USDA, Marianne Okal, USDA; RE: Sample Transfer Letters.

³⁹ See fn 10.

⁴⁰ March 4, 2013 email at 5:48 PM from Courtney Rowe to Ashley Martin, Carlissia Graham, Patrick Hollmes, Sarah Scanlon, Daniel Christenson, Elvis Cordova, Adela Ramos, Liz Reiter, Franz Hochstrasser, Yeshimebet Abebe, Suzanne Palmierei, Krysa Harden, Todd Campbell, USDA Office of the Secretary; Sequester Timeline.

⁴¹ OMB later revised the amount owed by states upward to \$17.4 million.

⁴² *Id.*

percent transfer authority for the Forest Service. USDA does not see another way to move funds to SRS.⁴³

The following day, a USDA staff person sent an email referencing that two telephone calls had occurred at Office of the Secretary level on the subject of the SRS sequestration and that the process would be “smoother moving forward.”⁴⁴

After the apparent involvement from Secretary Vilsack and additional consultations with OMB, it appears the plan to use only Title II to make up the shortfall was abandoned. According to a revised implementation timeline attached to a March 8 USDA email, it appears USDA was no longer considering making up the SRS sequestration shortfall only from Title II money but instead was “analyzing options for addressing [the sequestration] issue.”⁴⁵

In accordance with Secretary’s desire to ensure that no affected state avoided the pain of sequester, USDA finalized a decision to apply sequestration in a way that would affect *all* SRS funds, including those already paid out under Titles I and III . For the 29 states awaiting disbursements of Title II money, their future payments would be reduced to offset Titles I and III money they had previously received. For the 12 states and Puerto Rico that would not be receiving Title II money, they would be instructed to repay the affected money that had already been disbursed under Titles I and III.⁴⁶

On March 19, the Forest Service announced the decision to claw back portions of Title I and Title III money already paid out to states.

However, a March 20 email from Ms. Cahill suggests this decision was not made by the Forest Service: “Thursday, March 14 – notified FS budget office of new scenario for SRS sequestration. They had not seen the new plan so I faxed them the one pager that Mike provided. Verbal request to update SRS section of the sequester plan.”⁴⁷

⁴³ March 7, 2013 email at 6:19 pm from Adrienne Lucas to Sally Ericsson, Sophie Shulman, Janet Irwin, and Kathleen Cahill; re: Call with USDA on SRS Sequester.

⁴⁴ March 8, 2013 email at 3:31 PM from Patrick Holmes, USDA, to Courtney Rowe, USDA; courtesy copy Charles Lippstreu, USDA, Rachael Dubinsky, USDA; RE: DRAFT Sequester for timeline for next week.

⁴⁵ *Id.*

⁴⁶ March 12, 2013 email at 2:48 PM from Patrick Holmes, USDA to Courtney Rowe, USDA; RE: Interchange letter.

⁴⁷ March 20, 2013 email at 2:30 pm from Kathleen Cahill to Marianne Okal; re: SRS timeline for various deliverables.

OMB's views on sequester remained a subject of discussion within USDA. A senior USDA attorney sent an email to colleagues on March 27 discussing a draft response to a question about legal authority from a Senate staffer: "FYI my draft response to Senate questions that I sent to OMB after talking to them today. The only theory they have still is that the sequester is taken against the full budget amount, and if we don't have the funds, we have to get it back."⁴⁸ A few days later, the same attorney wrote, "It's bad enough OMB is forcing us to get the money back or cut Title II program by approx. 55%."⁴⁹

In April 2013, USDA released a statement of its legal authority to justify the decision to demand states repay SRS money already received under Title I and Title III or to forgo portions of Title II money that is opposite of the legal advice that had been developed and communicated in February 2013 to OMB. The statement stresses the importance of consistency:

Thus, consistent with the application of sequestration across all USDA programs and across the Government as a whole, the amount of the sequester is based upon the full budget authority in the receipts PPA and the Treasury payments PPA for the entire fiscal year, not the amount remaining available on March 1, 2013, the date of the sequester order. . . . In theory, USDA could have taken the sequester against only Title II funds, and not asked for any Title I and Title III money back. However, USDA has determined that in order to ensure equality in the treatment of States, each State should take the same percentage reduction to SRS payments regardless of which Title they are provided pursuant to.⁵⁰

This rationale not only contradicts the advice originally provided by USDA's attorneys but also suggests USDA had discretion in how the sequester was applied to the SRS program.

⁴⁸ March 27, 2013 email sent at 1:25 PM from Benjamin Young, Jr. to Lori Monfort; courtesy copy sent to David Grahn; re: Sequester – Hill question.

⁴⁹ March 30, 2013 email sent at 2:29 PM from Benjamin Young, Jr. to Adam Hermann and Lori Monfort; courtesy copy sent to David Grahn; re: FW: Sequester – Hill question.

⁵⁰ April 3, 2013 email at 2:46 pm from Thelma Strong to Barry Anderson; re: Legality of sequestering SRS funds already allocated to states.

Conclusion

During the course of the Committee's investigation, OMB has provided more than 1,300 pages of documents and USDA more than 2,200 pages of documents, and additional USDA documents have been made available for review by Committee staff. However, neither agency has fully complied with the Committee's subpoenas for documents, as an unknown number of internal documents continue to be withheld by both agencies. In addition, both OMB and USDA have declined to make senior officials specifically invited to testify available at the Committee's January 14, 2014 hearing.

Accordingly, there are a number of important questions that remain unanswered about the motivations and authority for the sequester decisions affecting the SRS program, whether the Obama Administration will continue to pressure states to return FY 2012 money that was paid to them in FY 2013 and later covered by the sequester, and how sequestration will affect the SRS program in future years.

Given the change in USDA's legal analysis, pressure by the White House's OMB, and the choice to apply the sequester of SRS funds as broadly as possible, it is clear that Congress, states, and rural communities were right to question whether these decisions were correct and made for any reason other than to make sequestration as visible and painful as possible in rural communities across the country.

Appendix A

States Without Title II Funds to Cover Sequester		States With Sequester Taken from Title II		Title II Total	
State	Sequester Amount Owed	States With Sequester Taken from Title II	Sequester Amount		
Alabama	\$94,054.37	Alaska	\$93,954.84	\$2,324,245.11	
Georgia	\$79,030.56	Arizona	\$86,135.95	\$1,987,403.54	
Illinois	\$12,947.48	Arkansas	\$460,630.92	\$1,258,203.33	
Indiana	\$13,719.17	California	\$2,168,303.51	\$3,219,737.21	
Maine	\$3,648.36	Colorado	\$786,915.56	\$1,072,180.20	
Nebraska	\$10,037.86	Florida	\$139,103.82	\$179,112.20	
New Hampshire	\$27,883.55	Idaho	\$1,720,989.54	\$3,672,582.05	
New York	\$960.08	Kentucky	\$94,387.88	\$108,096.41	
North Carolina	\$97,026.19	Louisiana	\$117,497.78	\$300,109.26	
North Dakota	\$32.13	Michigan	\$229,491.00	\$282,763.14	
Ohio	\$13,686.33	Minnesota	\$143,027.10	\$237,328.08	
Puerto Rico	\$7,509.87	Mississippi	\$334,078.54	\$437,520.20	
Vermont	\$17,037.37	Missouri	\$175,783.73	\$94,016.41	
Total	\$377,573.32	Montana	\$1,276,381.10	\$2,713,307.28	
		New Mexico	\$624,616.62	\$966,335.37	
		Nevada	\$234,016.46	\$475,907.86	
		Oklahoma	\$62,340.75	\$161,763.98	
		Oregon	\$3,951,295.09	\$7,315,467.14	
		Pennsylvania	\$174,528.14	\$91,479.04	
		South Carolina	\$107,461.46	\$148,939.69	
		South Dakota	\$98,922.53	\$166,759.49	
		Tennessee	\$60,908.81	\$44,708.36	
		Texas	\$144,763.40	\$239,793.71	
		Utah	\$638,401.28	\$930,735.04	
		Virginia	\$85,069.92	\$62,492.02	
		Washington	\$1,284,308.35	\$2,614,773.35	
		West Virginia	\$116,798.95	\$253,380.19	
		Wisconsin	\$120,158.76	\$225,980.39	
		Wyoming	\$259,106.98	\$354,833.34	
		Total	\$17,404,594.77		
Total owed by States from funds already paid out:	\$582,168.09				
Total withheld from States from Title II	\$17,404,594.77				