

ASAP/ESAP Summary

Following a recommendation from a Task Force of local stake holders, the State Water Commission initiated the Available Storage Acreage Program (ASAP) in 1996. This was thought to be the most effective way to quickly obtain flood storage in the Devils Lake basin. Since virtually all land in the basin is privately owned; obtaining flood storage would require landowner cooperation. A budget of \$3 million dollars was established and extensive advertising and public meetings were used to gain storage sites. The sites were to be short term, one to two year contracts, making the program more acceptable to landowners. ASAP expended \$2.6 million in acquiring 159 contracts on 12,950 acres of land. Tracts were 2 to 860 acres in size and held and estimated 20,500 acre-feet of water. While it was first thought that the cost per acre would be approximately the going rental rate, the program had to pay from 190 to 210 percent over rental rates to gain participation. Due to the high cost and short-term nature of ASAP, the State Water Commission changed its approach by creating the Extended Storage Acreage Program (ESAP).

ESAP provides for 10-year water storage contracts and is more efficient and cost effective than ASAP. Based on the number of agreeable landowners, the State Water Commission budgeted \$120,500 for ESAP contracts that are administered through the Devils Lake Joint Water Resource Board. Since the first 10-year contracts are now expiring, the State Water Commission budgeted another \$142,250 to extend for another 10-year period. About 1,000 acre-feet of water is stored on 338 acres by ESAP.

In order to get landowner participation in ASAP and ESAP, it was necessary to have agreements with the four federal agencies that have jurisdiction over wetlands, the Environmental Protection Agency (EPA), Natural Resource Conservation Service (NRCS), U.S. Army, Corps of Engineers (Corps), and U.S. Fish and Wildlife Service (FWS) that would guarantee to landowners that water storage created through the ESAP program, would not be treated as a jurisdictional wetland. This agreement provided landowners until December 31, 2014 to return ESAP sites to pre-project conditions.

The original ESAP contract ended December 31, 2009. In June of 2009, the Water Commission approved funding for ESAP for an additional 10 years. In August of 2009, SWC staff began contacting the four federal agencies about renewal of ESAP and the agreement that prevented ESAP sites from being considered a jurisdictional wetland. The NRCS, Corps, and FWS all agreed to renew the agreement by December of 2009, but the EPA did not respond initially, and after referral of the matter to their legal counsel, needed further time for review.

Throughout the winter and spring of 2010, periodic contact was initiated with the EPA, and it became clear that EPA legal counsel was concerned about three things: verifying that ESAP sites would be returned to pre-project conditions, and not drained further; potential precedent set for the EPA in other wetland jurisdictional issues; and the efficacy of the project in terms of Devils Lake flood control.

In May of 2010, EPA indicated that they would be unable to renew the existing agreement, and that their legal counsel would need to make alterations to the agreement, in order for it to be acceptable. SWC staff will be sending letters out to the other three federal agencies, informing them of the changed project status. At this stage, the next step will be to see what comes out of EPA, and if those proposed changes will be acceptable to the other three agencies and the SWC. Given how long getting this much from the EPA, a resolution, if it is achievable, could be several years away.

In the interim, SWC staff began working on alternatives to continue storing water. What was decided, was to attempt convince landowners to sign a five-year contract, that would store water into 2014.

Initial contacts with landowners have been positive, and a modified agreement will be sent out to project participants in the near future.

If the four federal agencies and SWC are able to reach a consensus on the wetland agreement, it will be possible to extend ESAP further.