

# **Boardman River Dams Settlement Agreement**

**Originally drafted:  
January 20, 2005  
Revised:  
May 16, 2005**

# **Sabin, Boardman, and Brown Bridge Dam Settlement Agreement**

## **Covering FERC Hydroelectric Projects Dams:**

<b>FERC Project Name:</b>	<b>Project Number:</b>
Sabin	2980
Boardman	2979
Brown Bridge	2978

**Executed by:** Michigan Department of Natural Resources  
Michigan Department of Environmental Quality  
United States Department of Interior Fish and Wildlife  
Service  
Michigan Hydro Relicensing Coalition  
Grand Traverse County  
City of Traverse City  
Traverse City Light and Power Department  
Grand Traverse Band of Ottawa and Chippewa Indians

**May 16, 2005**

**IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of -----, 2005.**

\_\_\_\_\_  
Traverse City Light and Power Department Date

\_\_\_\_\_  
City of Traverse City Date

\_\_\_\_\_  
Grand Traverse County Date

\_\_\_\_\_  
Michigan Hydro Relicensing Coalition Date

\_\_\_\_\_  
United States Department of the Interior  
Fish and Wildlife Service Date

\_\_\_\_\_  
Michigan Department of Environmental Quality Date

\_\_\_\_\_  
Michigan Department of Natural Resources Date

\_\_\_\_\_  
Grand Traverse Band of Ottawa and Chippewa Indians Date

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- Appendix 1                      Union Street, Sabin, Boardman, and Brown Bridge Dam locations
- Appendix 2                      Michigan Dam Safety Act MCL 324.31501
- Appendix 3                      Preliminary Restoration Plan for potential Removal of Union Street, Sabin, Boardman, and Brown Bridge Dams on the Boardman River, Grand Traverse County, Michigan
- Appendix 4                      Maintenance Agreement between Traverse City Light and Power Department and Grand Traverse County

## **1. Background Information**

### **1.1. The Applicant and the Projects**

Traverse City Light and Power Department (TCLPD) operates the Sabin, Boardman, and Brown Bridge Projects. The Sabin and Boardman Dams are owned by Grand Traverse County, and Brown Bridge Dam is owned by the City of Traverse City. Therefore, this offer of settlement (Settlement), submitted pursuant to 18 CFR 385.602, concerns only the Sabin, Boardman, and Brown Bridge Projects (collectively referred to as the Boardman River Projects) Federal Energy Regulatory Commission (FERC) license surrender, project decommission, and potential dam removal. The Brown Bridge Project FERC license expires in 2014. The Sabin and Boardman Projects have FERC exempted licenses. TCLPD is the licensee for the Boardman River Projects and the applicant for the surrender applications which include FERC Project No. 2978 (Brown Bridge), 2979 (Boardman), and 2980 (Sabin). TCLPD has decided to surrender the licenses of the Boardman River Projects because they are no longer economic to operate (Appendix 1).

The City of Traverse City also owns and maintains the Union Street Dam. The Union Street Dam is not a FERC licensed project, but has been under MDEQ jurisdiction. The Union Street Dam is a lake level control structure and will be included in the engineering/feasibility study if the City of Traverse City decides it is appropriate.

The Boardman River Projects are located in Grand Traverse County in the Northern Lower Peninsula of Michigan. A map of the Boardman River Basin identifying the location of the project dams in this Settlement can be found in Appendix 1.

### **1.2. The Settlement**

This Settlement was negotiated among the Parties (Michigan Department of Natural Resources, Michigan Department of Environmental Quality, United States Department of Interior Fish and Wildlife Service, Grand Traverse County, the City of Traverse City, TCLPD, the Michigan Hydro Relicensing Coalition, and the Grand Traverse Band of Ottawa and Chippewa Indians) to facilitate the surrender and decommissioning of the Boardman River Projects, and the disposition of the Boardman River Dams.



## 2. General Provisions

### 2.1. Abbreviations and Definitions

#### 2.1.1. Abbreviations

CFR	- Code of Federal Regulations
CORPS	- United States Army Corps of Engineers
FERC	- Federal Energy Regulatory Commission
FPA	- Federal Power Act
FWS	- United States Department of Interior Fish and Wildlife Service
GTB	- Grand Traverse Band of Ottawa and Chippewa Indians
MDEQ	- Michigan Department of Environmental Quality
MDNR	- Michigan Department of Natural Resources
MHRC	- Michigan Hydro Relicensing Coalition
NGO	- Non-Governmental Organization
TCLPD	- Traverse City Light and Power Department
T/E/S	- Threatened/Endangered/Sensitive

#### 2.1.2. Definitions

**Boardman River Dams:** the collective term for Sabin, Boardman, Brown Bridge, and Union Street Dams.

**Boardman River Projects:** Sabin, Boardman, and Brown Bridge hydroelectric facilities.

**Day:** a 24-hour period, midnight to midnight.

**Ex officio advisory member:** an organization or an individual that participates in the settlement implementation process but does not have voting rights.

**Licensee:** Traverse City Light and Power Department.

**Michigan Hydro Relicensing Coalition:** a coalition of Michigan conservation organizations that includes the Anglers of the Au Sable, Michigan United Conservation Clubs, Michigan Council of Trout Unlimited and Great Lakes Council of the Federation of Fly Fishers.

**Parties:** Signatories to the Settlement Agreement: Grand Traverse County, United States Department of the Interior Fish and Wildlife Service, Traverse City Light and Power Department, Michigan Department of Natural Resources, Michigan Department of Environmental Quality, the City of Traverse City, the Michigan Hydro Relicensing Coalition, and the Grand Traverse Band of Ottawa and Chippewa Indians.

**Resource Agencies:** the Michigan Department of Natural Resources, Michigan Department of Environmental Quality, and the United States Department of Interior Fish and Wildlife Service.

**Riparian Lands:** lands adjacent to a water course.

**Settlement:** the Boardman River Dams Settlement Agreement.

**Team:** Boardman River Dams Settlement Agreement Implementation Team as provided for in Section 6 of this document including representatives of Grand Traverse County, the City of Traverse City, TCLPD, the MDNR, GTB, MDEQ, FWS, MHRC, and ex officio advisory members. Ex officio advisory members are non-voting Team members.

**Ad Hoc Committee:** Any individual or organizational representative invited by the Team to participate in meetings and provide council or advice. Ad Hoc Committee members participate in an ex officio advisory capacity, in addition to the ex officio advisory members.

## **2.2. Jurisdiction**

### **2.2.1. The Offer of Settlement**

This Settlement is entered into by the Parties for the Boardman River Projects pursuant to FERC rules, 18 CFR Section 385.602. This Settlement concerns the surrender, decommissioning, and disposition of the Boardman River Projects. The issues to be considered by the Parties in this Settlement Agreement, and through the implementation procedures set forth herein, will ultimately include: land management; water quality; wildlife management; threatened, endangered and sensitive species management; recreation, cultural resources, nuisance species, soil erosion, instream flows, future dam responsibility for the Boardman River Projects and other Settlement implementation matters.

## **2.3. Effect of Offer of Settlement**

### **2.3.1. The Negotiated Settlement**

This Settlement is made upon the express understanding that it constitutes a negotiated Settlement of issues in the above-captioned proceedings, and no Party to the Settlement shall be deemed to have approved, admitted, accepted, agreed to or otherwise consented to any operation, management, valuation or other principle underlying or supposed to underlie any of the matters herein, except as expressly provided herein. Further, the Parties agree that this Settlement shall not be used as a precedent or as an admission with regard to any issue dealt within the Settlement.

### **2.3.2. The Settlement and License Conditions**

For those issues addressed in this Settlement, the Parties agree not to propose, mandate, support or otherwise communicate to FERC any license condition other than those provided for herein, or oppose FERC license

articles which incorporate the provisions described in this Settlement, except as provided for in Section 18 of the Federal Power Act (FPA).

### **2.3.3. Settlement Effective Date**

This Settlement shall become effective upon signature by all Parties. This Settlement may be modified pending the FERC's review. If the FERC issues final orders acknowledging the Settlement with modifications or conditions, this Settlement shall be considered modified to conform to the terms of those orders unless at least one Party indicates to the other Parties in writing within 30 days after the issuance of such orders its objection to the modification, change or condition. The Parties shall then commence negotiations for a period of up to 90 days to resolve the issue(s) and modify the Settlement as needed. If agreement cannot be reached at the end of the ninety (90) day period, the objecting Party may withdraw from the Settlement by notifying the other Parties in writing within 10 days. If any one of the Parties withdraws, this Settlement shall cease to have any force or effect. If this Settlement is modified to conform to the terms of the FERC orders, as discussed above, it shall be considered officially modified on the latest of the following events: the date when all of the rehearing requests on those orders have been denied; if rehearing is not applied for, the date on which the right to seek rehearing expires; the date upon which all of the Parties agree to the modification of the Settlement. The above shall not preclude a Party from seeking rehearing on the modifications or conditions pursuant to 18 C.F.R 385.713 within the prescribed time limits. However, a Party need not seek rehearing prior to withdrawing from this Settlement. The Request for rehearing shall be withdrawn if the Parties subsequently reach agreement on modifying the Settlement. The terms of this Settlement shall continue in effect, subject to the FERC's reserved authority under the license to require modifications until the effective date of any FERC order approving surrender of a project under 18 C.F.R. 6.1. For the purposes of this section, the phase that the FERC issues final orders accepting the Settlement with modifications or conditions includes, but is not limited to, the situation where the FERC issues final orders that do not include all of the conditions of this Settlement because the FERC has determined it lacks jurisdiction over those issues.

#### **2.3.4. FERC Jurisdiction**

In the event that the FERC issues final license orders that do not include all of the conditions of this Settlement because the FERC has determined it lacks jurisdiction over those issues, the Parties agree that they will be bound by the conditions of the entire Settlement. With respect to those conditions over which the FERC does not have jurisdiction or has relinquished its jurisdiction, the Parties agree that the Settlement shall be enforceable in a court of appropriate jurisdiction.

#### **2.3.5. Environmental Resources**

The Parties concur that this Settlement is an agreement that fairly and appropriately addresses, or provides a template for the future resolution of the environmental and natural resource issues associated with the license surrender and decommission of the Boardman River Projects by the FERC. The Parties will, if requested, support this Settlement as fairly and appropriately addressing environmental and natural resource issues before, but not limited to, the FERC.

#### **2.3.6. Schedule of Implementation**

The Parties shall prepare a draft schedule for implementing the studies, plans and actions called for in this Settlement. The schedule shall specify dates for initiation, progress reporting and completion for each study, plan, or action and shall include milestones for major activities. A draft schedule shall be submitted to the ex officio advisory members for review in accordance with Section 6 of this document not later than 120 days after execution of this Settlement by the Parties.

### **2.4. Parties Bound**

This Settlement shall apply to, and be binding on, the Parties and their successors and assigns. However, no Party shall be bound by any part of this Settlement unless the Settlement is approved and made effective as provided for in Section 2.3.3. No change in the status of any Party shall in any way alter any other Party's responsibilities under this Settlement. Each signatory to this Settlement certifies that he or she is authorized to execute this Settlement and legally bind the Party he or she represents.

## **2.5. Anti-Deficiency Provision**

Nothing herein shall be construed to make or authorize any expenditure or obligation of funds in excess of appropriations already made, nor create any cause of action by any party or non-party seeking implementation or funding of any activity described or referenced in this Agreement.

## **3. Project Surrender, Decommission, and Dam Removal**

### **3.1. Project License Surrender**

Upon signature of the Settlement by all Parties, and in accordance with 18 CFR 4.102, 6.1, 385.601, and 385.602:

**3.1.1.** The Parties will distribute the Settlement to the FERC.

**3.1.2.** TCLPD will initiate the process to surrender the licenses and decommission the Boardman River Projects.

**3.1.3.** Within 90 days of the Notices of Intent to Surrender, the TCLPD will file a schedule for submittal of a surrender application.

**3.1.4.** Appropriate Parties will prepare surrender applications for the Boardman River Projects according to the schedule.

**3.1.5.** Upon issuance of the Surrender Order by the FERC, regulatory responsibility over the Sabin, Boardman, and Brown Bridge Dams will be assumed by the appropriate authority under the Michigan Dam Safety Act MCL 324.31506 (Appendix 2), operation and maintenance of Sabin and Boardman Dams will revert to Grand Traverse County, and operation and maintenance of Brown Bridge Dam will revert to the City of Traverse City (Appendix 4).

### **3.2. Project Decommissioning**

The Boardman River Projects shall be decommissioned upon issuance of the Surrender Order. TCLPD will cease to operate all equipment and remove the generators, related electrical equipment, turbines, and guide vanes (only remove guide vanes if they are not needed to regulate water flow) at the Boardman River Projects. The actual structure and such equipment required to regulate flows will remain intact until disposition of the Boardman River Dams is determined.

### **3.3. Disposition of the Boardman River Dams**

A Draft Preliminary Restoration Plan has been prepared that documents the economic and ecologic consequences of the Boardman River Dam removals (Appendix 3). To facilitate decisions on the disposition of the Boardman River Dams, the following steps will be taken by appropriate Team members:

**3.3.1.** Collect community input on the Preliminary Restoration Plan once the Corps review of the Plan is complete.

**3.3.2.** Contract with a consultant to provide an engineering/feasibility study for potential dam removal. The study will evaluate the feasibility of removing Sabin, Boardman, and Brown Bridge Dams. It will also evaluate the feasibility of removing Union Street Dam if the City of Traverse City decides it is appropriate.

**3.3.3.** Prepare an Environmental Assessment and collect community input.

**3.3.4.** The Team will evaluate the engineering/feasibility study and the Environmental Assessment to determine whether or not dam removal is appropriate, and Grand Traverse County and the City of Traverse City will decide whether or not to pursue dam removal. If dam removal is pursued, then the Team will prepare a Removal Plan that includes (but is not limited to) sediment mitigation, erosion control, wildlife management, nuisance species mitigation, fish passage (Union Street Dam maintenance), cultural resources, appropriate permit acquisition, potential relocation of the river channel at the Boardman Pond, resolution of Boardman Pond bottomland ownership and disposition, and resolution of vehicular traffic at Cass Road.

**3.3.5.** Collect community input on the engineering/feasibility study results and decision on the disposition of the Boardman River Dams.

**3.3.6.** Implement the decision on the disposition of the Boardman River Dams.

## **4. Natural Resource Management Issues**

### **4.1. State of Michigan Environmental Regulation**

The TCLPD (until the Surrender Order is issued), Grand Traverse County, and the City of Traverse City shall operate the Boardman River Dams in such a

manner to be in compliance with the Michigan Natural Resources and Environmental Protection Act, MCL 324.101 et. seq. FWS expresses no view whatsoever on the public safety implications associated with operation of the Boardman River Projects pursuant to this Settlement Agreement.

#### **4.2. Recreation**

Grand Traverse County and the City of Traverse City shall continue to provide and maintain appropriate existing recreational facilities associated with their respective Boardman River Dams.

#### **4.3. Threatened, Endangered or Sensitive Species**

The FWS has determined that presently there is a federally listed species (bald eagle) occurring within the vicinity of the Brown Bridge project area. In addition, Grand Traverse County and the City of Traverse City shall notify the resource agencies if any other federal or state listed threatened, endangered or sensitive species are found to occur within the former project boundaries and consult with the resource agencies on the development of a protection plan.

In working with the parties to develop terms and conditions to be proposed to the FERC, the FWS must fully comply with any and all federal statutory and regulatory requirements, including but not necessarily limited to the Endangered Species Act. Nothing herein shall be construed to affect or pre-determine the outcome of any Endangered Species Act, Section 7 Consultation between the FWS and the FERC, or any other federal agency.

#### **4.4. Cultural Resources**

The TCLPD (until the Surrender Order is issued), Grand Traverse County, and the City of Traverse City shall be responsible for compliance with Section 106 of the National Historic Preservation Act, including all State Historic Preservation Officer requirements.

### **5. Funding**

#### **5.1. General Concept**

The Team will collaborate to secure necessary grants and funding for implementing the plans outlined in Section 3.3 of this document.

## **6. Implementation and Oversight**

### **6.1. Project Coordination**

#### **6.1.1. Team Responsibility and Composition**

The Team shall be established to provide for coordination and implementation of the Settlement. The Team shall consist of a single official representative or designate from MDNR, MDEQ, FWS, Grand Traverse County, the City of Traverse City, TCLPD, GTB, MHRC, and ex officio advisory members. The voting Team members shall designate a Chair. If any Party decides to change its Team member, the name, address and telephone number of the successor shall be provided, in writing, to the other Team Members and the FERC Director, Division of Project Compliance and Administration (DPCA) (if applicable), 7 days prior to the date the change becomes effective or as soon after as practical. The Team is subject to the Open Meetings Act and the Freedom of Information Act.

#### **6.1.2. Ex officio Advisory Team Membership and Meeting Notification**

The date, time, and location of Team meetings shall be public noticed and noticed to the ex officio advisory members. The Team may also invite other organizations or individuals to participate as ex officio advisory members. Ex officio advisory Team members do not have voting privileges.

#### **6.1.3. Annual Meetings**

The Team shall have one annual meeting to review activities for the preceding year and, in addition, may have other scheduled meetings throughout the year to provide for the ongoing coordination and implementation of the actions required by this Settlement. The Chair shall be responsible for: (1) setting the date, time and place of the annual meeting and such other meetings of the Team as may be required; (2) noticing the other Team members of any meeting at least 14 days in advance; (3) scheduling a meeting of the Team, if requested in writing by any two members; and (4) making all meeting arrangements, including the recording and dissemination of notes. All meeting items and arrangements shall be provided to the ex officio advisory members at the same time as the Team. A quorum to conduct business shall be defined as any four of the eight voting Team members, at a properly noticed meeting. All decisions will be made by consensus vote of the members of the Team



in attendance at a meeting. For the purpose of this agreement, consensus means you do not need to have a unanimous approval of all voting Team members to make a decision. A voting Team member may disagree with but not oppose a decision for there to be a consensus. If one or more voting Team members oppose a proposed decision, there is no consensus.

#### **6.1.4. Team Meeting Notification**

The date, time and location of Team meetings to review the overall implementation of the Settlement shall also be noticed to the Team at least 14 days in advance and all ex officio advisory members. These individuals, or their designee, may attend Team meetings and participate in an ex officio advisory capacity. These individuals shall each receive a copy of the notes from the Team meetings, regardless of whether they or their designee attended. Provision of notice and notes to the representatives of ex officio advisory members is dependent on those members providing the Team with their respective representative's name and address in writing. The voting Team may, at its option, invite any individual or organizational representative to any of its meetings to serve in a similar ex officio advisory capacity.

#### **6.1.5. Team Communications and Ad Hoc Committees**

Communications among the Parties and all documents, reports, submissions and correspondence concerning activities performed pursuant to the terms and conditions of this Settlement shall be directed through the Team. The Team will meet as often as is necessary to provide for the implementation of the terms and conditions of this Settlement. The Team may, at its option, invite any individual or organizational representative to any of its meetings for advice and participation in an ex officio advisory capacity, in addition to the ex officio advisory members. The Team may also form ad hoc committees that include other employees, interested entities, contractors or consultants to pursue and/or monitor any actions required by or resulting from this Settlement. The Team shall periodically inform all interested entities, as may be identified, regarding their progress and actions taken to implement this Settlement. Nothing herein shall require FWS to take any action or engage in any process which will result in a violation of any federal statutory or regulatory requirement, including but not limited to the Federal Records Act, the Freedom of Information Act, and the Federal Advisory Committee Act.

This information may be provided in a written or meeting format. The frequency of these periodic reports will be determined at the Team meetings described in Section 6.1.4 of this document.

## **6.2. Dispute Resolution**

### **6.2.1. Mediation/Facilitation**

In the event that a dispute arises with the terms and conditions of this Settlement, the voting Team agrees to engage in good faith negotiations for a period of 90 days unless extended by written agreement of the voting Team members. The negotiations shall be initiated by either the Chair or the aggrieved voting Team member. In the event that resolution cannot be reached by the voting Team, it shall engage the services of a third party mediator/facilitator or other agreed upon entity. The voting Team and facilitator shall agree on the schedule for achieving a resolution under this process. All voting Team members shall share in the cost of the mediator/facilitator, with the total cost and distribution agreed upon by the voting Team prior to initiating the process, subject to available appropriated funds, with respect to any government agency that is a member of the voting Team.

## **7. Governing Law**

**7.1.** This Settlement shall be governed by and interpreted in accordance with the laws of the State of Michigan and applicable federal law.

## **8. Waiver**

**8.1.** No waiver of any of the provisions of this Settlement shall be deemed or shall constitute a waiver of any other provisions of this Settlement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

## **9. Severability**

**9.1.** If any term or other provision of this Settlement is invalid, illegal or incapable of being enforced under any rule of law, all other conditions and provisions of this Settlement shall nevertheless remain in full force and effect.

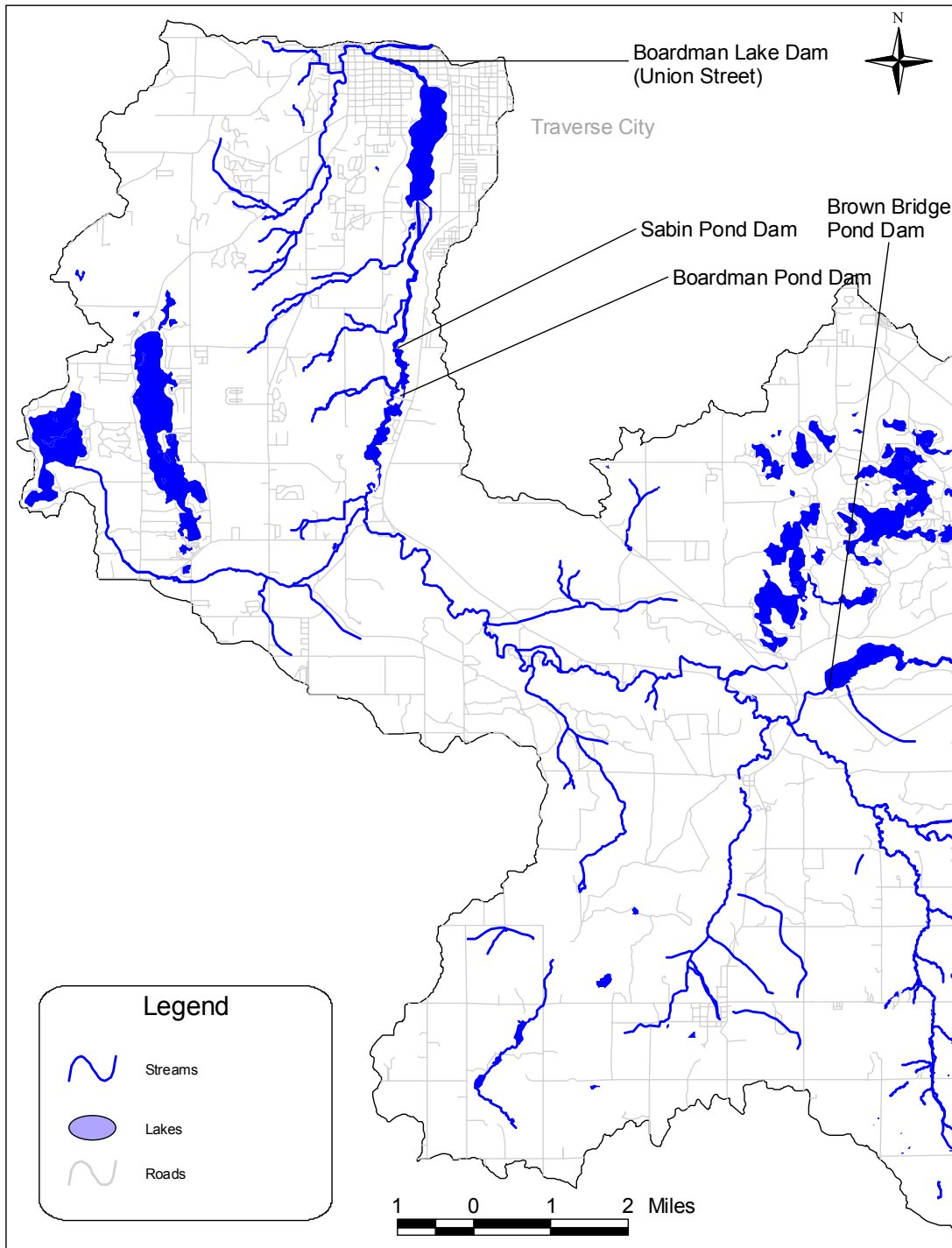
## **10. Hold Harmless**

**10.1.** The Parties agree to use good faith and their best efforts to fulfill their obligations under this agreement. Grand Traverse County, the City of Traverse City, TCLPD, the GTB, and MHRC will indemnify and hold each other harmless against all losses, damages, costs, and expenses, including reasonable attorney fees, resulting from any breach of any warranty, representation, or covenant contained in this agreement. The DEQ and DNR shall be held harmless against all losses, damages, costs, and expenses, including reasonable attorney fees, resulting from any breach of any warranty, representation, or covenant contained in this agreement.

## **11. Termination of the Settlement Agreement**

**11.1.** This Settlement Agreement shall be terminated at any time by agreement of all the Parties except that FWS may terminate its own involvement in this agreement by providing written notice to all other parties.

Appendix 1. Union Street, Sabin, Boardman, and Brown Bridge Dam Locations.  
Source: Michigan Department of Natural Resources, unpublished data.



Appendix 2. Michigan Dam Safety Act MCL 324.31501. (Will be attached to the final draft that will be sent to FERC).

Appendix 3. Preliminary Restoration Plan for the Potential Removal of Union Street, Boardman, Sabin, and Brown Bridge Dams on the Boardman River, Grand Traverse County, Michigan. (Will be attached to the final draft that will be sent to FERC).

Appendix 4. Maintenance Agreement between Traverse City Light and Power Department and Grand Traverse County. (Will be attached to the final draft that will be sent to FERC).