



PROCEDURES REGARDING DISCLOSURE AND CONFIDENTIALITY

Recognizing that Chapter I, Article II, Section 4(a) of Appendix I of the Protocol of Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank (the "Charter") requires the Border Environment Cooperation Commission (BECC) to establish procedures to ensure, to the extent possible, public availability of documentary information on all projects for which a request for assistance or an application for certification is made; and

Mindful that Chapter I, Article III, Section 8(a) of the Charter prohibits the BECC from making public information with respect to which a Party to the Charter has notified the BECC that public disclosure would impede its law enforcement; that Chapter I, Article III, Section 8(b) of the Charter requires that the BECC establish regulations to protect from disclosure business or proprietary information and information the disclosure of which would violate personal privacy or the confidentiality of government decision-making; and

Noting that Chapter I, Article III, Section 8(c) of the Charter permits a party that requests assistance or submits an application for certification to the BECC to request that information contained therein be designated confidential by the BECC, and may request an advance determination from the BECC as to whether such information is entitled to confidentiality pursuant to Chapter I, Article III, Section 8(b); that if the BECC determines that such information is not entitled to confidentiality pursuant to Section 8(b), the party may withdraw its request or application prior to further action by the BECC; that upon withdrawal, the BECC shall not keep a copy of the information or make public that it received such a request or application; and

Affirming the policy of the BECC that, all the documentary information in the possession of the BECC will be available for disclosure to the public, unless it is information that is designated confidential under the Charter or pursuant to these Procedures; and

Convinced that documentary information on all projects for which a request for assistance or financing from the North American Development Bank (NADB) is made should also be available to the public, subject to the same limitations on disclosure applicable to the BECC;

Recognizing that Chapter III, Article VII, Section 1 of the Charter establishes that the Board of Directors may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the BECC and the NADB;

The Board of Directors of the Border Environment Cooperation Commission and North American Development Bank adopts the following Procedures:

ARTICLE I: DEFINITIONS

(a) Business or Proprietary Information. Trade secrets or commercial or financial information provided to the BECC or NADB by the party requesting a confidentiality designation that:

- (1) is privileged and confidential;
- (2) has not been released to any person or organization other than the BECC or NADB, a national or sub-national government of the United States or Mexico, as required by law, or a person or organization that is bound by a confidentiality agreement with respect to the information; and
- (3) if disclosed would be reasonably likely to cause substantial harm to the competitive or economic position of the party; or information that is the subject of an application for a patent.

(b) Trade Secret, Commercial or Financial Information. For purposes of paragraph (a) above, the term "trade secret" is a secret, commercially valuable plan, formula, process or device used for the making, preparing, compounding or processing of trade commodities, and which is the result of either innovation or substantial effort, and the identity of which is not readily discoverable through reverse engineering; For purposes of paragraph (a) above, the term "commercial or financial information" might include, for example, business sales statistics, research data, innovative technologies or designs, customer and supplier lists, internal operating costs, information on internal financial conditions, and information used in the bidding process for contracting and sub-contracting.

(c) Notwithstanding the definition of "business or proprietary information" in Article I(a), information concerning a hazardous chemical, extremely hazardous substance, or toxic chemical (as defined by the domestic law of either Party) that could be used, transferred or released by a project for which the BECC or NADB has received a request for assistance or an application for certification or financing and such use, transfer or release could result in a significant environmental effect under Chapter I, Article II, Section 3(c) of the Charter, shall not be considered business or proprietary information by the BECC or NADB under these procedures, with the exception that the specific chemical identity may be designated confidential as a trade secret by the BECC or NADB if it meets all of the requirements of Article I(a) and (b) of these Procedures.

(d) Specific Chemical Identity. For purposes of subparagraph (c) above, the term "specific chemical identity" includes the chemical name and other specific identification, but does not include the generic class or category of the hazardous chemical, extremely hazardous substance or toxic chemical.

(e) Government Decision-making. Internal, pre-decisional deliberations or analyses relating to a project or proposed project and generated by any national or sub-

national governmental agency of either Party. For purposes of determining whether or not information is pre-decisional, a decision on a matter will be deemed to have been taken when an agency official with either original or delegated authority to take final agency action on the matter, has in fact taken such action. The final agency decision will be available to the public.

ARTICLE II: PUBLIC ACCESS TO INFORMATION

(a) All documentary information in the possession of the BECC shall be available to the public during normal business hours at BECC Headquarters, and all documentary information in the possession of NADB shall be available to the public during normal business hours at NADB Headquarters, unless the information is:

(1) confidential under Chapter I, Article III, Section 8(a) of the Charter, which states that the BECC shall not make public information if the Government of the United States of America or of the United Mexican States notifies the BECC that public disclosure of the information would impede its law enforcement;

(2) determined by the BECC or NADB, acting independently or at the request of a party submitting information to the BECC or NADB, to be confidential under the Charter and pursuant to Article I of these Procedures as business or proprietary information, or information the disclosure of which would violate personal privacy or the confidentiality of government decision-making;

(3) designated confidential pursuant to the Charter and through the process established by Articles III and IV of these Procedures as business or proprietary information, or information the disclosure of which would violate personal privacy or the confidentiality of government decision-making; or

(4) confidential in accordance with Article VI of these Procedures.

(b) Such non-confidential documentary information not designated or otherwise determined to be confidential shall be available to the public by mail or by photocopying at BECC or NADB Headquarters. Copies of the first ten pages of any particular request (e.g., file on project application for certification) shall be provided free of cost. Copies of additional pages shall be available at a cost to be determined by the BECC General Manager or NADB Managing Director, provided that only current costs of duplication are reflected.

(c) Requests for information shall be processed by the BECC or NADB in the order received.

(d) No project shall be recommended or considered for certification or financing until all claims of confidentiality are fully resolved.

ARTICLE III: REQUEST FOR CONFIDENTIALITY DESIGNATION

(a) A party who requests assistance or submits an application to the BECC or NADB may request that the BECC or NADB designate as confidential, in accordance with Chapter I, Article III, Section 8(c) of the Charter, all or part of the information provided by the party in its request or application. The party must provide sufficient supporting information justifying the requested confidentiality designation.

(b) Supporting information under Article IV, Section (a) of these Procedures shall include:

(1) clear identification of exactly what information (e.g., page and paragraph) the party requests be designated confidential;

(2) clearly stated justification for each category of information for which a confidentiality designation is requested including:

(i) if the information is claimed to be business or proprietary information under Chapter I, Article III, Section 8(b) of the Charter, how the information is reasonably likely to cause substantial harm to the competitive position of the party; and

(ii) if the information is claimed to be confidential under government decision-making, the nature of the claim and to which aspect(s) of the project it pertains; and

(3) a written statement that information for which a confidentiality designation is requested is not otherwise available to the public, including through news media articles, public corporate reports or mandatory disclosure to the public under federal, state or local statutes, and that the information will not be made available to the public pending the BECC General Manager's or the NADB Managing Director's decision on confidentiality.

(c) For information designated confidential, the BECC's General Manager or the NADB Managing Director shall prepare a written statement to be included for public review, upon request, in the file on the proposed project which shall include the category or categories of information withheld and the reasons why the information is confidential.

(d) Pending review and determination by the BECC or NADB, including the Board of Directors, information for which a confidentiality designation is requested shall be designated confidential and shall not be disclosed to the public by the BECC or NADB.

(e) If a request concerns government decision-making documents, neither the BECC's General Manager nor the NADB's Managing Director may release such information unless all three of the members of the Board of Directors representing the agencies of the federal government to which the documents relate, appointed under Chapter III, Article II, Sections 1 - 6, approve.

ARTICLE IV: RESPONSE TO REQUEST FOR CONFIDENTIALITY DESIGNATION

(a) Within thirty days of receipt of a request for confidentiality designation, the BECC General Manager or the NADB Managing Director, in consultation with his/her respective General Counsel, shall determine whether the information, in whole or in part, shall be designated confidential. The BECC General Manager or NADB Managing Director, if necessary to fully and fairly assess the requested confidentiality designation, may request additional information from the party or from other sources, including national or sub-national governments.

(b) The party requesting a confidentiality designation shall be informed of the determination of the BECC's General Manager or NADB Managing Director and provided with a written explanation of that determination, by certified mail, return receipt requested, or by facsimile.

(c) In exceptional circumstances (e.g., awaiting more information from the party or from other sources), the BECC's General Manager or NADB Managing Director may take over thirty days to make a determination on the requested designation.

(d) If the BECC's General Manager or NADB Managing Director determines that information for which a confidentiality designation is requested will not be designated confidential, and so notifies the party requesting the designation, the party may withdraw its request for assistance or, application for certification or financing prior to further action by the BECC or NADB, or may withdraw from its request for assistance or application only the particular information for which a confidentiality designation was requested. If particular information for which a confidentiality designation was requested and denied is withdrawn by the party requesting the designation, the BECC or NADB shall not consider it in assessing the party's request for assistance or, application for certification or financing.

(e) Upon withdrawal of a request for assistance or application for certification or financing, the BECC and NADB shall not keep any copy of the request or application and shall not make public that it received such a request or application. Upon withdrawal of particular information from a request for assistance or application, the BECC and NADB shall not keep any copy of the information withdrawn, and shall not make public that it received the information.

ARTICLE V: APPEALS

(a) A party whose request for documentary information pursuant to Chapter I, Article II, Section 4(a) of the Charter is denied in whole or in part by the BECC's General Manager or NADB Managing Director, shall be provided with a copy of the file statement prepared by the BECC's General Manager or NADB Managing Director under Article III(c) of these Procedures which includes the category or categories of information withheld and the reasons why the information is confidential, and may appeal to the Board of Directors.

(b) A party requesting a confidentiality designation, and whose request was denied in whole or in part by the BECC's General Manager or NADB Managing Director,

may appeal to the Board of Directors any determination of the BECC's General Manager or NADB Managing Director.

(c) Appeals must be presented to the Board of Directors, and contain a precise statement concerning why the party is appealing the BECC General Manager's or NADB Managing Director's decision. The appeal should be sent to the Chairperson of the Board of Directors, through the BECC's General Manager or NADB Managing Director, within thirty days of receipt by the party making the request of notification of the BECC General Manager's or NADB Managing Director's decision. The party appealing shall be notified that the appeal has been received and forwarded to the Chairperson of the Board of Directors.

(d) Appeals may be submitted to the Board of Directors in English or Spanish, and the BECC or NADB shall be allowed a reasonable time to translate the appeal into the other official language before the appeal is ready for consideration by the Board of Directors.

(e) The Board of Directors shall strive to issue a decision concerning each appeal by its next meeting following receipt of the appeal and, if necessary, translation. Before issuing a decision, the Board of Directors may confer on the appeal, and may meet privately with the party submitting the appeal. Once the Board reaches a decision it shall notify the parties involved of its reasons for making the decision, in writing and by certified mail.

ARTICLE VI: OTHER CATEGORIES OF INFORMATION PROTECTED FROM DISCLOSURE

(a) The following information shall not be made public unless otherwise designated for disclosure by the BECC's General Manager, NADB Managing Director or the Board of Directors:

(1) internal, predecisional deliberations or analyses prepared by the BECC or by NADB to assist a BECC official or a NADB official who has authority to make a final decision on a particular matter make a decision on that matter, including all attorney-client communications or attorney work product material or documents in the possession of the BECC or NADB prepared to assist the BECC or NADB in making a final decision;

(2) internal BECC or NADB documents relating to BECC or NADB personnel, including performance reviews and other personal information;

(3) all documents prepared for discussion purposes for the Board of Directors at its meetings, or documents prepared for discussion purposes for any committee of the Board of Directors, unless the Board of Directors explicitly states that all or part of these documents may be made available to the public.

(b) Information already designated confidential pursuant to these Procedures and protected by a confidentiality agreement between the BECC or NADB and another party, shall not be made public.

ARTICLE VII: NONCOMPLIANCE AND SANCTIONS

(a) If, under any circumstances, BECC or NADB officials or employees make any information designated as confidential available to a third party, any information concerning which a request for designation of confidentiality is pending decision by the BECC's General Manager or NADB Managing Director, or any information that is the subject of an appeal to the Board of Directors pursuant to these Procedures, or that in accordance with Article V of these Procedures may become the subject of such an appeal, the BECC's General Manager or NADB Managing Director may apply any of the following sanctions:

- (1) verbal warning;
- (2) written warning;
- (3) temporary suspension of employment without pay. The duration of the suspension without pay will be determined on a case-by-case basis;
- (4) termination of employment.

(b) If the BECC's General Manager, the BECC's Deputy General Manager, the NADB Managing Director, the NADB Deputy Managing Director or any member of the Board of Directors makes any of the categories of information designated as confidential listed in Article VII(a) of these Procedures available to a third party, the Board of Directors shall have sole jurisdiction over the issue and any sanctions to be applied.