

Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement

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Mekong River Commission

**Guidelines on Implementation
of the Procedures for Notification, Prior
Consultation and Agreement**

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Mekong River Commission Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement

Pursuant to the Mekong River Commission (MRC) Council Resolution of 18 October 1999 on the Water Utilization Programme and its subsequent approval of the Procedures for Notification, Prior Consultation and Agreement (PNPCA) on 13 November 2003 at its 10th Meeting, the MRC Joint Committee (JC) does hereby approve the following Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement (G-PNPCA) as a complimentary and supplementary document to the PNPCA.¹ The purpose of these Guidelines is to facilitate the implementation of the PNPCA as well as to address issues or points of the PNPCA requiring clarification or elaboration and they are to be applied in conjunction with the PNPCA.²

I. National Mekong Committee’s (NMC) preparation and submission of Notification, Prior Consultation and Agreement (NPCA) under the PNPCA

A. Notification³

- 1. Timely submission of notification by NMC to the MRC Joint Committee “prior to implementation” is required by Sections 4.1.1, 4.4 and 4.5⁴.**

Time of submission should be flexible, acknowledging that the MRC Secretariat requests up to one month in advance of intended implementation to allow for internal processing and distribution to the other member States⁵.

- 2. Format and content of notification submission:**

The format/content of the submission is described in Section 4.2 using the form/format as set out in Annex I of the PNPCA.⁶

Submission is to be provided in English⁷. Regarding the inclusion of the

¹ It is understood that these and other MRC guidelines should not be “stand-alone” documents and must be read in conjunction with respective Procedures/Rules.

² If some issues are raised that are not addressed in the PNPCA or these Guidelines, such as clarification or application of the terms “wet and dry season”, “water use/utilization” and “Mekong Tributary”, these would be resolved by the MRC Joint Committee on a case-by-case basis.

³ Notification is addressed in Section 4 of PNPCA. Only two issues need clarification as set out in the G-PNPCA – “timely submission” and “content of submission”; the other portions of Section 4 are self-explanatory.

⁴ The section numbers used in the G-PNPCA are as they appear in the PNPCA.

⁵ In actual practice since the first “notification” was submitted in November 1995 to the present, most all submissions were made 2-6 months in advance of the start-up dates of the proposed use project.

⁶ Section 4.2.1 identifies the content to “include feasibility study report, implementation plan, schedule and all available data.” with Section 4.2.2 providing the form/format in Annex I.

⁷ In actual practice since the first “notification” submitted in November 1995 to the present, all submissions have been in English

“feasibility study report”, a summary of the study and only relevant portions are acceptable as being sufficient and practical. The data required for Notification shall be “relevant available data”.⁸

3. Roles/functions/responsibilities of the NMCs⁹:

The roles/functions/responsibilities to be followed by NMCs are set out in Section 4.3.1 include informing the relevant line agencies of notification application to a proposed use and requirements;¹⁰ reviewing and checking the Notification prepared by the line agencies for compliance with Sections 4.1 and 4.2;¹¹ and, assembling, recording and transmitting the Notification and documentation to the MRC Secretariat on behalf of the MRC Joint Committee as specified in Section 4.4.¹²

The NMCs may be requested by the MRC Joint Committee to provide additional assistance or data and information as may be asked for by members of the MRC Joint Committee.

⁸ It has been agreed that submissions should only include summaries of relevant matters from the feasibility studies, etc., (partly due to translation costs of entire reports). It was noted that most feasibility study reports already include an EIA or IEE; and in large-scale projects the EIA is prepared in a separate document. It was also noted that the format and content of the feasibility study conducted in one country may be different from another, and feasibility studies carried out for government or local projects may be different from that prepared for international support projects. A practical understanding of the phrase “and all available data” in Section 4.2.1 is that an effort be made to provide sufficient “relevant” data, meaning the data necessary for the notified parties to be informed of and to understand the proposed project and use of water to determine impacts upon them, e.g., data relevant to the notified parties, not the notifying party. If additional information or data is requested by a notified party(ies), it will be provided by the notifying party(ies) in the language of the notifying party if that information or data is not available in English. If a translation is requested by the notified party(ies), the cost will be borne by the requesting party(ies). If the Joint Committee considers that these Guidelines are inconsistent with the PNPCA, it is suggested that the PNPCA Section 4.2.1 be amended i.e. “1. summaries of the feasibility study and other relevant reports, and 2. relevant available data”.

⁹ Section 4.3 addresses the “Institutional Mechanism for Notification”. Aside from the brief clarification of the role of the NMCs noted in these Guidelines, Sub-sections 4.3.1, 4.3.2, and 4.3.3 are clear and need no further explanation. The MRC Secretariat internal procedures for processing submission under the PNPCA provide details on handling notification and prior consultation submissions within the MRC Secretariat and the data and records maintained. Sections 4.4, 4.5 and 4.6 are self-explanatory and need no further elaboration except as noted in Para. 1 above.

¹⁰ This is the first step in implementation of the PNPCA for types of proposed uses subject to notification. The responsibility of the NMCs is to inform relevant line agencies of what proposed uses and projects within their respective jurisdiction requires notification.

¹¹ The primary responsibility for insuring the completeness of notification submissions to the MRC rests with the NMCs. After meeting requirements of Sections 4.1 and 4.2, the documentation would be submitted to MRC Secretariat.

¹² By transmitting notification to MRC Joint Committee through the MRC Secretariat, the process of the NMCs under notification is completed. It does imply that NMCs put into place a systematic record of the Notifications at the NMC. A similar record system should be made of submissions made by other parties and copied to the NMC. The MRC Secretariat internal register for notifications and prior consultations will contain a systematic computerized database record of all notifications submitted; this or a modified system could be adapted by the NMCs for their internal use.

B. Prior Consultation¹³

- 1. Timely submission by NMC to the MRC Joint Committee through the MRC Secretariat of the prior consultation is required by Sections 5.2.1, 5.4.1 and 5.5. The submission will be subsequently provided by the MRC Secretariat to other member States for their evaluation and reply**

Section 5.5.1 of the PNPCA allows at least 6 months from the date of receiving the documents for member States to review and carry out their “due diligence”.¹⁴ Therefore submission to the MRC Joint Committee must be at least 6 months prior to commencement of project implementation, preferably greater, acknowledging that the MRC Secretariat requests up to one month in advance of intended implementation to allow for internal processing and distribution to the other member States.¹⁵

- 2. Format and content for prior consultation submissions is described in Section 5.2.2.¹⁶**

In addition to the same documentation and format in English as for notification described in I.A.2 above, submissions for prior consultation shall include:

- a) Summary of the impact assessment documents, i.e. EIA or IEE; and,
- b) Additional available technical data to enable the notified parties to carry out their evaluation and reply as described in Section 5.4.2 of the PNPCA.

¹³ Types of proposed uses requiring prior consultation are set out in Section 5.1 as inter-basin diversions from the mainstream during the wet season, intra-basin uses from the mainstream during the dry season, and inter-basin diversions of surplus quantities of water during the dry season. No further details on the types of proposed uses under prior consultation category are necessary. Since there have been no submissions under prior consultation category as of the date of signing of these Guidelines, This Section 5 of the PNPCA should be intensively reviewed after several submissions have been made to determine its practicality and in meeting the principles set out in Section 3.

¹⁴ Due diligence is an internationally recognized legal standard of “appropriate carefulness” to limit liability or determine a potential cause harm to one’s rights and interest; it is the degree of care that a prudent person or state would exercise under the same or similar circumstances.

¹⁵ In effect, a prior consultation submission should at a minimum be at least 6 months before intended commencement of project implementation taking into account that the MRC Secretariat needs up to one month for its internal process. In actual practice, it is likely that projects for proposed water uses falling within the “prior consultation” category would be submitted far in advance of the intended start-up date because they are long-term large scale projects requiring considerable technical, economic, social and impact analyses (inter-basin diversions from mainstream in the wet season, intra-basin water uses during the dry season, and inter-basin diversion in the dry season of surplus waters).

¹⁶ This includes documentation required for notification and “available and additional technical data and information on its proposed use of waters for an evaluation of impacts by other riparian States” using the form/format set out in Annex II of the PNPCA. The documentation content for a prior consultation submission is more extensive than documentation required for notification. The rationale is that prior consultation category projects are more likely to have a significant impact on the mainstream of the Mekong River and should afford the other member States the opportunity to evaluate and comment on the proposed use, carry out their obligation to do “due diligence” to assess any adverse impacts upon their rights and interests as riparian States, and provide their reply to the MRC JC with the intent that an agreement will be reached and there is no objection to the project from notified parties or to avoid perceived harm to the rights and interests of the notified parties. The intent of the 1995 Mekong Agreement was also to afford the parties the opportunity in reaching an agreement in extending the multi-party benefits of proposed projects to achieve an optimum use and prevention of waste of water (note definition of “Agreement” in Chapter II, 1995 Mekong Agreement). This differs from the “specific agreement addressed in Section 6 of the PNPCA.

3. Roles/functions/responsibilities of NMCs for Prior Consultation:

The roles/functions/responsibilities of NMCs are set out in Section 5.3.1 and need no further clarification or elaboration¹⁷.

C. Specific Agreement

The member State(s) which has/have the proposed inter-basin project during the dry season from the mainstream shall prepare the necessary request and documentation using the format and content of the prior consultation process for such a project and submit it to the MRC Joint Committee through the MRC Secretariat. The process initially applied would be that the country or countries would notify the MRC Joint Committee by letter and attached documentation requesting the MRC Joint Committee to initiate, on a case-by-case basis, the consultation process leading to a Specific Agreement. The MRC Joint Committee may request the notifying member State(s) for any assistance and facilitation during its deliberations in arriving at a Specific Agreement.

II. MRC Secretariat roles and internal procedures¹⁸

Provision of the PNPCA concerning the roles and functions of the MRC Secretariat on any submission under the Procedures is set out in MRC Secretariat internal procedures.

MRC Secretariat shall prepare internal procedures relating to receiving, processing, recording and transmitting notification and prior consultation submissions and facilitating the MRC Joint Committee in carrying out its tasks as set out in Sections 4.3.3, 4.6, 5.3.3, 5.4.2, 5.4.3 and 5.6, and reporting annually to the MRC Joint Committee on the PNPCA implementation process as set out in Section 7.b.

The MRC Secretariat will carry out further instructions or directives of the MRC Joint Committee to assist and facilitate implementation of the PNPCA in accordance with, but not limited to, the roles/functions/responsibilities listed in the PNPCA, and take a pro-active role to assist the MRC Joint Committee and member countries in the overall implementation of the 1995 Mekong Agreement.

¹⁷ As noted in footnote 10 above, this is also the first step in implementation of the PNPCA for types of proposed uses subject to prior consultation. The responsibility of the NMCs to inform relevant line agencies of what proposed uses and projects within their respective jurisdiction will require prior consultation. The primary responsibility for insuring the completeness of prior consultation submissions to the MRC Joint Committee rests with the NMCs. Only after meeting the requirements of Sections 5.1 and 5.2 should the documentation be transmitted to the MRC Secretariat. The process of prior consultation differs from notification in that other member States have the right and opportunity to comment on a proposed use under this process, and to request through the MRC Joint Committee: additional data and information, consultations with and presentations by the member State(s) proposing the use, evaluations by the notified State(s) or MRC Secretariat, and site visits. For these activities and other assistance, the respective NMC will respond to the request from the MRC Joint Committee. Since the prior consultation process may extend over a considerable period of time, the respective NMC would be actively involved until the MRC Joint Committee determines the submission complete, all parties satisfied with the proposed use, and a consensus or an agreement is reached by the MRC Joint Committee.

¹⁸ The detailed process to be followed internally by the MRC Secretariat for undertaking its roles/functions/responsibilities in sections 4.3.2 and 5.3.2 is set out in a separate document adopted by the MRC Secretariat and periodically reviewed and revised to assure optimum support to the MRC Council and Joint Committee in implementing the PNPCA.

III. MRC Joint Committee roles and functions for NPCA

The MRC Joint Committee will play roles and undertake functions under the PNPCA with the assistance of the MRC Secretariat and NMCs.

The MRC Joint Committee will decide the process for notification or prior consultation for the joint project shared by two or more member States.

Done on 31st August 2005 at the 22nd Meeting of the MRC Joint Committee in Vientiane, Lao People's Democratic Republic.

Member of the MRC Joint Committee for the Kingdom of Cambodia

Alternate Member of the MRC Joint Committee for the Lao People's Democratic Republic

Alternate Member of the MRC Joint Committee for the Kingdom of Thailand

Member of the MRC Joint Committee for the Socialist Republic of Viet Nam