



Australian Government

Department of Foreign Affairs and Trade

Ms Pianporn Deetes
International Rivers – Thailand Campaign Coordinator
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Dear Ms Deetes,

Thank you for your letter of 26 February 2014 to the Minister for Foreign Affairs, the Hon Julie Bishop MP, regarding a request for the release of findings from a review in 2012 by the Australian aid program of the Mekong River Commission's (MRC) Procedures for Notification, Prior Consultation and Agreement (PNPCA). The Minister has asked me to reply to you on her behalf.

Through the Australian Mekong Water Resources Program, the Australian Government is providing financial resources to the MRC to assist it to implement the PNPCA and other procedures that are intended to support the effective and equitable adherence to the cooperation and transparency aspirations of the 1995 Mekong Agreement.

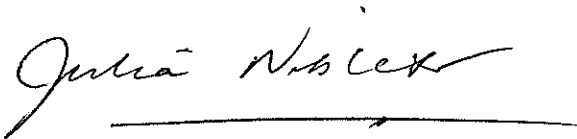
In 2012, at the request of several MRC member country officials, the Australian aid program commissioned an analysis of the PNPCA process, by discussing PNPCA interpretation and practice with a range of stakeholders in each of the MRC member countries. A team was assembled comprising experienced national researchers from the four MRC member countries to interview interested and knowledgeable stakeholders that had been observing or participating in the Prior Consultation process for the Xayaburi hydropower project in Laos. The teams started work in September 2012.

In November 2012 the research organisation commissioned by former AusAID withdrew from the work prior to completing its task. However, the national teams in Cambodia, Thailand and Vietnam submitted draft reports that have been passed through to DFAT. These contain useful observations and suggestions, but the draft reports are incomplete, and as such cannot be circulated. In lieu of that, please find attached a brief summary of indicative findings from the three draft national reports submitted in late 2012.

We are advised by the MRC that it was agreed in December 2013 by its Joint Committee to establish an MRC process (called the Joint Platform) that is intended to function as a formal state-state process to clarify ways forward for PNPFA and the other MRC procedures. The indicative research findings and suggestions are being provided by DFAT to the MRC as an input to this Joint Platform.

Thank you for bringing your request to the attention of the Minister.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Julia Niblett", is written over a horizontal line.

Julia Niblett
Assistant Secretary
Mekong, Philippines and Burma Development Branch
East Asia Development Division

cc. choechoe@internationalrivers.org

Brief summary of 2012 PNPCA research

1 April 2014

MRC Procedures and Guidelines

The MRC has negotiated basin-wide water resources management procedures and guidelines. They are a key to ensuring fully-informed and transparent choices about reasonable and equitable utilisation of the waters in the Mekong River Basin as per Article 5 and other key provisions of the 1995 Mekong Agreement.

PNPCA

The PNPCA is a state-to-state mechanism, which obliges Thailand, Laos, Cambodia and Vietnam to jointly review any major developments proposed for the Lower Mekong mainstream. The provisions in the PNPCA and other procedures, and roles of the MRC Joint Committee (Article 24) and Council (Article 18) were intended to provide a 'permanent' mechanism for consensus building and proactive dispute prevention and minimisation. Implementation of Article 5 is supported by the PNPCA prepared under Article 26 and approved by the MRC Council at its 10th Meeting on 29-30 November 2003 and its Guidelines approved by the Joint Committee in August 2005.

The applicable process depends on whether the water use proposed by the notifying country is on the Mekong mainstream or a tributary; whether it involves use of water in the wet or the dry seasons; and whether it involves transfer of water within the Mekong River Basin (intra-basin use) or to outside of the Mekong River Basin (inter-basin diversion).

PNPCA process for Xayaburi

The PNPCA was triggered for the first time with the notification by the Government of Lao PDR in late-September 2010 of its interest in building the Xayaburi Hydropower Project on the Lower Mekong river mainstream. This first activation has consumed considerable time and resources. The process has been contested by member countries, covered closely by the regional and international press, and critiqued by many observers and participants.

The formal process for the Xayaburi PNPCA has involved submission of documents, working group meetings, national consultations, deliberations by the MRC Joint Committee and finally a decision by the MRC Council. Opinions differ between the countries as to whether the formal process has yet been concluded. The total process has been more complicated and has also included bilateral discussions, the launching and subsequent debate catalysed by the mainstream dams Strategic Environment Assessment¹, extensive lobbying by developers and concerned scientists, the Save the Mekong Campaign², film-making and media reporting.

¹ ICEM, 2010. MRC Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, Produced for Mekong River Commission by ICEM. International Centre for Environmental Management.

² A major achievement of the Save the Mekong Campaign has been to succeed, despite available science being inconclusive, in reframing the perceived dams threats from environmental protection to food security and the potential for irreversible economic damage.

This is not to say that all parties are satisfied with the PNPCA and the way the Xayaburi PNPCA process played out:

Developers and the promoting agencies in government may see [the PNPCA] as onerous; campaign NGOs and others may find it lacks teeth. There will always be dissenters of any system if the outcome is not as they hope. But in the regional context it seems to me a pragmatic way of maintaining a balance between national sovereignty and regional cooperation.³

Lower Mekong mainstream dams are now being examined more openly. This is a result of many factors, including the MRC SEA process, and the subsequent, formal, Prior Consultation facilitated by the MRC, that has yielded various technical contributions⁴, and opened an inter-government window for more informed discussions between Lower Mekong countries. Each of these processes has been improved by advocacy from civil society, science, academia and governments.

It is recognised that there will be further activations of the PNPCA in the future and it would be useful to learn from this first experience, to improve subsequent implementation. Hence, former AusAID considered there would be value in commissioning national researchers to explore the Xayaburi PNPCA test case in their own countries, with an emphasis on hearing the experiences, perspectives and suggestions from national actors. Prior to the research organisation withdrawing, the intention had been to bring the national teams together to share their findings in a regional workshop.

Against this backdrop, the objective of the research commissioned by former AusAID in 2012 was to:

To provide Mekong countries, civil society organisations and the Australian Government, a better understanding of how the PNPCA were being implemented and how they might be clarified and improved.

Preparation

The national researchers held a planning workshop in Vientiane on 24 September 2012 to ensure a common understanding of their task and familiarity with the background material. Secondary data were collected to enhance the researchers' insights on the context of the study and to develop an understanding of the web of stakeholders and thereby facilitate identification of potential interviewees and framing of appropriate interview questions. The document sources were official reports, previous research and articles from published media and websites.

Information assembled included both qualitative and quantitative data, included the 1995 MA, approved procedures and guidelines of the MRC, profile of the proposed Xayaburi project and its review comments, results of the national PNPCA stakeholders consultations and dominant policy discourses of various organisations on hydropower development in the Mekong Region in general and on the Xayaburi case in particular. During the interviews, more documents were also gathered both from the interviewees and through the researchers' search. All secondary data were used to supplement, compare, cross-check and elaborate the findings from the interview discussion.

³ Jeremy Bird, MRC CEO, 2008-2011, quoted by Whitehead, p 107.

⁴ A key contribution was: MRC, 2011. Prior Consultation Project Review Report for Proposed Xayaburi Dam Project. Mekong River Commission, Vientiane.

Identification of interviewees

An initial list of interviewees was made during the project team planning workshop on. The list was first developed based on key agencies and persons indicated in the relevant reports reviewed by the researchers. These potential interviewees, particularly in the non-government sector who need no formal arrangement, were contacted for interview appointments shortly after the planning workshop. Through the interviews with these key informants, the researchers were further directed to other interviewees knowledgeable on the issues. The list of interviewees was then revised accordingly.

For the government sector, the researchers first contacted the offices of the Thailand, Cambodia and Vietnam National Mekong Committee Secretariats (NMCSs) and requested information about which government officials had participated in the consultation process. Key informants were then selected. These interviewees represent relevant government offices that have various stakes and would thus have different views and interests on the issue. For example, in Thailand – in addition to the Thailand NMCS at the Bureau of Mekong Affairs in the Department of Water Resources – they included officials from the Office of Natural Resources and Environmental Policy and Planning, Electricity Generating Authority of Thailand, Energy Policy and Planning Office and the Royal Irrigation Department.

Process and validation

Almost all of the 40+ interviews were run face-to-face. The interviews were semi-structured in their nature as the researchers had guiding questions, however, actual questions varied in response to the flow of the conversations between the researchers and the respondents. The researchers in each of the three countries pursued an understanding of the practice and multiple understandings of the PNPCA implementation in their country. Indicative findings from their draft reports are summarised in the following sections.

PNPCA appreciation

The PNPCA Articles can be read narrowly and seen as constraining, or as an entry point and opportunity for dialogue. Most government officials and representatives of civil society groups appreciated the existence of the PNPCA process, considering it as an important part of a complex picture. PNPCA is recognised as a tool with the potential to lift transparency and ensure water resources development in Lower Mekong countries is less opaque and well-considered. PNPCA should provide opportunities and a forum within and between countries to communicate and share information about Mekong River mainstream and tributary development. The following quotes reflect a common attitude of interviewees:

PNPCA theoretically reflects the strong commitment and cooperation of the MRC member states in implementing the 1995 Mekong Agreement. It in fact is a good mechanism in providing clear forum for cooperation in implementing the 1995 MA both within the country and within the region.

PNPCA is fundamentally important for the MRC... for the cooperation among the member states... for the sustainable development of the Mekong River Basin. It allows... for discussion and consultation, especially on transboundary issues... If there is no PNPCA, there will be no forums for discussion, and this would lead to a disaster within the basin.

That said, participating in a Prior Consultation was new for all parties and numerous suggestions were forthcoming about clarifying and improving the process.

PNPCA understanding (of the Prior Consultation) and timeliness

The formal PNPCA Articles note that Prior Consultation requires “*timely*” notification “*that would allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. Prior Consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians’ rights*”. What constitutes timely is not further specified. What constitutes agreement is not specified. But key in the spirit of the text is the expectation that what is being discussed is proposed use. Hence, many interviewees note there should be no key contracts, such as Power Purchase Agreements, concluded while the Prior Consultation is ongoing. The proper sequence is to hold Prior Consultation before there is irreversible commitment for a project to proceed.

Quality of information provided and the actual Prior Consultation process in-country

All CSO/NGO interviewees in Thailand and Cambodia were CSOs/NGOs dissatisfied with the quality of the official Prior Consultation process and the information provided. According to them, only summary documents in the form of power-point presentation were available at the national consultation meetings and this was insufficient to enable meaningful consultation:

A several hour consultation session for about fifty unprepared people to say “Yes” or “No” to something that affects millions of people in a big way without prior provision of systematic information is not fair and not a genuine consultation.⁵

MRCS staff were on-hand to assist in presenting about the Xayaburi project at all of the official Prior Consultation national meetings. However, they could not always respond to participants’ questions effectively, and the project developer was nowhere in sight. As a result, the consultation process was widely viewed as constituting only a forum for giving out information about the project, without adequate explanation of its potential impacts on the ecology and the livelihood of people along the Mekong, such as the problems caused to sedimentation, riverine agriculture, and fish migration.

Although the PNPCA Articles specify that notification of a proposed use must include the feasibility study report, implementation plan, schedule and all available data, the PNPCA Guidelines are more flexible. The latter states simply that 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*”. Such requirement is far from the expectations of affected stakeholders and CSOs/NGOs, most of whom desire a full disclosure of the EIA report. According to one interviewee, “*we did not get even the minimum information as required by the PNPCA Procedures and Guidelines, let alone the EIA report. Although it is often claimed that the EIA report has already been provided on the website, this only happened after all the consultation process had ended*”. The MRCS did not have consent to release the full Xayaburi EIA until March 2011.

⁵ Nguyen Huu Thien, Mekong ecologist and SEA team member, quoted by Whitehead, p 62.

In addition, most interviewees in the CSOs/NGOs stressed the importance of making the information available in the national language of all the riparian countries. *“Ideally the whole EIA report should have been translated and the cost for this should be borne by the developers”*, said one interviewee. Many interviewees expressed similar dissatisfaction and raised other concerns about the short time of the consultations, inadequate representation and the absence of the actual project developer to answer questions. The frustration was felt not only by the invitees, but also by those tasked in-country to conduct the public meetings. For example, one government official observed:

We were also frustrated during the workshop. For one thing, it was like we spent a lot of time explaining to participants what the Prior Consultation process was all about and its significance for the Lower Mekong countries. For the other, when participants asked about the real Xayaburi project’s process, we were unable to answer them because the responsible company and/or those who were supposed to know were not present.

In Vietnam, though the official Prior Consultation consultations were also disappointing to most, there were consultations convened by others in which the government, scientists and activists engaged together extensively.

It was regularly suggested that Prior Consultation consultation methods for sharing and questioning information needed to be significantly improved. There were many suggestions, including the following. First, relevant information should be provided well in advance of consultations. Second, transboundary issues should be highlighted. Third, key material should be translated. Fourth, the project proponents should represent and be ready to present and respond to questions.

Duration

Section 5.5.1 of the PNPCA specifies that the timeframe for prior consultation shall be six months from the date of receiving documents on Prior Consultation. The provision of the six-month period for the PNPCA was by no means arbitrary. During the negotiation of the PNPCA Procedures and Guidelines, the Technical Drafting Group of the WUP/NMCs reviewed literature of international law scholars as well as the work of the International Law Commission (ILC) on the subject. The six-month timeframe was taken from the example set by Article 13 of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses.

Interviewees from government and CSOs/NGOs were almost unanimous in their view that the six-month timeframe was too short to enable meaningful consultation at the national level, unless stakeholders had already been well informed about the project and its potential impacts before commencement of the official Prior Consultation process.

Government interviewees expressed different attitudes about whether or not six months is enough:

The problem was not the timeframe. No amendment is needed. Six months, to me, is enough and is a good timeframe for the preliminary response from each member state. People need a deadline or they will not really work hard to achieve it. The timeframe is open because we could prolong it upon the decision of the Joint Committee..... The problem is the unclear decision issued by the Joint Committee and the Council.

Another view:

If documents and information are inadequate, we cannot achieve a good consultation process even under a three year timeframe. The notification should include information concerning transboundary impacts, and possibly cumulative impacts in the long run. It should be the responsibility of developers to study and provide this information.

Whereas, the official response from Vietnam's NMC⁶ stated:

Vietnam found that the limited timeframe of Prior Consultation was not adequate to facilitate the achievement of the process's objectives. Vietnam therefore strongly requests that the decision on the Xayaburi Hydropower Project as well as all other planned hydropower projects on the Mekong mainstream be deferred for at least 10 years, as overwhelmingly recommended by social communities, national and regional NGOs and many development partners.

In summary, several points were regularly made by both government and CSOs/NGOs. First, the current PNPCA Articles allow for extension of the Prior Consultation if required/requested. Second, that without timely release of relevant information the Prior Consultation cannot work effectively. Third, that the official decisions (or non-decisions) about Prior Consultation completion or extension were unclear and enabled multiple interpretations, creating a dissonance that MRC has been unable to solve.

⁶ VNMC, 2011. Form for Reply to Prior Consultation – Xayaburi Hydropower Project. Available on MRC's website at <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Viet-Nam-Reply-Form.pdf>.