



**Mekong River Commission**

Cambodia • Lao PDR • Thailand • Viet Nam

For sustainable development

## Summary note

# Procedures for Notification, Prior Consultation and Agreement (PNPCA) Commentary

*Final draft*

*In an effort to communicate openly with broader stakeholders of the Mekong River Commission (MRC) and to help them participate in MRC's regional stakeholder forums more meaningfully, the MRC Secretariat has prepared this summary report to present key and substantive points from selected on-going technical work of the MRC which is in the process of development and finalization in consultation with its member countries.*

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## 1. Background of PNPCA Commentary from the PNPCA Lessons Learnt

The 1995 Mekong Agreement is a framework agreement that contains 42 articles, grouped into six chapters. It superseded all three prior agreements (the Joint Declaration, the Interim Mekong Committee Declaration and the 1957 Statute) and all rules of procedure adopted under past agreements. The 1995 Agreement is an international treaty as defined by the Vienna Convention on the Law of Treaties of 1969.<sup>1</sup>

The 1995 Mekong agreement is also characterized by the following features: i) stipulating broad principles (Articles 1 and 10); and, ii) providing a flexible framework and continuous process of dialogue, negotiation and peaceful conflict management process (Articles 11-33 and 34-35).

The major principles of the 1995 Agreement are: reasonable and equitable utilization of Mekong waters; no substantial harm and state responsibility for substantial damages, dispute management; freedom of navigation; and environmental integrity of the Mekong River, including maintenance of its natural flows.

The 1995 Mekong Agreement tries to balance between “*no right to veto*” and “*no unilateral right to develop without due consideration of other rights*”. The embedded principles are that each riparian should utilize the Mekong River system in a reasonable and equitable manner in their respective territories, subject to rules to be established under the Agreement, and in line with the provisions of the relevant rules, procedures and guidelines (Article 5 and Article 26).

As a "framework" agreement, the 1995 Mekong Agreement leaves the finer details to subsequent rules, protocols, or procedures to be negotiated and agreed upon by the parties. The PNPCA was approved by the MRC Council at its 10<sup>th</sup> Meeting on 29-30 November 2003, and the Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement was approved by the MRC JC in Vientiane on August 31<sup>st</sup>, 2005. As shown in Figure 1 below, PNPCA and other related procedures are an integral part of the 1995 Mekong Agreement.

The related Procedures and Guidelines include:

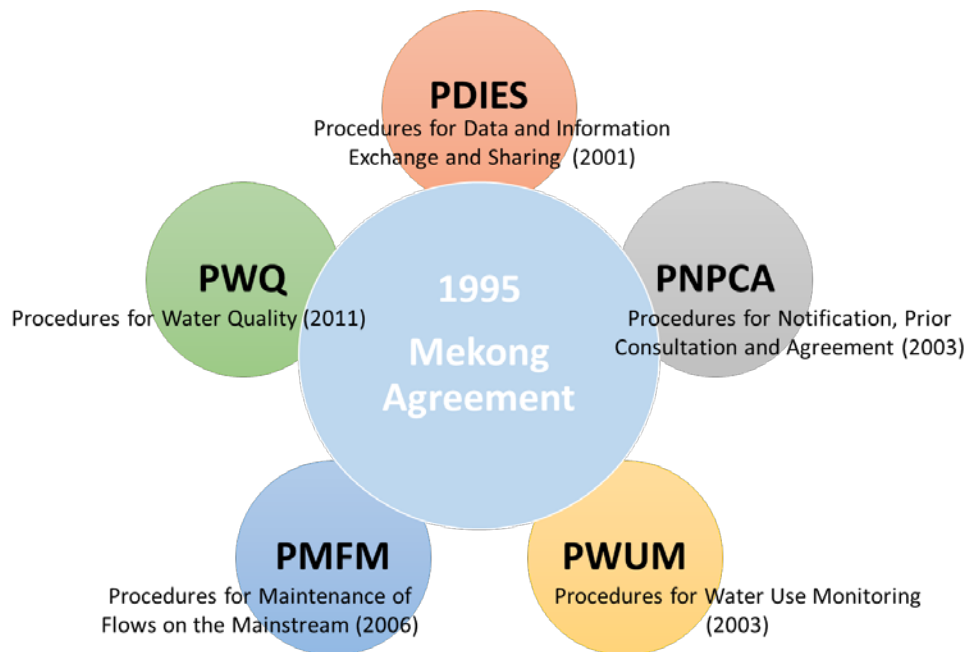
- Procedures for Data and Information Exchange and Sharing, approved in 2001
- Procedures for Water Use Monitoring, approved in 2003
- Procedures for Notification, Prior Consultation and Agreement, approved in 2003
- Procedures for Maintenance of Flows on the Mainstream, approved in 2006
- Procedures for Water Quality, approved on 26 January 2011

Technical Guidelines

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<sup>1</sup> The Convention on the Law of Treaties was signed at Vienna on 23 May 1969 and entered into force on 27 January 1980 (United Nations, *Treaty Series*, vol. 1155, p. 331). Its Article 2 - Use of terms 1, defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. Its Article 11 defines “means of expressing consent to be bound by a treaty” can be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

- Guidelines on Implementation of the Procedures for Data and Information Exchange and Sharing, 2002
- Guidelines on Implementation of the Procedures for Water Use Monitoring
- Guidelines on Implementation of the PNPCA, 2005.
- PMFM Technical Guidelines are being tested
- PWQ Technical Guidelines approved by the MRC JC on 22 November 2016.



*Figure 1: 1995 Mekong Agreement and the Procedures for Water Diplomacy*

Since the adoption of the PNPCA in late 2003 by the MRC Council, and the Guidelines on Implementation of the PNPCA in August 2005 by the MRC JC, the MRC Secretariat have received 68 notifications. Among them, only four projects have been subject to the Prior Consultation process, this includes Don Sahong, Xayaburi, Pak Beng and the recently notified Pak Lay Hydropower Project.

The implementation of the PNPCA has received critique specifically in relation to the Prior Consultation process. It was questioned whether the process was functioning effectively to facilitate regional decision-making for the future of the Mekong River and its people. Challenges with the implementation of the PNPCA include the ambiguity within the text of the 1995 Mekong Agreement (MA) and its related Procedures. Such challenges may exacerbate the ability to reconcile competing interests where a country's requirements for development may have transboundary impacts.

Up to August 2018, there are about 11 hydropower development projects at different stages of development, from early the stage of studies to a construction phase on the Lower Mekong Mainstream. More proposed use projects potentially triggering PC, or even the specific agreement processes, are expected in the coming years.

The first two 'Prior Consultation' processes, a six-month consultation process consumed considerable time and resources. The implementation of the Xayaburi and Don Sahong

Hydropower Project prior consultation processes demonstrated a level of ambiguity in interpretation of PNPCA, and thus a need for greater clarity. The Pak Beng Prior Consultation Process attempted to improve and address some of these challenges applying lessons learnt from the previous prior consultations.

Through implementation of the PNPCA, several lessons learned, and pending and emerging challenges have been documented. A draft working paper on PNPCA implementation lessons learnt was prepared by the MRC Secretariat from past experiences of the implementation of the PNPCA and analysis undertaken in the literature of the process. The draft working paper was used as a tool to identify Lesson Learnt by the four Member Countries, through a one-day Dialogue Workshop on Lessons Learnt from the Implementation of the PNPCA held in Bangkok in February 2016 by the MRC JP, with participation from NMCs and international experts to develop recommendations for improvement and to meet international best practice to discuss PNPCA. As a result, the MRC Member Countries have concurred that it is important to learn from this experience, to improve subsequent implementation, and to provide greater certainty and clarity for all member countries and other key stakeholders about the PNPCA process.

The principal recommendations of the participants for promoting more effective implementation of the PNPCA, on which there was a very considerable measure of consensus included:

- Greater clarity regarding the commencement and conclusion of the Prior Consultation process;
- A process for the review and approval of the adequacy of documentation received for Prior Consultation;
- Greater clarity regarding the roles of all actors who have a responsibility for implementing the PNPCA;
- Development of appropriate project information disclosure practices to effective stakeholder participation;
- Greater clarity regarding the role of transboundary EIA;
- ***Development of a "Commentary" on the provisions of the PNPCA***, to supplement the current Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement by placing the key provisions of the PNPCA in the wider context of international best practice in the field.

Following the 2016 regional workshop in Bangkok, Thailand, the commentary note assignment was undertaken by the MRCS with the support from an international consultant and four senior national experts. The commentary would present the MRC and its member countries with a further opportunity to strengthen confidence building measures and demonstrate the global leadership in the cooperative management of a major international basin by systematically identifying which aspects of the PNPCA works effectively, which aspects present challenges in implementation, which improvements or changes in approach might address such challenges, and the means for achieving such improvements or changes.

## 2. Purpose, Scope and Approach of the PNPCA Commentary

Rooted from the PNPCA lessons learnt, the MRC member countries have expressed their intention to re-visit through the MRC Joint Platform <sup>2</sup>(MRC JP) to recall and document different comments and opinions expressed, and to further clarify the key provision, terms and procedural process of the PNPCA.

The rich discussion reflected in the Record of the 3<sup>rd</sup> meeting of the MRC Joint Platform (JP) in Hanoi in October-November 2016, provides a good overview of the expectation, scope and depth, and desired approach to the PNPCA Commentary.

The expectation from the Commentary by the MRC JP and member countries can be summarized as follows: the PNPCA “commentary” is to supplement the current Guidelines on the Implementation of the PNPCA by clarifying the key provisions and procedural aspects of the PNPCA in the context of the 1995 Mekong Agreement and other MRC procedures and guidelines, and international best practice in the field. It is to provide clarity around the PNPCA process.

The key consideration for the approach and scope of work expressed by the MRC JP includes, but not limited to, the followings:

1. Building on and using in-house expertise and capability: Developing the PNPCA commentary internally with a high-quality engagement and consultation with MRCS, MCs, the designated national experts by NMCs, and those officials and experts who have got the institutional memories from 1995 MA, PNPCA and guidelines negotiation etc.
2. Improving the PNPCA related matrix on lessons learnt, pending issues, and challenges to use it for moving forward to reach further consensus among the MRC countries on common areas for generating PNPCA commentary (properly explain, appropriately prioritize and clearly state what are lessons learned, pending and emerging issues and challenges, and perspectives from the MRC countries).
3. Reviewing the 1995 Mekong Agreement, the PNPCA and its Guidelines, and other procedures and guidelines etc., for improving consistency and clarity in interpretation and understanding of key terms and substantive and procedural provisions - ensuring its consistency with the mother agreement - 1995 Mekong Agreement - and other MRC’s key documents<sup>3</sup>.

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<sup>2</sup> The MRC Joint Platform acts as a forum for the exchange of experiences with the development and implementation of the Procedures. The term ‘platform’ is used, as the intention is to provide a common forum where a number of existing sub-committees and technical working groups can come together, without implying any hierarchical structure or importance – and without replacing any of these existing bodies

<sup>3</sup> For example, some definitions such as wet and dry season are working definition which need further work on or revisit according to characteristic and hydrological condition of the Mekong River.

4. Reviewing all relevant MRC documents including but not limited to the minutes of the MRC technical working group meeting (TACT, TRG and others), the minutes of the JC meetings and the WUP completion reports, the commentary for the 1995 Mekong Agreement and the explanatory note support to FMMP working paper - The Legal Aspects of the Mandate of the 1995 Mekong Agreement for Enhancing Cooperation in Addressing Transboundary Flood and Related Issues (LA-MA95).
5. Being inspired by the international good practices in the field – most importantly, the international practice needed to tailor fit with the MRC context.
6. Considering the capacity and knowledge management needs in MRCS and at national level.

The Commentary does not amend the existing Procedures or Guidelines, but rather supports a more effective, constructive and mutually beneficial PNPCA Implementation process for sustainable development, utilization, conservation and management of the Mekong River Basin (MRB) water and related resources. It reconfirms a common understanding of and commitment for the PNPCA and identify areas for further improvement<sup>4</sup>.

### 3. Methodology for the Commentary Development

The Commentary development used a “Phased and Integrated Approach”. Methods included well-planned/facilitated processes to ensure maximum involvement of key stakeholders. It is designed to provide a credible study, founded on a time-bound implementation and a step-wise analytical and deliberative framework that includes information gathering, rigorous analysis, and a well-planned/facilitated process of key stakeholder consultations, and documentation.

The development of a “Commentary” was strongly orient towards collaboratively learning what works, and debugging what doesn’t, and documenting what can be done to accelerate mutual understanding of the PNPCA implementation and support the implementation of the PNPCA itself in line with the 1995 Mekong Agreement and renounced “Mekong Cooperation Spirit”. The phases and activities, key stakeholders and information requirements are shown Figure 2.

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<sup>4</sup> Any pending issues that fall outside the PNPCA Commentary Note will be addressed through the MRC Joint Platform meetings.

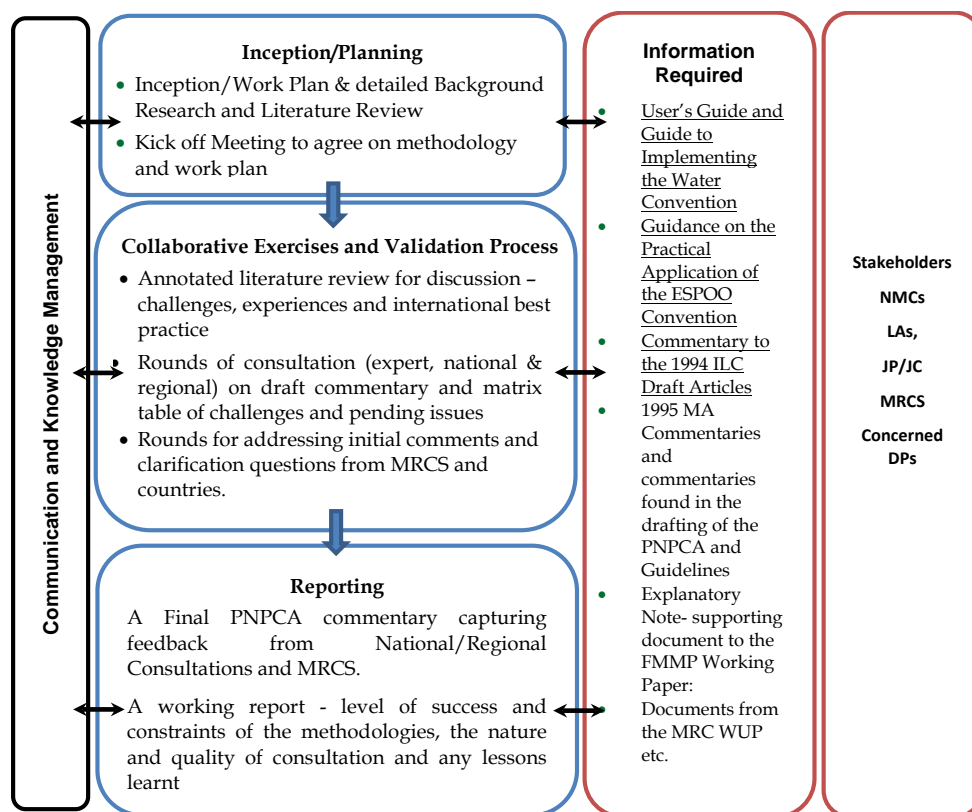


Figure 2: Approach and phases of the Commentary development

## 4. Structure and Content of the Commentary

The PNPCA Commentary was developed by the MRC through a carefully planned and highly consultative and participatory manner. The structure of the Commentary draws from the lessons learnt through consultation with the member countries, key stakeholders, development partners and international experts which mainly contains of three similar section in each commentary; *reviews of relevant 1995 MA/Procedures Provisions; consideration of relevant international norms and practice and makes specific recommendations regarding each key commentary*. The PNPCA Commentary was based on:

- 1) Systematic analysis of all relevant provisions, and practices contained in:
  - a. various MRC documents such as the 1995 MA, PNPCA, Guidelines on Implementation of the PNPCA (G-PNPCA), and other Procedures and Guidelines etc.<sup>5</sup>
  - b. other practical international best practices.
- 2) Clarification of key substantive provisions in the 1995 MA.

<sup>5</sup> The PNPCA Commentary outlines and contents are drawn from and inspired by the MRC related works and other international examples e.g. UN Watercourses Convention User's Guide, 2012, ILC's Commentary to the 1994 Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Helsinki Rules on the Uses of the Waters of International Rivers in 1966 (with comments), Guide to Implementing the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and Guidance on the Practical Application of the ESPOO Convention on Environmental Impact Assessment in a Transboundary etc.).



- 3) Clarification of the procedural aspects, such as the starting/commencement date, duration and ground for decision on its extension, access to and adequacy of information, and key terminology. The clarification was also informed by the recent MRC's "established practices" in its latest prior consultation processes, and the lessons learned workshop and its follow-up.
- 4) Taking stock and clarifying the roles and responsibilities of relevant institutional actors and stakeholders of the PNPCA during each phase or step as stated in the existing G-PNPCA and Pak Beng PC's lessons learned, and
- 5) Confirming many key guidelines currently embodied both in the main text and footnotes of G-PNPCA.

Thus, the Commentary is divided into sections and further elaborated 19 Key Commentaries addressing the key challenges with PNPCA interpretation and implementation as presented in the table below.

Section	Commentary
2.1 Entirety and Coherence	Commentary 1: Treating 1995 Mekong Agreement and PNPCA in their Entirety
2.2 Purpose of Mekong Cooperation	Commentary 2: A Duty to Promote Mutually Beneficial Cooperation
2.3 Purpose and Role of PNPCA within the 1995 MA Framework	Commentary 3: Purpose of PNPCA and Inter-dependency
2.4 PNPCA and Relevant Substantive Provisions	Commentary 4: Sovereign Equality and Territorial Integrity, Reasonable and Equitable Use and No Significant Harm  Commentary 5: Aiming at Achieving Equity and Reasonableness for all
3.1 Notification Requirements	Commentary 6: Proposed Use Subject to Notification Requirements
3.2 Notification Process: Timeliness	Commentary 7: Timely Notification Requirements
3.3 Clarify Notification Process: Completeness	Commentary 8: Completeness of Notification Documentation
3.4 Institutional Mechanism for Notification	Commentary 9: Notification Institutional Mechanism
4.0 Prior Consultation	Commentary 10: Proposed use under prior consultation
4.1 Prior Consultation: Content and Format	Commentary 11: Available" and "Relevant" Data and Information for PC
4.2 Prior Consultation: Procedural Requirement of Timeliness	Commentary 12: Timely Notification Requirements under PC
4.3 Prior Consultation: Time Frame	Commentary 13: When and how PC deems to be complete

4.4 Prior Consultation: Obligation of Member States during the Period of Prior Consultation	Commentary 14: Good Faith and Due Diligence Obligation During PC
4.5 Prior Consultation: Roles and Responsibilities	Commentary 15: Prior Consultation Institutional Mechanism
5.0 Specific Agreement	Commentary 16: Specific Agreement
6.1 Procedure in Case Notification Absence	Commentary 17: Monitor and Address of Absence of Notification
6.2 Addressing Differences and Disputes	Commentary 18: Addressing Differences and Disputes
6.3 Roles and Responsibilities of other Key Stakeholders	Commentary 19: Roles and responsibilities of other Key Stakeholders

In summary, the Commentary has addressed the following issues and recommendation:

- **Principles and objectives of the 1995 Mekong Agreement, PNPCA and its Guidelines**, confirming that:
  - the 1995 MA and PNPCA provisions should be considered in their entirety rather than standalone as provisions;
  - an obligation exists for mutually beneficial cooperation by the member countries, and MRC bodies and platforms;
  - the PNPCA and 1895 MA is a continuous, collaborative and proactive process;
  - the need for mutual respect of sovereign equality and territorial integrity; and
  - the need to apply relevant factors and circumstances of reasonable and equitable utilisation.
- **Procedural norms and provisions related to the Notification, Prior Consultation, and Specific Agreement**, confirming the need for:
  - reviewing/expanding the definition of proposed use;
  - timely notification;
  - completeness of notification documentation;
  - clarification and strengthening of roles and functions of MRCS and NMCs and the adoption of the MRC internal PNPCA procedures;
  - the adoption and application of a transboundary EIA guideline and relevant design guidelines; endorsement of the Pre-PC, PC and Post PC by the JC;
  - adoption of similar procedural and substantive requirements of the prior consultation in the case of ‘Specific Agreement’
- **Roles and responsibilities of MRC and NMCs, and those of external stakeholders**, confirming the need for:
  - avoidance of preparatory activities prior to completion of PC by the developer;
  - the MRCS and NMCs to take a stronger role in encouraging the notifying agency to share project information to share project information at least several months before the PC process commence, facilitate timely provision of additional data and information, host a site visit and inform/engage other Member States in addressing their comments;

- the MRCS and NMCs to be more proactive in carrying out instructions and directives of the MRC JC and assist the MRC JC and Member States in the overall implementation of the 1995 MA and PNPCA, especially when there is a deadlock in reaching a decision by the JC or Council; and
- improvement of public participation and communication during PC to Post PC.

## 5. Benefit of the Commentary

The Commentary presents to the MRC Governance Bodies and its Member States, and other key stakeholders, an opportunity to strengthen confidence building and demonstrates global leadership in the cooperative management of a major international basin.

The PNPCA Commentary has been devised to help the MRCS, Member States and other key stakeholders to learn from their PNPCA implementation's experiences, to improve the subsequent implementation, and provide greater certainty and clarity for all member countries and other key stakeholders about the PNPCA process and its implementations.

The PNPCA Commentary has drawn from other guiding material from international experiences and practices but maintains regional focus and realities within the Lower Mekong Basin and will continue to be improved and updated over time.



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