

Submission regarding the Pak Beng Dam Prior Consultation Procedures for Notification, Prior Consultation and Agreement (PNPCA)

International Rivers makes this submission with regard to the Prior Consultation for the proposed Pak Beng Dam on the Mekong River in Oudomxay Province, Lao PDR. We note that we have raised many of the issues in this submission throughout the Pak Beng Prior Consultation process, through our participation in the two regional stakeholder forums convened by the Mekong River Commission (MRC) on 22 February and 5 May 2017 in Lao PDR, and by issuing public communications and statements. The submission consolidates issues we have identified with respect to the Pak Beng Prior Consultation, as well as broader questions relating to the role of the MRC and ongoing review of the Procedures for Notification, Prior Consultation and Agreement (PNPCA).

Scope and purpose of Prior Consultation

According to the 1995 *Mekong Agreement*, Prior Consultation involves the provision of data and information to the MRC Joint Committee, “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.” While specific agreement is not a requirement for Prior Consultation, the process is expressly aimed at trying to achieve agreement between the Lower Mekong governments over a proposed use through good faith negotiations. The Mekong Agreement states that “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.”¹

The MRC Secretariat has an important role in the Prior Consultation process, which includes, *inter alia*, determining whether the information provided is sufficient to meet the objectives of Prior Consultation, conducting a technical review of project documents and assessing the proposed project’s compliance with the MRC’s ‘Preliminary Design Guidance’ (PDG), and providing platforms for effective stakeholder participation.² Prior Consultation should adequately balance the competing rights and interests of riparian states and populations along the Mekong River towards the sustainable development, use, conservation and management of the Mekong Basin.

Recent statements by the MRC Secretariat and information on the MRC website,³ citing the fact that the MRC does not have the mandate to stop an individual project, have framed the Prior Consultation process as limited to dialogue on impact mitigation options for a proposed project.

¹ Mekong River Commission, *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, Chiang Rai, Thailand, 5 April 1995: Chapter II.

² Mekong River Commission, ‘Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin’, 31 August 2009.

³ See, for example, Pak Beng: Prior Consultation: www.mrcmekong.org/topics/pnpca-prior-consultation/pak-beng-hydropower-project; ‘The Mekong River Commission is striking a balance between development and protection of the Mekong river’: www.mrcmekong.org/news-and-events/news/the-mekong-river-commission-is-striking-a-balance-between-development-and-protection-of-the-mekong-river.

This excludes from the Prior Consultation process the broader question of whether a project is so damaging to the rights and interests of other riparians and Mekong communities that it should not proceed. In our view, excluding discussion of the overall merits of a project and whether or not it should be built from the Prior Consultation process reflects an overly narrow interpretation of the 1995 *Mekong Agreement*.

Lessons learned and review of the Prior Consultation Process

The MRC has announced an ongoing review of the PNPCA and other procedures through the Joint Platform. As part of this process, a Dialogue Workshop on Lessons Learnt from Implementation of the PNPCA was held in January 2016,⁴ drawing on input from independent experts. The report⁵ from the workshop documented lessons from implementation of the Prior Consultation for the Xayaburi and Don Sahong Dams.

The report emphasized key issues, including the inadequacy of the project documents and studies submitted for Xayaburi and Don Sahong, and the limited time and space for meaningful public participation, particularly of affected communities. The report also noted the lack of agreement between Lower Mekong governments in the case of both Xayaburi and Don Sahong.

We note that the decisions to move forward with construction of both the Xayaburi and Don Sahong Dams disregarded concerns raised by neighboring countries over transboundary impacts, requests for further studies, and opposition from local communities directly and indirectly affected by the project. While project developers committed to a project redesign for the Xayaburi Dam and ongoing impact mitigation and monitoring studies for both projects; these are yet to be publicly released, limiting the means to independently verify the effectiveness of impact mitigation measures.

The report from the Dialogue Workshop made several observations and recommendations to improve and strengthen the process. These include:

- Concern that the timeline of six months is too short, and recognition of the need to consider options to extend the process;
- A process for the review and approval of the adequacy of documentation received for Prior Consultation before the process begins;
- Greater clarity regarding the roles of all actors who have a responsibility for implementing the PNPCA, including national line agencies;
- Development of appropriate project information disclosure practices to ensure effective stakeholder participation, including in regional languages;
- Greater clarity regarding the role and standards with respect to transboundary EIA;
- Development of a “Commentary” on the provisions of the PNPCA, to supplement the current guidelines through examination of the wider context of international best practice in the field.

⁴ Dialogue Workshop on Lessons Learnt from the Implementation of the Procedures for Notification, Prior Consultation and Agreement (PNPCA) Bangkok, Thursday, 25th February 2016.

⁵ Report from the Dialogue Workshop, available at: www.mrcmekong.org/assets/Publications/PNPCA-WORKSHOP-REPORT-Bangkok-Feb-2016-Final-web.pdf.

The report from the Dialogue Workshop was not published on the MRC's website until 9 February 2017, more than a year after the workshop and over a month into the Pak Beng Prior Consultation. While some of the recommendations have been taken up, others have not. More information is needed on how lessons from previous processes, ongoing weaknesses in the Prior Consultation and the specific recommendations from the Dialogue Workshop are being addressed in the review process.

Stakeholder engagement

International Rivers attended the two regional consultations meeting convened by the MRC Secretariat on 22 February and 5 May 2017 in Lao PDR as part of the Pak Beng Prior Consultation process. Our purpose in attending the meetings was to continue the monitoring and scrutiny role we have played with respect to the Prior Consultation for the Xayaburi and Don Sahong dams; in particular, to assess information transparency, public participation, and the engagement of civil society and affected communities in decision-making during the process.

From attending these meetings, we note that some improvements have been made to the Prior Consultation process, including: making information publicly available at an earlier stage compared to previous processes; facilitating opportunities for stakeholders to provide input; and enabling space for discussions and questions at the two regional forums. However, major questions remain as to how the inputs and concerns from stakeholders will meaningfully and transparently inform decisions on whether and how the project proceeds and the mitigation options that will be developed. In our view, due to the limited framing of the Prior Consultation as a dialogue around mitigation options, together with the poor quality of impact assessments based on weak and inadequate baseline information and data (see below), the improvements made to the Prior Consultation are far from sufficient to enable meaningful public participation or stakeholder engagement in the process for Pak Beng.

National level consultations

We are further concerned that improvements to stakeholder engagement and public participation were focused at the regional level, and were not reflected in the national level consultations that remain the key forum for community representatives, members of the public and other stakeholders in each country to receive information and provide input. Information collected by International Rivers from the national level consultations indicates that the process was weak and participation was limited in each of the lower Mekong countries of Thailand, Cambodia and Vietnam. Key issues included:

- Limited number of meetings;
- Imbalance in representation, in particular by affected communities as well as civil society groups;
- Limited information shared during the meetings, project and other documents not made available in local languages;
- No information on the transboundary or cross-border impacts of the project;
- Questions about the project answered by national line agencies, rather than by the project developer;
- Limited time for discussion and to raise questions and concerns.

In Thailand, prompted by perceived inadequacies in the consultation meetings, on 8 June 2017 Thai Mekong communities filed a lawsuit against the Thai National Mekong Committee and other Thai state agencies in the Thai Administrative Court for failures to fulfil their duties to provide information and consult under Thai law and the 1995 *Mekong Agreement*.

Adequacy of information submitted for consultation

International Rivers commissioned an independent review of the project documents submitted for Prior Consultation.⁶ The four reviewers have expertise across a range of issues, including fisheries impact mitigation, social impacts and resettlement, gender impacts, environmental law, and international standards for impact assessment. Overall, the review found that project documents are substantively inadequate, and provide an extremely limited picture of the Pak Beng Dam's expected environmental and social impacts, especially the transboundary and cumulative impacts of the project. The MRC's draft Technical Review Report (TRR) supports many of the findings of the review.

The MRC Secretariat has also acknowledged the shortcoming of the project documents, including lack of baseline information, use of outdated data, and flaws in the analysis. However, the MRC Secretariat has stated that because these are feasibility stage studies, and the developer has committed to providing further information and conducting further studies at a later stage, the documents satisfy the requirements of Prior Consultation.⁷

We do not agree. The independent review concludes that the Pak Beng project documents submitted and relied on in the Prior Consultation process are insufficient to meaningfully evaluate the project's environmental and social impacts, as well as the viability of proposed impact mitigation measures. Complete, current and credible baseline data is essential to understand the risks associated with the Pak Beng Dam to fisheries, hydrology, and sediment flows, along with impacts on the livelihoods of Mekong communities. Adequate baseline data is also vital in developing appropriate and context specific mitigation measures as well as effective monitoring systems. Adequate studies must be available at the outset of Prior Consultation to inform discussion and stakeholder input on the impacts of the project and potential mitigation options and to ensure a meaningful process.

Need for cumulative impact assessment and basin-wide studies

To date, the transboundary and cumulative impacts of dams in the Mekong Basin have been largely ignored in decision-making, setting a dangerous precedent as new dams are put forward for review. The Pak Beng Dam cannot be considered in isolation, but must be examined in terms of its cumulative impacts with dams under construction and proposed developments in the Mekong Basin. The project studies fail to take into account important data accumulated in the last ten years, including studies by the MRC and basin-wide studies such as the 2010 Strategic

⁶ International Rivers, 'Independent Expert Review of the Pak Beng Dam': www.internationalrivers.org/resources/independent-expert-review-of-the-pak-beng-dam-eia-16488.

⁷ MRC, 'Pak Beng consultation: Indispensable and effective despite gaps': www.mrcmekong.org/news-and-events/news/pak-beng-consultation-indispensable-and-effective-despite-gaps.

Environmental Assessment,⁸ the Vietnamese government's Mekong Delta Study⁹ and the MRC Council Study,¹⁰ which is currently ongoing.

As further dams are built on the Mekong River, it is critical that decision-making on individual projects is supported by up to date cumulative impact assessments and basin-wide studies to ensure fully informed decision-making on hydropower development in the Mekong Basin.

The MRC Council Study was initiated by the four lower Mekong governments in December 2011, at the 3rd Mekong-Japan Summit. According to the MRC, the Council Study aims to close important knowledge gaps on how mainstream dams "will impact the river basin environmentally, economically and socially". As a basin-wide study, it is intended to supplement information on individual projects provided through the Prior Consultation process.

The Council Study has been subject to repeated delays, but is now scheduled for completion in December 2017. Lower Mekong governments and other stakeholders will soon be a position to benefit from the findings of this study to inform their decision-making on Mekong dams. As the Council Study enters its final phase, it is imperative that the study prioritizes participation of Mekong communities and civil society through meaningful consultation and that the findings are shared in a timely and transparent manner. The Prior Consultation process should be extended until the Council Study has been completed so that the findings can inform consultations and decision-making on the Pak Beng Dam.

Prior Consultation timeline and sequencing

Recent statements by the MRC Secretariat have indicated that the process will conclude at the end of the six months, at the special session of the Joint Committee Working Group on 19 June 2017. While recognizing gaps and weaknesses in the information submitted by the project developer, the MRCS has stated an expectation that a 'Joint Action Plan' will be developed that will frame the 'post-consultation' to address outstanding concerns and information gaps.¹¹

What is meant by 'post-consultation', and how the proposed Joint Action Plan would be implemented and monitored remain unclear. We are concerned that, in practice, this will mean little departure from the experience of the Xayaburi and Don Sahong Dams, in which the project developer made undertakings to conduct further studies and address information gaps and concerns alongside signing agreements and commencing project construction. In the case of the Xayaburi Dam, while the developers have invested in a project redesign, the details of the redesign are yet to be released to the public or reviewed by the MRC for compliance with the 'Preliminary Design Guidance', yet the project is over 75% complete.

⁸ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream', prepared for the Mekong River Commission, October 2010.

⁹ DHI, 'Study on the Impacts of Mainstream Hydropower on the Mekong River', prepared for the Vietnam Ministry of Natural Resources and Environment, December 2015.

¹⁰ Mekong Rivers Commission, 'Study on Sustainable Management and Development of the Mekong River including Impacts of Mainstream Hydropower Projects': www.mrcmekong.org/highlights/the-study-on-sustainable-management-and-development-of-the-mekong-river-including-impacts-of-mainstream-hydropower-projects.

¹¹ MRC, 'Pak Beng consultation: Indispensable and effective despite gaps': www.mrcmekong.org/news-and-events/news/pak-beng-consultation-indispensable-and-effective-despite-gaps.

We note that the Mekong Agreement already enables a mechanism to address inadequate studies and information gaps, through allowing extension of the Prior Consultation beyond the initial six months to ensure information is adequate and concerns are addressed.

It is critically important that baseline data is collected and adequate impact assessments are conducted at the outset or during the Prior Consultation in order to ensure a meaningful process. Baseline data must be collected, adequate studies completed and consultation undertaken around these studies before any decision is made to move forward with the project and before project agreements are signed and any construction activities commence.

Recommendations

- Updated and complete project studies should be submitted to the MRC and member countries for review within the Prior Consultation process, and form a basis for decision-making on the Pak Beng Dam.
- The project studies must include a comprehensive transboundary and cumulative impact assessment, based on international standards for public participation and consultation with affected communities within the Mekong Basin.
- The timeline for the Prior Consultation process must be extended to allow for updated studies to be evaluated within the Prior Consultation procedure, before any decision is taken on the project. This should include consideration of the final findings of the MRC Council Study, which will be completed in December 2017.
- Decision-making, preparatory work, and signing of project agreements for the Pak Beng Dam must be suspended until there is adequate information to properly evaluate the project's impacts in the context of the Mekong River Basin.
- A Joint Action Plan, marking the end of the Prior Consultation process should be developed, but only once adequate baselines studies are conducted, and there is agreement from MRC member countries on how to proceed.
- More information is needed on how identified weaknesses in the Prior Consultation and the specific recommendations from the Dialogue Workshop are being addressed in the PNPCA review process.

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