

Consultation on MRC's Hydropower Programme

Vientiane, Lao PDR, 25-26 September 2008

Session 1 – MRC's Role in Hydropower Development

Experiences from the Procedures for Notification, Prior Consultation and Agreement (PNPCA)

Dr. George E. Radosevich

International Water Law Advisor

Key Points of Presentation

1. **The MA95 Articles 5, 6 & 26 and PNPCA implementation, and Intentions and Expectations from Spirit of Cooperation**
2. **Practices** under Article 5 from 4/95 and after PNPCA adopted in 11/03
3. **Conclusions** relative to HP particularly mainstream dams and implementation of MA95: **What, How, When, Who**

1. The MA95, PNPCA & PMFM

- **Insight: A water lawyer's perspective of hydropower dam development!**
- **Four Prerequisites** for international river basin/watercourse agreements
- **MA95** perceives optimum developments through multi-purpose, multi-objective coordinated projects – for mainstream HPD through prior consultation process.
- **What is behind the MA95? - intentions and expectations – Spirit of cooperation as a basin-sharing agreement.**

What is Spirit of Cooperation in Art. 5 & 6 & PNPCA?

- International standard of reasonable and equitable utilization applied.
- Recognizes the rights, interests and responsibilities (RIR) of riparians to meet standard.
- Recognizes all prior/existing use rights (O-I-O) in accordance with the provisions of Article 6 and the PMFM minimum flows for allocations and operations (utilization).
- Use is based on need for type, time, place and impact, concern for all riparian RIR, related basin resources and environment.

Provisions of Article 5 A & B

	Notification	Prior Consult. ¹	Agreement
A. <u>Tributaries:</u> Wet & Dry Season	XXX		
B. <u>Mainstream:</u>			
1. Wet Season			
- Intra-Basin Use	XXX		
- Inter-Basin Diversion		XXX	
2. Dry Season			
- Intra-Basin Use		XXX	
- Inter-Basin Diversion			XXX²

Note:

1. Prior Consultation aims at arriving at an agreement by the JC; decision of JC shall be issued and water and use monitored.

2. For Inter-basin Diversion Projects during the dry season, Article 5 calls for specific agreement, except an inter-basin diversion of the surplus could be made by prior consultation if a surplus quantity of water is available in excess of proposed uses verified and unanimously confirmed by the JC.

2. Practices under Article 5 and PNPCA

What have been the submissions and experiences gained since MA 4-95 and PNPCA adoption in 11-03?

Table1. Article 5 and PNPCA Submissions to date

Instrument	Cambodia	Lao PDR	Thailand	Vietnam	Total
Notification	1 0701	9 4 b/4;5 after (3 hp)	2 1995 (1 hp)	16 10 b/4;6 after (9 hp)	28 17 b/4 11 after
Prior Consultation	0	1 b/4 (no action) <i>1 (advance info 08 8 hp)*</i>	0	0	1
Agreement	0	0	0	0	0
Total	1	10	2	16	29

*LaoPDR took commendable action in June 08 by informing MRCS of plans for 8 dams on the mainstream even before feasibility studies completed with intention For MRCS to share with JC and NMCs.

3. Conclusions & Next: What, How, When, Who

1. **MA95** is consistent with international law
2. **MRC** is proper institutional forum for promoting the development, management and protection of the waters of the Mekong River system
3. **Any** hydropower development project on the Mekong mainstream comes under the Art. 5 and PNPCA provisions for prior consultation
4. **PNPCA** is adequate to begin PC process
5. **The questions are: what, how, when and who.**

What does 95 MA & PNPCA require?

- **Proposing party** needs to scope out proposed project and identify and protect existing uses of water, proposed uses of water and impacts on existing off-stream, in-stream and on-stream reasonable and equitable uses of water, including protection of the environment and water quality.
- **Specific Actions** include Preparations, Submissions, Consultations and consideration of Responses for proposed mainstream dry season intra-basin uses in accordance with Articles 5 and 26 as elaborated in the PNPCA. But Art. 5 is not a veto right nor unilateral right to use water.
- **Guidelines** provide more details on “What” needs to be done to operationally implement the PNPCA.
- **Requires** cooperation aiming at agreement based on “good faith” to jointly optimize use and prevent waste of Mekong waters.

When – “Timely manner”

- The question of when should the required submissions be made to the MRC varies as noted in the PNPCA.
- “the timeframe for Prior Consultation shall be six months from the date of receiving documents on Prior Consultation.” (section 5.5.1)
- Rationale behind providing a timeframe is to enable all parties to receive information on the proposed use and:
 1. to assess the potential impacts on their rights and interests;
 2. to determine if greater benefits can be derived through cooperation and trade-offs; and,
 3. to establish the right of claim by the proposing party against future proposed uses.
- The PNPCA clearly states no use of water should be made until compliance has been carried out. (section 5.4.3 Para⁹₂)

How

- Critical is to identify and incorporate existing & other proposed uses, Art. 6 flows in project planning.
- Initiate informal informing process via MRCS to JC to encourage participation and comments.
- Processes for formal submissions are clear; JC should appoint Working Group/Technical Advisory Team asap with instructions to MRCS/HP to begin setting up files, analyses, consultations, field trips, etc.
- Place as high priority on JC and Council agendas impacts of all PNPAs on BDP and annual use reporting.

Who are the Stakeholders?

Three categories – MRC, Governments & Public

- **MRC** established to implement the MA95.
- **PNPCA** identifies who has what role in implementation to include MRC & Government:
***MRC (Council/JC/MRCS)** ***NMCs** ***Line Agencies**
- **MA95** recognizes MRB and its natural resources and environment immense value to all riparians for economic and social well-being and living standards of their peoples. Hence, the Public, which includes water users, beneficiaries, and others, has an interest in the process and inputs to decision-making.

Who

- **NMC(s)** responsible to inform line agencies and others (government and private sector investors, etc.) of the MRC member's rights and responsibilities under the MA95 (Articles 5, 6 and 26) and specifically under the PNPCA, providing the content, format, forms and insuring the proper type and documentation is obtained for submission to the JC. (PNPCA 5.3.1)
- **MRCS** responsible to receive, check and submit the PC submissions to the JC and other NMCs, to review, analyze and provide technical advice as and if the JC requests. (PNPCA 5.3.2) MRCS has adopted internal procedures for PNPCA.

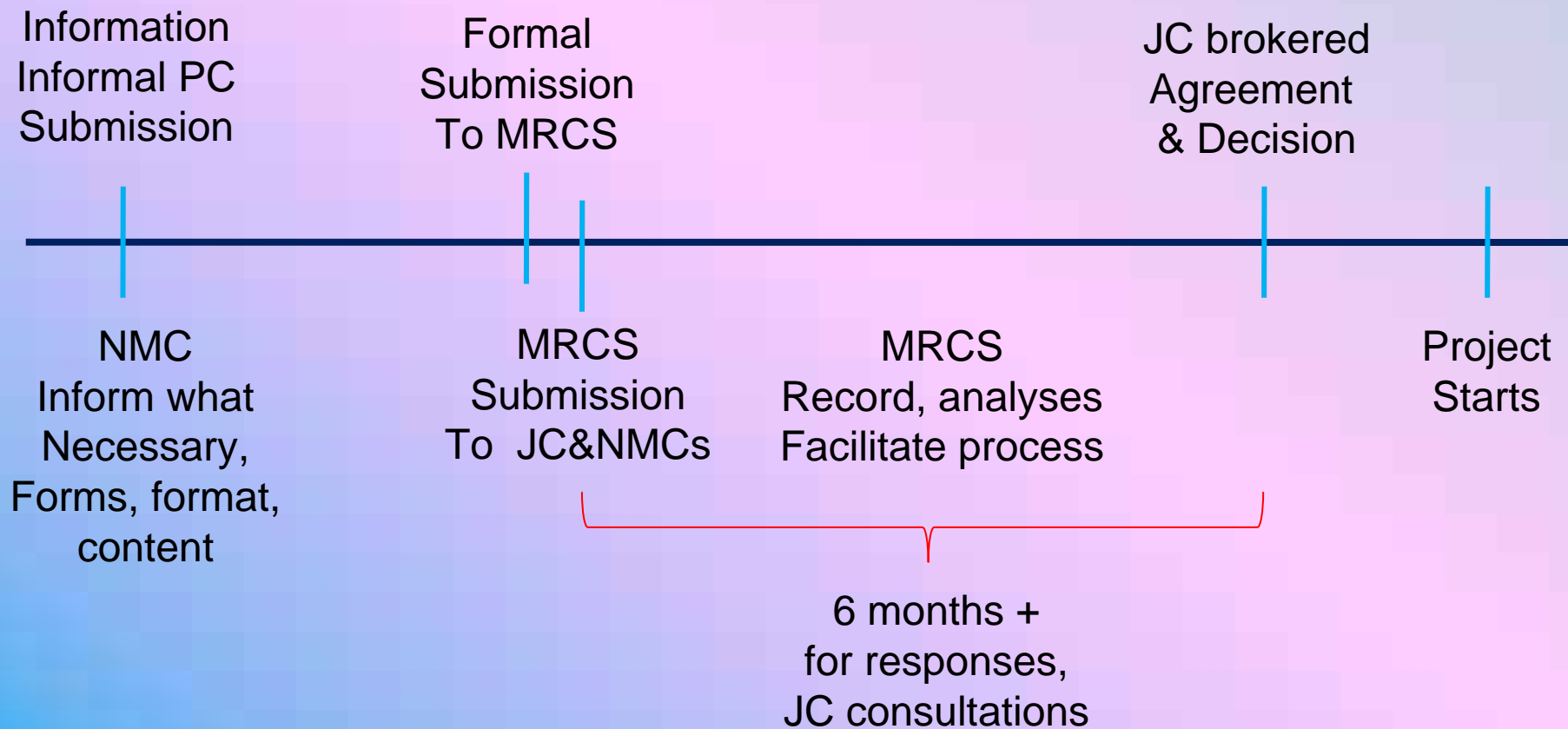
Who

- **JC** responsible to acknowledge and review PC submission documents, comments from other riparians, carry out consultations, field visits, set up a Working Group [or technical advisory team] to assist in consultation process. (PNPCA 5.3.3)
The JC shall aim at arriving at an agreement and shall issue a decision containing agreed upon conditions that is recorded and make a record of use when the use commences.
(PNPCA 5.4.3)

Public might/should be involved?

- Many indirect stakeholders outside the member countries and MRC (water users in the MRB and other beneficiaries, public parties/NGOs that are concerned about fisheries, aquatic life, environment, recreation, etc. and donors) may have important inputs for MRC consideration.
- Important to **provide a forum** for expression of public interests and comments. May be a sensitive issue for MRC member States; could be a function carried out by the MRCS and/or the Working Group.

Prior Consultation Timeline



Regarding development of the Hydropower Programme:

- Consult and Incorporate BDP, MRC-IS and DSF.
- MRCS should treat each transboundary issue without bias, impartially and transparently.
- Mainstream hydropower should not/cannot be developed either as single purpose or independent of other existing and proposed uses, particularly for operation, management and maintenance.
- Now 8-10 potential dams proposed - consider cumulative impacts from series of dams for benefits and potential harmful effects.
- Encourage and promote cooperation through early sharing of information and plans.