Regulatory Enforcement and Inspections in the Environmental Sector of Peru



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Foreword

Regulations are indispensable for the proper functioning of the economy and society. They create the "rules of the game" for citizens, business, government and civil society. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services, such as the protection of the environment. The way in which regulations are designed is a major factor in both the quality of the regulatory framework and the outcomes achieved. But how regulations are implemented and enforced, and how compliance with regulatory requirements is assured and promoted, are also critical determinants of whether the regulatory system is working as intended.

The objective of regulatory policy – or "better regulation", as it is also known in many countries and jurisdictions – is to ensure that regulations and regulatory frameworks work effectively in the public interest. Therefore, better regulation programmes should consider and appraise regulatory enforcement and inspection activities.

The Environmental Evaluation and Enforcement Agency of Peru (*Organismo de Evaluación y Fiscalización Ambiental,* OEFA) asked the OECD to assess regulatory enforcement and inspections in the environmental sector in Peru. This report provides an in-depth assessment of the institutional framework and current practices carried out in OEFA. It also offers recommendations to enhance the capacity to carry out inspection and enforcement activities that effectively contribute to the achievement of policy objectives in the environmental sector of Peru. The assessment was carried out by comparing OEFA practices with good international practices and best practice principles identified by the OECD, and, in particular, with the *OECD Regulatory Enforcement and Inspections Toolkit*.

For instance, the Toolkit recommends that regulatory enforcement and inspections should be based on evidence: deciding what to inspect and how should be grounded in data and evidence, and results should be evaluated regularly. In order to boost performance, OEFA should increase the collection, analysis and use of hard data in enforcement and inspections policy in the environmental sector in Peru.

This report recognises the achievements by OEFA in ensuring that the regulatory provisions on environmental protection are enforced effectively. It also offers a roadmap for OEFA to align with international practice and OECD recommendations in regulatory enforcement and inspections.

A draft version of this report was discussed and approved at the 21st session of the Regulatory Policy Committee on 7 November 2019.

Ackowledgements

This report was prepared by the OECD Public Governance Directorate (GOV), under the leadership of Janos Bertok, Acting Director. The review was led by Manuel Flores Romero, Co-ordinator of the programme on regulatory policy in Latin America, and by Daniel Trnka, Co-ordinator of the programme on regulatory management and delivery, both from the OECD Regulatory Policy Division. The report was co-ordinated under the leadership of Nick Malyshev, Head of the Regulatory Policy Division. The team received invaluable comments by the peer reviewers: Mr. Graham Russell, Chief Executive, Office for Product Safety & Standards, United Kingdom; and Gita Sematoviuciutem, then Head of the Business Supervision Policy Division, Business Environment Department, Ministry of Economy and Innovation of the Republic of Lithuania. The main authors are Giuseppa Ottimofiore, international expert on enforcement and inspections, Florentin Blanc, Andres Blancas, Alberto Morales, Gloriana Madrigal, Erik Perez, Daniel Trnka and Manuel Flores Romero from the OECD Regulatory Policy Division. Significant contributions were received from Martha Baxter, Anna Pietikainen, Andrea Uhrhammer, Klas Klaas, and Janos Bertok. Claudia Paupe, Anna Kanjovski and Mariama Diallo lent administrative and organisation support. Jennifer Stein co-ordinated the editorial process.

The review is based on information collected through a questionnaire in December 2018. The review team also held meetings in Lima, Peru, in March, April and July 2019, as well as in Cuzco and Truijjo, Peru, in April 2019, with a wide range of stakeholders, including government officials from several ministries and government agencies, representatives from the academia and business community, and experts in regulatory enforcement and inspections, and environmental topics.

A draft of the report was discussed in a meeting of the OECD Regulatory Policy Committee in November 2019. Thanks are extended to all delegates for their input and comments.

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Abbreviations and acronyms

ANA	National Water Authority	*Autoridad Nacional del Agua*
CEPLAN	Nacional Centre of Strategic Planning	*Centro Nacional de Planeamiento Estratégico*
COFEMA	Coordination of Specialised Prosecutor's Offices for Environmental Matters	*Coordinador en Fiscalías Especializadas en Materia Ambiental*
DAA	Declaration of Environmental Suitability	*Declaración de Adecuación Ambiental*
DCCAE	Department of Communications, Climate Action and Environment	*Departamento de Comunicaciones, Acción Climática y Medio Ambiente*
DHPLG	Department of Housing, Planning and Local Government	*Departamento de Vivienda, Planificación y Gobierno Local*
DIGESA	Directorate General of Environmental Health	*Dirección General de Salud Ambiental*
EFAs	Environmental Enforcement Entities	*Entidades de Fiscalización Ambiental*
EMM	Enforcement Management Model	*Modelo de Gestión del Cumplimiento*
EPA	Environmental Protection Agency	*Agencia de Protección Ambiental*
EPS	Enforcement Policy Statement	*Declaración de Política de Cumplimiento*
FEMA	Specialised Prosecutor's Office for Environmental Matters	*Fiscalía Especializada en Materia Ambiental*
HSE	UK's Health and Safety Executive	*Oficina de Salud y Seguridad del Reino Unido*
HSWA	Health and Safety at Work etc. Act	*Ley de Salud y Seguridad en el Trabajo*
ICT	Information and Communication Technologies	*Tecnologías de la Información y Comunicación*
IGAs	Environmental Management Instruments	*Instrumentos de Gestión Ambiental*
INAPS	Applied Information System for Supervision	*Sistema de Información Aplicada a la Supervisión*
IT	Information Technologies	*Tecnologías de la Información*
KPI	Key Performance Indicators	*Indicadores de Desempeño Clave*
LGA	General Law of the Environment	*Ley General del Ambiente*
LMOs	Living Modified Organisms	*Organismos Modificados Vivos*

MINAM	Ministry of Environment	*Ministerio del Ambiente*
MSME	Micro, Small and Medium Enterprise	*Micro y Medianas Empresas*
NIECE	Network for Ireland's Environmental Compliance	*Red para el Cumplimiento Ambiental en Irlanda*
NPS	National Priority Sites for Enforcement System	*Sistema Nacional para la implementación de Sitios de Prioridad Nacional*
OECD	Organisation for Economic Co-operation and Development	*Organización para la Cooperación y Desarrollo Económicos*
OEFA	Environmental Evaluation and Enforcement Agency	*Organismo de Evaluación y Fiscalización Ambiental*
OGIP	Operational Guidance: Inspection Procedure	*Orientación operacional: procedimiento de inspección*
PAMA	Programme of Environmental Suitability and Management	*Programa de Adecuación y Manejo Ambiental*
PDP	Personnel Development Plan	*Plan de Desarrollo de las Personas*
PEDN	Strategic Plan of National Development	*Plan Estratégico de Desarrollo Nacional*
PEI	Institutional Strategic Plan	*Plan Estratégico Institucional*
PIDE	State Interoperability Platform	*Plataforma de Interoperabilidad del Estado*
PIFA	Interactive portal for environmental enforcement	*Portal Interactivo de Fiscalización Ambiental*
PLANAA	National Environmental Action Plan	*Plan Nacional de Acción Ambiental*
PLANEFA	EFA's annual plan of inspections	*Plan Anual de Inspecciones de las EFAs*
POI	Institutional Operational Plan	*Plan Operativo Institucional*
PESEM	Multiannual Strategic Plan	*Plan Estratégico Sectorial Multianual*
RAA	Registry of Administrative Acts	*Registro de Actos Administrativos*
RAL	Remedial Action List	*Lista de Acciones Correctivas*
RIA	Regulatory Impact Assessment	*Evaluación de Impacto Regulatorio*
RINA	Registry of Environmental Violators	*Registro de Infractores Ambientales*
RRNN	System of Management of Natural Resources	*Sistema de Manejo de Recursos Naturales*
RRR	Risk-Regulation Reflex	*Reflejo de Regulación de Riesgo*
SECONFIA	Consultation Service of Competencies in Environmental Inspections	*Servicio de Consulta de Competencias en Fiscalización Ambiental*
SFVS	State Food and Veterinary Service	*Servicio Estatal de Alimentos y Veterinaria*
SEIA	National Environmental Impact Assessment System	*Sistema Nacional de Evaluación y Fiscalización Ambiental*

SENACE	National Environmental Certification Service for Sustainable Investments	*Servicio Nacional de Certificación Ambiental para las Inversiones sostenibles*
SERNANP	National Service of Natural Areas Protected by the State	*Servicio Nacional de Áreas Naturales Protegidas por el Estado*
SERVIR	Nacional Authority of Civil Service	*Autoridad Nacional del Servicio Civil*
SIGA	Integrated Administrative Management System	*Sistema Integrado de Gestión Administrativa*
SINADA	Online tool for environmental complaints	*Servicio de Información Nacional de Denuncias Ambientales*
SINANPE	National System of Natural Areas Protected by the State	*Sistema Nacional de Áreas Naturales Protegidas por el Estado*
SINEFA	National System of Environmental Assessment and Oversight	*Sistema Nacional de Evaluación y Fiscalización Ambiental*
SINIA	National Environmental Information System	*Sistema Nacional de Información Ambiental*
SME	Small and Medium Enterprise	*Pequeñas y Medianas Empresas*
SNGA	National System of Environmental Management	*Sistema Nacional de Gestión Ambiental*
SUNAFIL	National Superintendence of Labour Inspection	*Superintendencia Nacional de Inspecciones Laborales*
SUPEREFA	EFAs Remote Oversight System	*Sistema de Supervisión Remota de EFAs*
TUO	Single Consolidated Text	*Texto Único Ordenado*

Executive summary

For regulations to meet their policy objectives – for instance the protection of the environment – government and agencies must have in place a carefully designed enforcement strategy, including inspections, and should implement this strategy in an effective manner.

The report evaluates the policies and legal framework for the Environmental Evaluation and Enforcement Agency of Peru (OEFA), as well as its practices and resources employed in enforcement and inspections activities. Based on this evaluation, it and offers policy options for improving performance. The benchmark for comparative analysis is the *OECD Regulatory Enforcement and Inspections Toolkit*. This Toolkit offers government officials, regulators, stakeholders and experts a simple tool for assessing the inspection and enforcement system in a given jurisdiction, institution or structure.

Some of the main assessment and recommendations include:

Regulatory enforcement and inspections should be based on evidence and measurement: deciding what to inspect and how should be grounded in data and evidence, and results should be evaluated regularly.

Both OEFA's mandate and mission include goals of reducing risk and pursuing public interest; thus, efforts are being made to select requirements based on risk. Furthermore, in a continuous effort to move away from formalism (compliance with formal requirements), processes and tools are being developed to fully implement an enforcement policy based on data ad evidence. However, priorities in terms of protecting the public welfare are largely concentrated in areas of 'social-environment conflict'. Other environmental issues in areas where no population is directly affected, or where the citizens are less well organised, may be neglected.

- The increase in the collection, use and analysis of data, and ensuring that quantitative assessment of harms and risks is taken into account in both *ex ante* and *ex post* regulatory processes can strengthen the evidence-based nature of regulatory enforcement and inspections activities in OEFA.
- The performance of preventive environmental assessment should be used more frequently, whenever possible in sites or in establishments located in social-environmental conflict areas.
- As data collection and analysis improve, it is crucial to make sure that they are used to inform the enforcement and inspections' policy in the environmental sector. Other elements such as socio-environmental conflicts and complaints would thus play a reduced role in priority-setting and planning activities.

Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk, and enforcement actions should seek to reduce the actual risk posed by regulatory infractions.

Applicable legislation and internal OEFA regulations and guidelines allow for risk focus and proportionality. Risk is defined according to good practice.

OEFA has developed a series of tools (e.g. methodology for imposing sanctions based on existing risks, prioritisation criteria for planning of inspections) to promote a common approach to risk proportionality and focus. However, some of the criteria employed (socio-environmental conflicts, complaints and requests from other authorities) should be reviewed to ensure that the elements to be considered pertain to hard evidence, rather than perception.

- There is a need to rely more on fact-based and empirical prioritisation criteria as data are collected.
- Planning of inspections should always based on risks, using hard, measureable evidence and taking into account the vulnerability of the location and the management of risks by the operator.

Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management.

The governance structures and strategic decision-making processes of OEFA support transparency and accountability. However, OEFA could benefit from systematically including representatives of different stakeholder groups (private sector, civil society, amongst others,) in the governance of the agency, particularly when it comes to discussing strategic priorities and transformations.

- Systematically engaging stakeholders in the governance of OEFA would be an important step in building trust among the different actors, ensuring that their needs and views are heard and considered. It would also increase the overall transparency and independence from political influence of the institution and the environmental enforcement system more broadly. Options that might be considered include setting up an advisory body, strengthening the participation of stakeholders in the preparation of regulatory instruments and in asking for feedback on public reports.

Information integration: Information and communication technologies should be used to maximise the focus on risks, promote co-ordination and information sharing and ensure an optimal use of resources

OEFA has made significant progress in the development, introduction and use of ICT tools. As additional competences are transferred to OEFA, efforts have been made to collect data on regulated subjects, primarily through taking a census of the different establishments covered. However, risk data need to be further completed.

- OEFA would benefit in particular from fully digitising data and information to improve risk analysis, planning and automation. Following this, they may consider introducing automated planning of inspections, as the range of establishments covered in the system and relevant risk data are progressively expanding.

Institutions in charge of inspection and enforcement, and the regulatory enforcement and inspection system as a whole, should operate at the levels of performance expected from them

OEFA has set a number of indicators for assessing the efficiency and effectiveness of the agency, as well as stakeholder satisfaction. However, most available measurements are of outputs, as most outcome indicators were only set recently, and have not yet been measured.

- There is a need for OEFA to differentiate and better classify the reported indicators, and to clearly communicate to the public when and where these can be found. OEFA may also want to consider informing the public and stakeholders about the different types of indicators and why and in which document they are set out (e.g. by displaying this information clearly on their website, by means of a section within the annual report amongst others).
- It is indispensable to strengthen the focus on indicators of actual results (effectiveness). A clear difference should be made between indicators of volume of activities and outputs and indicators of effectiveness.

Legal instruments

Legal instrument in English	Legal instrument in Spanish	Web link
Annual Plan for Environmental Evaluation and Inspection of OEFA 2019	Plan de Evaluación y Fiscalización Ambiental 2019	https://www.oefa.gob.pe/planefa/planefa-2019
Board of Directors Resolution - Nº 008-2016-OEFA/C – On Environmental Sanctions	Nº 008-2016-OEFA/C	http://www.oefa.gob.pe/wp-content/uploads/2016/05/RES-008-2016-OEFA-CD-PERUANO.pdf
Board of Directors Resolution – No.018-2013-OEFA/CD	Resolución del Consejo Directivo – No.018-2013-OEFA/CD	http://www.oefa.gob.pe/wp-content/uploads/2013/04/R-018-2013-CD.pdf
Environmental Protection Act (1992)	Ley de Protección Ambiental (1992)	http://www.legislation.gov.uk/uksi/1992/266/contents/made
General Environmental Law No. 28611	Ley General del Ambiente – No.28611	http://www.minam.gob.pe/wp-content/uploads/2013/06/ley-general-del-ambiente.pdf
Guidelines for the formulation, approval, monitoring and evaluation of compliance with the Annual Environmental Assessment and Control Plan	Lineamientos para la formulación, aprobación, seguimiento y evaluación del cumplimiento del Plan Anual de Evaluación y Fiscalización Ambienta - No. 004-2019OEFA/CD	https://www.oefa.gob.pe/avisos/lineamientos-para-la-formulacion-aprobacion-y-evaluacion-del-plan-anual-de-evaluacion-y-fiscalizacion-ambiental-planefa
Health and Safety at Work etc. Act 1974	Ley de Salud y Seguridad en el Trabajo	https://www.hse.gov.uk/legislation/hswa.htm
Institutional Planning Guide – CEPLAN	Guía para el Planeamiento Institucional – CEPLAN	https://www.ceplan.gob.pe/wp-content/uploads/2018/11/Gu%C3%ADa-para-el-planeamiento-institucional-_26marzo2019w.pdf
Law No. 28245, Framework Law of the National Environmental Management System, and its Regulation	Ley Marco del Sistema Nacional de Gestión Ambiental No. 28245	http://www.minam.gob.pe/wp-content/uploads/2013/10/ley-SNGA-28245.pdf
Law No. 27806 on Transparency and Access to Public Information	Ley de Transparencia y Acceso a la Información Pública - No. 27806	https://www.peru.gob.pe/normas/docs/LEY_27806.pdf.
Law of Protected Areas No. 26834	Ley de Áreas Naturales Protegidas No. 26834	http://biblioteca.unmsm.edu.pe/RedLIEDS/Recursos/archivos/Legislacion/Peru/ley26834.pdf
Law of the National Evaluation System of Environmental Impacts No. 27446	Ley del Sistema Nacional de Evaluación de Impacto Ambiental y su Reglamento No. 27446	https://www.minam.gob.pe/wp-content/uploads/2013/10/Ley-y-reglamento-del-SEIA1.pdf
Law of the National Environmental Evaluation and Inspection System No. 29325	Ley del Sistema Nacional de Evaluación y Fiscalización Ambiental No. 29325,	https://www.oefa.gob.pe/?wpfb_dl=12165
Legislative Decree No. 613 – Environmental and Natural Resource Code	Decreto Legislativo No. 613 – Código del Medioambiente y los Recursos Naturales	http://www.oas.org/dsd/FIDA/laws/legislation/peru/peru.pdf
Ministerial Resolution N° 247-2013-MINAM	Resolución Ministerial No. N° 247-2013-MINAM	http://www.oefa.gob.pe/wp-content/uploads/2013/08/regimen-comun-de-fiscalizacion-ambiental.pdf.
Ministerial Resolution No. 385-2016-MINAM	Resolución Ministerial No. 385-2016-MINAM	http://www.minam.gob.pe/disposiciones/resolucion-ministerial-n-385-2016-minam-2/
Model of Regulation of Supervision, Supervision and Sanction in environmental matters of the Regional Government	Modelo de Reglamento de Supervisión, Fiscalización y Sanción en materia ambiental del Gobierno Regional – Resolución Directiva No. 036-2017-OEFA/CD	https://www.oefa.gob.pe/avisos/resolucion-036-2017-oefa-cd
National Plan of Environmental Measures - Decree N° 014-2011-MINAM	Plan Nacional de Acción Ambiental - Decreto Supremo N° 014-2011-MINAM	http://www.minam.gob.pe/disposiciones/decreto-supremo-n-014-2011-minam/

National Policy on Environment - Supreme Decree No. 012-2009-MINAM	Política Nacional del Ambiente - Decreto Supremo No. 012-2009-MINAM	http://www.minam.gob.pe/wp-content/uploads/2013/09/ds_012-2009-minam.pdf
OEFA Personnel Development Plan – General Secretary Resolution NO. 025-2018-OEFA/SG	Plan de Desarrollo de las Personas 2018 del Organismo de Evaluación y Fiscalización Ambienta – Resolución de la Secretaría General No. 025-2018-OEFA/SG	https://www.gob.pe/institucion/oefa/normas-legales/217911-025-2018-oefa-seg
OEFA's Regulation on Inspections No. 006-2019-OEFA/DC	Reglamento de Supervisión de OEFA – No. 006-2019-OEFA/DC	http://www.oefa.gob.pe/wp-content/uploads/2019/02/Texto-Reglamento-de-Supervisi%C3%B3n-.pdf
OEFA's Internal Rules of Procedures – Supreme Decree No. 013-2017-MINAM	Reglamento de Organización y Funciones del OEFA – Decreto Supremo No. 013-2017-MINAM	http://www.oefa.gob.pe/?wpfb_dl=26390
OEFA's Operational Institutional Plan 2019	Plan Operativo Institucional de OEFA 2019	https://www.oefa.gob.pe/?wpfb_dl=32819.
OEFA's Regulation on Inspections and new Guidelines on Environmental Inspectors	Guía de Supervisores Ambientales	https://www.oefa.gob.pe/publicaciones/guia-de-supervisores-ambientales
Plan for the Environment 2017-2021 – Approved by the Ministerial Resolution No.385-2016-MINAM	Plan Estratégico Sectorial Multianual del Sector Ambiental 2017-2021 – Resolución Ministerial No. 385-2016-MINAM	http://www.minam.gob.pe/disposiciones/resolucion-ministerial-n-385-2016-minam-2/.
Regulation on Transparency, Access to Environmental Public Information and Participation and Citizen Consultation in Environmental Matters – Supreme Decree No. 002-2009-MINAM	Reglamento sobre Transparencia, Acceso a la Información Pública Ambiental y Participación y Consulta Ciudadana en Asuntos Ambientales – Decreto Supremo No. 002-2009-MINAM	http://www.minam.gob.pe/disposiciones/decreto-supremo-n-002-2009-minam/
Rules for handling complaints about processing defects of the Environmental Assessment and Control Agency	Reglas para la atención de quejas por defectos de tramitación del Organismo de Evaluación y Fiscalización Ambiental – Resolución No. 009-2015-OEFA/CD	http://www.oefa.gob.pe/wp-content/uploads/2015/03/RES-009-2015-OEFA-CD-REGLAS.pdf
Supreme Decree amending the Environmental Management Regulation for Manufacturing Industry and International Trade.	Decreto Supremo que enmienda la Regulación de Gestión Ambiental para la Industria Manufacturera y su Comercio Internacional	https://cdn.www.gob.pe/uploads/document/file/339170/Decreto_Supremo_N__006-2019-PRODUCE20190703-25057-19kvejp.pdf
Supreme Decree amending the Text of the Law Nº27444 of the General Administrative Procedure	Decreto Supremo que aprueba el Texto Único Ordenado de la Ley nº27444 – Ley del Procedimiento Administrativo General	https://www.indecopi.gob.pe/documents/51759/1562772/Texto+%C3%9Anico+Ordenado+de+la+Ley+N%C2%BA+27444.pdf/a0e63da4-3c3c-bcdc-100a-a4ca6e5affd7
Supreme Decree No. 014-2011-MINAM	Decreto Supremo No. 014-2011-MINAM	http://www.minam.gob.pe/disposiciones/decreto-supremo-n-014-2011-minam/

1 Background and context

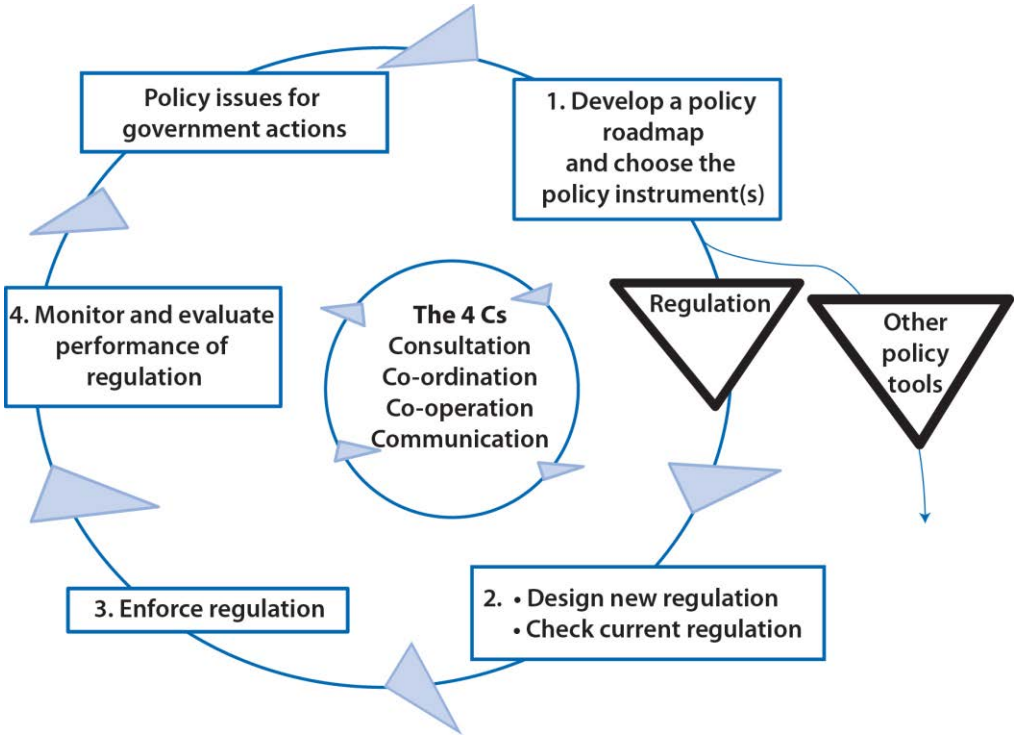
This chapter highlights the relevance for governments to ensure the effectiveness of enforcement and inspection activities to help achieve policy objectives. It then presents the environmental regulatory system and its management in Peru, provides a description of the Environmental Evaluation and Enforcement Agency (OEFA), and includes an introduction to assessment and recommendations.

Enforcement and regulatory governance

Inspections and the regulatory policy cycle

The regulatory cycle defines the steps that any public policy must follow, starting from the identification of the public policy issue, the regulation design, until the *ex post* evaluation (see Figure 1.1). In this process, enforcement, and more specifically, inspections, is a key element to achieve the expected results and the public policy purpose.

Figure 1.1. Regulatory policy cycle



Source: OECD (2011[1]), *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest*, Paris, https://dx.doi.org/10.1787/9789264116573-en.

In the first stage, an institution or a policy group starts defining a public policy issue. Clear definition of the issue at hand is essential to identify the right solutions and achieve good and expected policy outcomes. The design of the specific policy is the institutional response to deal with an observed issue, after assessing different policy options, according to the efficiency and effectiveness in the achievement of expected outcomes. At this stage, designing the approach to ensuring and measuring compliance also plays a key role in achieving the success of the public policy. When deciding what the desirable policy outcomes are, policymakers have to start thinking about the specific goals to measure and to foresee how compliance with the new regulation will be measured and evaluated.

The second stage involves conducting an *ex ante* assessment of regulation. In this stage, a number of policy alternatives are weighted against each other. Regulatory Impact Assessments (RIA) is the most widely tool used across OECD countries to perform *ex ante* assessments (OECD, 2020[2]). Regulatory Impact Assessments (RIA) is the most widely tool used across OECD countries to perform *ex ante* assessments and ensure evidence-based decision-making. The core of RIA is to identify and contrast benefits and cost of the alternatives of public policy. Using a consistent methodology to dissect the benefits

and costs of each regulatory alternative allows a clear discussion on what is the best measure to solve the policy issue. Performing this cost-benefit analysis is complex, as it has to take into account direct or indirect stakeholders affected and integrate monetary costs as well as non-monetary externalities. Non-monetary externalities are crucial in environmental policy (air quality, clean water, etc.). Several techniques are available to monetise some of the costs related to environmental protection as well (willingness to pay, reduced market cost of fish from polluted waters, etc.) It is very important to identify the enforcement approach already at this stage and to identify which institution will be responsible for enforcing the preferred option. The costs of implementing the regulation including enforcement activities and compliance promotion have to be included in the calculations of costs for each option. When developing regulations, it is also desirable to involve in the discussion representatives of inspection authorities responsible for enforcing regulations, as they have first-hand experience with how regulations are complied with, what are the reasons for non-compliance by regulated subjects, and how regulatory framework can be improved in general. This communication often does not take place in many OECD countries.

The third stage, implementation and enforcement, comes after choosing the best-ranked policy alternative. This is the stage where inspections and compliance promotion become central to the success of regulation. After the regulation is approved and published, inspections should start their operations. Inspections should aim to cover the precise public policy goals stated in the regulation. In this process, inspections should have several mission: helping understand whether the implementation itself is on track, contribute to measuring whether the policy objective is being achieved but also assisting regulated subjects in understanding regulations and implementing necessary measures to comply with them. The inspection authorities must work in close co-ordination with the regulatory agencies or Ministries in order to measure the success of both goals.

The *ex post* evaluation is the last stage, when regulators decide whether the regulation is efficient in solving the defined policy issue (OECD, Forthcoming[3]). *Ex post* evaluations are usually the weakest link of the regulatory cycle and approaches to them vary greatly among jurisdictions. In some countries, regulations include sunset clauses: automatic shutdowns (or mandatory revisions) after a defined period, usually from three to five years. Other jurisdictions prefer systematic *ex post* evaluations, managed as industry specific revisions. Government agencies perform evaluations to identify obsolete, inefficient or not-up-to-date regulations. Thus, they need reliable data Inspections in the context of environmental protection

Regulation is successful when effectively solves market failures and/or reduces social risks. As explained previously, governments should regulate when a relevant assessment determines that there is no current mechanisms to correct an economic, social, environmental, safety problem, etc. If a regulation is issued, its enforcement will have an essential role in achieving the policy goals.

Understanding the specific market failure underlying a policy issue is crucial for a regulatory agency. This is of particular relevance for OEFA as environmental assets are often plagued by market failures. While market failures have been studied for a long time, their understanding is continuously expanding as knowledge of markets and human behaviour improves. Traditional market failures include well-understood notions of asymmetric information, free riding, market power, and principal-agent problems – see Box 1.1. The challenging part is that different market failures call for different policy solutions. Understanding the specifics will help regulators design policies that properly address them. Reducing air pollution from passenger vehicles will not have the same solution as ensuring quality of water in rivers close to industrial facilities. Different policy measures and in turn different inspections strategies should be put in place.

Box 1.1. Common market failures

- Market power: ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition is referred to as market or monopoly power. The exercise of market power leads to reduced output and loss of economic welfare.
- Free riding: Free riding occurs when one firm (or individual) benefits from the actions and efforts of another without paying or sharing the costs.
- Externalities: situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided.
- Environmental externalities: uncompensated environmental effects of production and consumption that affect consumer utility and enterprise cost outside the market mechanism.
- Asymmetric information: information relating to a transaction in which one party has relevant information that is not known by or available to the other party.
- Public good: product that one individual can consume without reducing its availability to others and from which no one is deprived.

Source: OECD (2007[4]), *OECD Glossary of Statistical Terms*, https://stats.oecd.org/glossary/ (accessed 17 January 2020).

The identification of a specific market failure should be stated as part of the RIA and inspections should be designed in a way that enforcement of regulation will correct the incentives of stakeholders to stop environmental harms, for instance. Thus, inspections and enforcement of regulation should focus on the problem that is trying to correct, rather than stick to inner legal compliance.

Principles of inspections and enforcement

Inspection practices vary across jurisdiction: both in their governance and in their practical operations. The OECD recently published the OECD Regulatory Enforcement and Inspections Toolkit, which presents checklist of 12 criteria to improve inspection practices. This section presents a brief summary of the criteria outlined in the report.

1. **Evidence-based enforcement:** Regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded in data and evidence, and results should be evaluated regularly.
2. **Selectivity:** Promoting compliance and enforcing rules should be left to market forces, private sector actions and civil society activities wherever possible: inspections and enforcement cannot take place everywhere and address everything, and there are many other ways to achieve regulations' objectives.
3. **Risk focus and proportionality**: Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk, and enforcement actions should aim at reducing the actual risk posed by infractions.
4. **Responsive regulation**: Enforcement should be based on "responsive regulation" principles; that is, inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses.
5. **Long-term vision**: Governments should adopt policies on regulatory enforcement and inspections, and establish institutional mechanisms with clear objectives and a long-term strategy.

6. **Co-ordination and consolidation**: Inspection functions should be co-ordinated and, where needed, consolidated: less duplication and fewer overlaps will ensure a better use of public resources, minimise the burden on regulated subjects, and maximise effectiveness.
7. **Transparent governance**: Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management. The execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded.
8. **Information integration**: Information and communication technologies should be used to maximise a focus on risks, promote co-ordination and information sharing and ensure an optimal use of resources.
9. **Clear and fair process**: Governments should ensure that rules and processes for enforcement and inspections are clear. Coherent legislation to organise inspections and enforcement needs to be adopted and published, and the rights and obligations of officials and of businesses, clearly articulated.
10. **Compliance promotion**: Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists.
11. **Professionalism**: Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency. This requires substantial training focusing not only on technical but also on generic inspection skills, and official guidelines for inspectors to help ensure consistency and fairness.
12. **Reality check**: Institutions in charge of inspection and enforcement, and the regulatory enforcement and inspection system as a whole, should deliver the levels of performance expected from them – in terms of stakeholder satisfaction, efficiency (benefits/costs), and overall effectiveness (safety, health, environmental protection etc.).

Environmental regulatory system in Peru

In 2010, the central government of Peru implemented a series of reforms with aims at improving the regulatory practices. The reforms gave birth to several independent regulators to separate policy promotion from regulatory supervision on industries as telecom, energy and mining, transport and environmental industries. In this context, OEFA was created as an independent oversight body of the environmental policy in Peru with focus on enforcement and inspections. Thus, OEFA inspects and apply sanction to regulated entities (mostly enterprises or business) that fail to comply with environmental standards. OEFA also has the power to issue precautionary and corrective measures.

Table 1.1. OEFA's regulatory portfolio timeline

2010	2011	2012	2013	2015	2016	2017	2019
	Energy	Fishing	Environmental aspects of the beer industry	Concrete, cast, iron steel and metal	Sugar production	Non-metal minerals, common metals, metals, machinery and electrical devices	Agriculture
			Cement manufacturing	Biofuels and petrochemicals		Tobacco, medical equipment, telecom equipment	
			Tannery	Alcohol manufacture		Food and beverage, textile industry, leather and plastic products, lumber production, automobile production, various transportation equipment, furniture recycling	
						Solid waste	

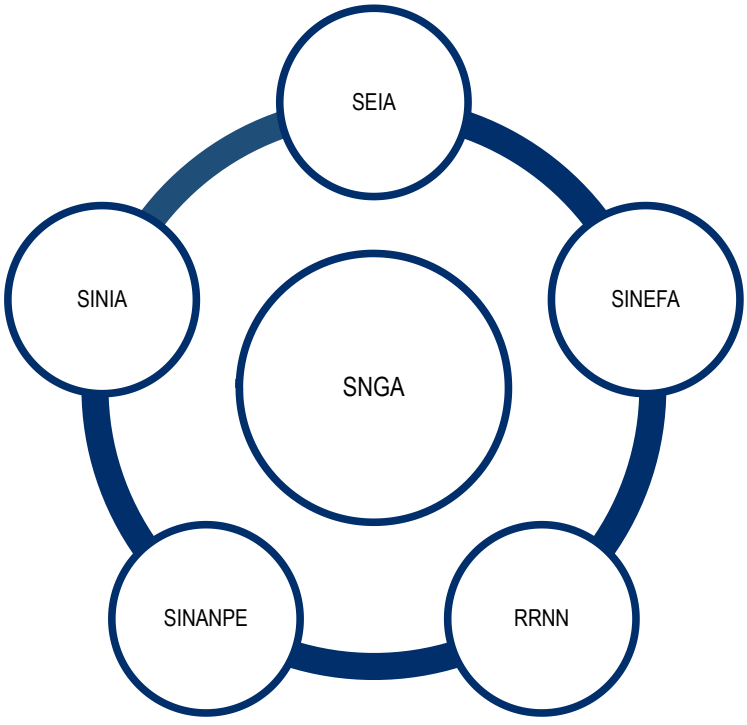
Source: OEFA (2017[5]), *Institutional Memory OEFA 2017*, http://www.oefa.gob.pe/?wpfb_dl=34477 (accessed 14 January 2020).

OEFA is an independent body that forms part of the Ministry of Environment (MINAM). Its regulatory supervision entails national, regional and local jurisdictions. Table 1.1 outlines the history of OEFA's responsibilities since 2010. While starting with a focus in mining, OEFA has grown in terms of industry sectors it is focusing on.

Environmental management and regulation in Peru

Environmental protection and management is a relatively recent regulatory area in Peru. The Environment and Natural resources Code was approved only in 1990, followed by the General Environmental Law in 2005. The Organization for Environmental Evaluation and Inspections (OEFA) was created by the same legal act as the Ministry of Environment (MINAM) – Legislative Decree No. 1013, approving the Law on Creation, Organization and Functions of the Ministry of the Environment. The National Environmental Policy, approved in 2009, was set to improve: a) people's life quality, ensuring the long-term existence of healthy, viable and functional ecosystems; b) the sustainable country-development through the prevention, protection and recovery of the environment and the conservation and sustainable use of natural resources, aligned with the fundamental rights of individuals (Ministerio del Ambiente, n.d.[6]).

Figure 1.2. SGNA and the articulation with other relevant systems



Source: Ministerio de Ambiente (2016[7]), *Guía del Sistema Nacional de Gestión Ambiental*, MINAM, Lima, http://www.minam.gob.pe/politicas/wp-content/uploads/sites/17/2013/10/Guia-SNGA-MINAM.pdf (accessed 14 October 2019).

According to Legislative Decree No. 1013, the regulatory institutions for environmental protection form the National System of Environmental Management, which incorporates the following:

- The National System of Environmental Evaluation and Inspections (SINEFA), created by Law No. 29325, sets out to ensure compliance with the environmental requirements that can be inspected and to guarantee that national, regional and local EFAs[1] perform their functions in an independent and effective fashion. OEFA is the governing body of SINEFA.

- The National Environmental Impact Assessment System (SEIA)[2] sets the rules on identification, prevention, supervision, enforcement and early correction of negative environmental impacts that may be caused by investment projects. It establishes the duty to get environmental certification. MINAM is the governing authority of SEIA.
- The National Environmental Information System governed by the Law No. 28245 (SINIA) was created to articulate and ensure access to available information from public authorities on water, air, soil, flora, fauna and natural resources, as well as on the activities or measures that may affect them. MINAM is also the governing authority of SINIA.
- The National System of Natural Areas Protected by the State (Sinanpe),[3] regulates the creation, administration, conservation, and management of protected natural areas (continental and maritime). The governing entity of this system is the National Service of Natural Areas Protected by the State (SERNANP).
- The system of Management of Natural Resources (RRNN), biodiversity, climate change, soils and other thematic areas established by law.

Mandate and functions of OEFA

OEFA's mandate is based on achieving compliance and protection of the environment while seeking the development of social welfare. This reflects on its mission, which is to "Promote the fulfilment of environmental obligations by economic agents and the improvement of the National System of Environmental Management in an articulated, effective and transparent manner, contributing to the country's sustainable development and social welfare" (OEFA, n.d.[8]).

Within SINEFA, OEFA is an agency responsible for environmental inspections and enforcement. The latter is understood as a macro-process involving the following functions:

- Assessment: this includes monitoring, surveillance and other similar actions aimed at:
  - Preventing (including through alerts) *ex ante* the occurrence of negative impacts to the environment within OEFA's scope of competence
  - Determine *ex post* the origin of the negative impacts to the environment, as well as potential liabilities. This information serves as an input to the inspection-related activities carried out.
- Inspection (*supervisión*): this includes carrying out inspections on relevant facilities to verify compliance with environmental requirements. The conclusion of this stage can be the termination of the proceedings (when non-compliances are found) or the recommendation to initiate a sanctioning administrative procedure.
- Administrative procedure and sanction: this involves initiating a sanctioning administrative procedure. When violations or liabilities are found, sanctions may be imposed.
- Application of incentives: OEFA can apply incentives to ensure compliance with environmental requirements.

To date, OEFA is in charge of inspections and enforcement for the following sectors:

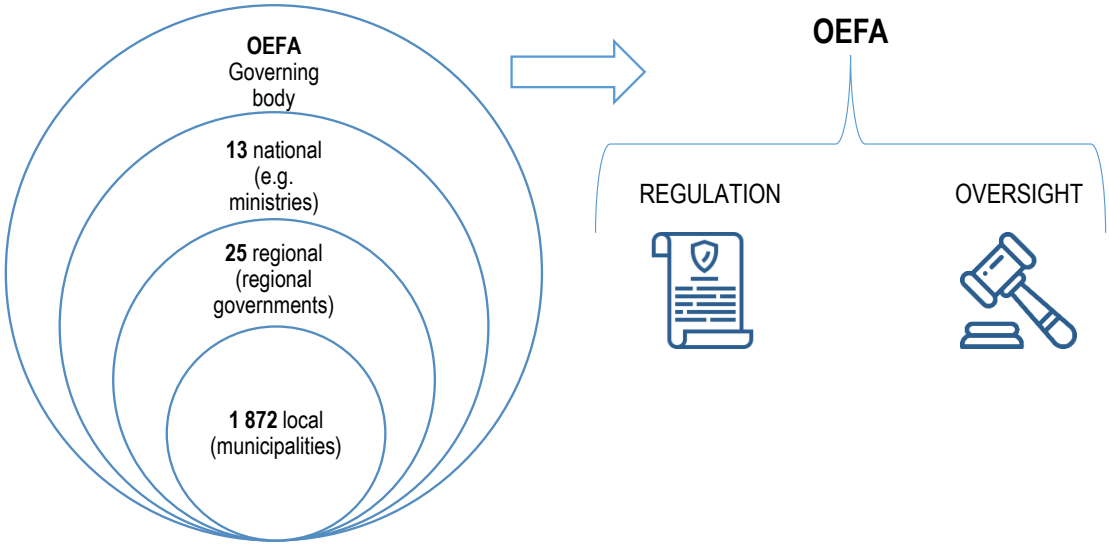
- Mining (medium and large establishments only)
- Energy (electricity and hydrocarbons)
- Fishing (medium and large companies of industrial fishing and aquaculture)
- Manufacturing industry and internal trade
- Moratorium on the entry and production of living modified organisms (LMOs)
- Solid waste infrastructure
- Environmental consultants responsible for preparing environmental studies to get environmental certification.

Competence over other sectors is being and is expected to be progressively transferred to OEFA, including, transportation, housing, health, tourism, communications and defence.

OEFA also contributes to the formulation and refinement of the SNGA, SINEFA and SEIA regulatory framework (according to the current Institutional Strategic Plan – PEI) (OEFA, 2018[9]).

As mentioned above, OEFA is also the governing body of SINEFA. This means that OEFA regulates and oversees the performance of inspection and enforcement functions of EFAs at the national, regional and local levels. Based on this role, OEFA establishes guidelines, procedures, amongst other instruments, to support a common vision of environmental inspections and enforcement.

Figure 1.3. OEFA as SINEFA's governing body



Source: OEFA (n.d.[10]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

The Common Regime of Environmental Supervision, in force since 2013, seeks to achieve a seamless enforcement system. It applies to OEFA and EFAs and "establishes the guidelines, principles and common bases of environmental supervision in the country, as well as general mandatory provisions which [EFAs] must comply with". See the Ministerial Resolution No. 247-2013-MINAM.

EFAs are functionally independent of OEFA with regard to the exercise of their powers. They are however subject to provisions issued by OEFA as the governing body of SINEFA (Art. 7 of SINEFA Law). An *Ex post* Evaluation Working Group on environmental regulations has been set up, with the purpose to assess existing laws and rules and prepare suggestions aimed at improve the regulatory system. MINAM, OEFA and SENACE make up this working group.

The functions of the working group are the following:

- Highlight identified problems regarding environmental inspections and enforcement to find alternative solutions (regulatory or non-regulatory)
- Carry out *ex post* evaluations of environmental regulations, which are under the inspective and enforcement scope of OEFA.
- Identify regulatory gaps in sectoral regulations.
- Propose intervention strategies to promote compliance with environmental requirements in sectors under the competence of OEFA.

- Propose intervention strategies to minimise the negative environmental impact of ongoing economic activities.

OEFA's Sub-Directorate for Policies and Regulatory Improvement also supports the formulation of regulatory drafts and feedback of the regulation in force (i.e. creates lists of issues encountered in the implementation of regulatory requirements, and suggests amendments, additions or derogations). A recent memorandum (No. 011-2019-OEFA / DPEF) has established the obligation for sectoral Directorates of OEFA to refer problems identified when performing their duties.

Introduction to the assessment and recommendations of enforcement and inspections in the environmental sector of Peru

In recent years, OEFA has achieved remarkably rapid progress in the way it organises and implements regulatory inspections and enforcement for environmental protection. In less than three years, it has developed and substantially improved instruments, methods and processes to enhance the effectiveness, efficiency, fairness and transparency of the overall environmental system. OEFA invested significant resources to develop IT tools, promote professionalism and improve trust among the different actors. This is a substantial achievement, as OEFA departed from a background with considerable challenges in the regulatory enforcement, and a long history of acute problems in environmental regulation. OEFA's policy approach appears to be on the right path, but further steps to consolidate a more consistent and sustainable improvement of the system are needed, as reflected in the results obtained so far–and the ongoing paradigm shift towards risk-based environmental inspections and enforcement.

Prior to the reform that led to the creation of OEFA and a set of regulatory and institutional changes during 2008, and that subsequently saw the further strengthening of OEFA's mandate, missions, structure and methods from 2010, environmental regulation and inspections in Peru could be characterised by a lack of systemic approach and overall coherence. For instance, "environmental protection" was not conceived as such and each public institution was responsible for a specific location, or an economic sub-sector. This organisation created overlaps, duplications, conflicts of competence, as well as a lack of professionalism.

The reform achieved further developments in terms of consolidation and co-ordination of competences among authorities (including the recently created environmental governing body); the establishment of clear long-term regulatory goals; the definition of governing principles inspired by international practices (in particular risk-based approach); the communication with relevant actors; and development of simple and transparent rules and processes. Following the reform, OEFA though not the unique environmental inspectorate in Peru, it is the governing body of the system – with strong influence in setting directions and methods.

Despite these improvements and the significant progress achieved by OEFA, many of the pre-existing problems remain to some extent because consolidation and rationalisation have been partial and still, there are ongoing and pending policy practices. The pre-reform context was also characterised by the lack of risk-focus and real proactive planning, insufficient professional competence and lack of information sharing. Inspections and enforcement were (and still are) linked to rigorous and burdensome formal administrative processes (permits/licenses), and frequently had little to do with protection of public welfare. The accumulation of such procedures and formalities remains and is still a major obstacle for business formalisation and development, but also to meaningful and effective regulation and regulatory delivery.

This reflects a wider characteristic of the Peruvian regulatory system consisting of rigorous formalism and burdensome procedures – resulting in a very large number of businesses that may entirely evade this heavy and costly set of requirements and documents – many of them being part of the informal sector of the economy. This inheritance of legal formalism, widespread informality of businesses, and previous legislation and structures not necessarily oriented to achieve the underlying public policy objectives, all

lead to a current situation where the "universe" covered by environmental inspections remains only on a sub-set of all the economic operations that actually impact the environment. It is important to fully understand this background, which includes:

- The achievements of the reform and the goals to overcome;
- The characteristics of the system are deeply entrenched, and therefore they represent a barrier to reform;
- The benchmark to which progress has to be assessed against, acknowledging that despite the fact that the current situation needs to further be improved, it nonetheless represents very real progress.

Finally, environmental issues are highly political – which is not unique to Peru, but is particularly acute in the country, given the combination of several factors:

- Exceptional ecological conditions in a number of regions
- Significant (and long-existing) extractive industries
- Important inequalities between different regions and population groups in terms of income and influence over government decisions and processes gave rise to strong grievances and distrust. This distrust applies both to private business operators, and to government institutions.
- Strong pressure for OEFA and the overall environmental protection system to be more responsive to popular demands, particularly in under-privileged regions and groups. This situation explains the focus of the agency to conduct inspections and other field activities on the named "socio-environmental conflicts".
- The overall legal framework and instructions are yet to be further aligned with good international practices that frames and limits OEFA's advancements and creativity

The description, assessment and recommendations presented in the next chapter are to be analysed against this background and challenges. The review itself, and the following report, have been structured following the principles identified in the *OECD Regulatory Enforcement and Inspections Toolkit*.

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OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed on 14 October 2019). [10]

Notes

[1] EFAs are public authorities – at the national, regional and local level – in charge of environmental inspections and enforcement on certain regulated subjects and/or objects. EFA stand for the Spanish acronym of environmental enforcement entities (*entidades de fiscalización ambiental*).

[2] Governed by Law No. 28245, Framework Law of the National Environmental Management System, and its Regulation, approved by Supreme Decree No. 008-2005-PCM, and the relevant Regulation, Approved by Supreme Decree No. 019-2009-MINAM.

[3] Governed by Law No. 26834 and relevant Regulation, approved by Supreme Decree No. 038-2001-AG.

2 Evidence-based enforcement

This chapter explains the rationality and purpose of the evidence-based enforcement principle. It aims at identifying evidence of the principle within OEFA's daily operation and work. This includes an assessment of OEFAs' implementation of inspection duties, the use of sources of information and indicators, etc. as supporting promoters of regulatory decisions.

> *Regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded in data and evidence, and results should be evaluated* regularly *(OECD, 2014[1])*, *(OECD, 2018[2])*.

Enforcement and inspections need to be evidence-based; thus, actions of regulatory agencies and their performance should be evaluated according to a set of well-defined indicators and reliable data. Collecting data on activities and outputs (e.g. how frequently an agency conducts inspections, how many entities are subject to inspections, how much time, private or public is taken up with inspections – and what are the administrative sanctions or criminal prosecutions that may follow) is necessary to assess the use of resources and burden creation on businesses. However, these indicators should not be taken as a reflection of the effectiveness (or lack thereof) of an agency.

In new regulations, enforcement planning (including inspections) should be covered during the impact assessment process. Likewise, evidence-based enforcement should be "anchored" during both design and *ex post* review of regulation. Moreover, it is necessary to analyse whether inspections and enforcement are needed for a proposed regulation, as well as the organisation scheme, the resources and methods to follow – these issues should also be considered when reviewing regulations *ex post*. In this process, it is of particular relevance, inputs from inspectors and stakeholders, which can offer valuable information.

The mandates of institutions in charge of regulatory enforcement and inspections should reflect goals in terms of risk reduction and pursuing public interest. Institutions empowered to inspect and enforce should have a purposes in terms of the harm they will mitigate and the positive outcomes they will contribute to achieve.

The reliability of the data used is of particular importance. As a rule, data collected directly from an agency's processes should not be used to assess compliance levels, as it is by no means "independent" and distorts incentives (e.g. number of prosecutions or sanctions). For instance, the agency can seek to increase or decrease these indicators to "perform" better, without reflecting an actual improvement in compliance levels.

For each regulatory enforcement agency or structure mandated with the authority to conduct enforcement and compliance, governments should ensure that this mandate is clearly defined with reference to the outcome indicators that the agency aims to influence (e.g. number of preventable deaths and injuries due to specific hazards, amongst others), and that the agency is required to track and report on these regularly.

Agencies should collect the data according to strictly defined protocols. In cases when data is produced or collected by the agency itself, it should be regularly crosschecked by independently conducted representative surveys. In all cases, governments should publish all the relevant information pertaining to indicators, how they were defined (and based on which assumptions and logic) and how they are measured.

Evidence-based enforcement also means that available evidence should be used for operational purposes (in particular, inspections' planning, and selection of the inspection-related activity). For new regulatory agencies that are still in the process of gathering empirical data, it is crucial that processes and methods are designed to make the best possible use of evidence, as soon as it is available, and that there is a real understanding of what 'evidence' means.

OEFA's use of evidence-based regulation and strategic principles

The importance of evidence-based inspections and enforcement is stated in OEFA's regulations and strategic principles. In recent years, there has been a real effort to embed this principle in policy or strategic documents, and that this then cascades through regulations to ensure its implementation.

The most representative examples are the current Institutional Strategic Plan and the Regulation on Inspections of OEFA, which underline the link between risk management and the need to ground OEFA's activities on evidence. These documents also indicate the need to regularly measure its performance and assess whether activities need to be adjusted to improve results.

The Institutional Strategic Plan establishes as the first direction for the institutional policy 'to ensure the prioritisation of actions based on evidence'. The declaration of institutional policy and the presentation in the PEI also emphasise the need for OEFA to perform activities "in line with a risk-based approach and based on evidence". OEFA's Regulation on Inspections' Principles include 'evidence-based inspection', defined as the need for inspection actions to be planned, performed and concluded taking into account objective information gathered by the inspection authority.

These concepts are broadly taken up and communicated by OEFA's management and generally reflected in the tools developed by OEFA. However, the review suggests that further efforts are needed to ensure that the concept of "evidence-based" is fully understood and implemented throughout the enforcement and inspection system of environmental regulation in Peru. "Evidence-based" should mean that regulatory inspection and enforcement actions are decided and evaluated "against a set of well-defined indicators, and based on reliable and trusted data", as explained in Principle 1 of OECD's Regulatory Enforcement and Inspections.

Implementation of the principle in planning of inspection-related activities

One of the main tools to govern the operations of OEFA and EFAs (*Entidades de Fiscalización Ambiental*)[1] is the PLANEFA – an annual plan of inspections to be carried out by each relevant authority. The PLANEFA should include all inspections planned according with the competences of the relevant EFA. It is to be noted that not only "regular" (proactive) inspections are included in the PLANEFA, but it also comprises a share of inspections to respond to emergencies, complaints or requests from other authorities. In addition, other supervision-related activities are also contained in the PLANEFA, such as 'environmental evaluations', which are defined as "actions of surveillance, control and monitoring to determine the quality of the environmental components, that an EFA carries out within its area of competence" (according to article 4 of PLANEFA Guidelines) (OEFA, n.d.[3]). Other document that underpins the inspection process by OEFA's regulation on inspections is the Bylaw on Supervision, where inspections should be evidence-based. Furthermore, the piece of legislation covers the responsibilities of inspectors and supervisor, defines the types of supervision and the results of the latter. Additionally, it describes the administrative measures that the supervision authority can use in case of non-compliance and the resources that regulated entities have to challenge the decision.

As per the relevant "Orientation Guide" (or Handbook, in English) elaborated by OEFA, the inspections' planning shall be determined by identifying the environmental 'issue' considered as significant (step 1 out of 8 of the proposed logical framework methodology), and by highlighting the 'problem or risk' (step 2 of 8) (OEFA, 2019[4]). The PLANEFA Handbook is a useful tool prepared by OEFA to ensure that all EFAs develop their PLANEFA following the same method. It explains systematically (including figures and graphs), which elements should be taken into account, in which order, how it must be used, what are the deadlines are, amongst others. Based on the specific competences of each EFA, the latter shall identify the environmental "issue" (*problemática*) considered as significant. Then, based on the identified "issue", the EFA must ascertain that the "problem" actually exists, and whenever possible, measure its magnitude or existing environmental risk. This involves reviewing the sources that demonstrate that the "problems or risks" exist.

This methodology would benefit from some improvements. This would include further clarifying the concepts included – e.g. using internationally accepted notions in concepts as "hazard" instead of "issue", and "risk" instead of "problem or risk". Including in-depth explanations and training on this would be advisable. As of today, there seems to be need for deeper clarification about the meaning and content of

these, and related terms. In many cases observed during the review, especially in the case of local EFAs, the 'issue' to be first identified corresponds to the field of competence of an EFA that requires the most attention. Following this, the EFA searches empirical evidence to prove that such topic actually must be seen as a priority. From a good international practice perspective, the methodology to define the planning of inspection-related activities would need to be inverted. Evidence should be the initial empirical element on which a topic can be defined as relevant or risky, and not the other way round, i.e. justifying that a topic creates significant risk, once it has already been chosen (based on existing structures).

Main evidence sources for inspections' planning

The PLANEFA Handbook includes four different evidence sources to determine the relevant environmental "issue": citizens' perceptions, results of previous environmental enforcement, environmental management tools (determined during the licensing process of an establishment), and other sources (such as environmental liabilities, economic activities performed without environmental license, studies revealing existing environmental problems).

In practice, a heavy share of inspections are performed by OEFA based on reactions to complaints and socio-environmental conflicts, rather than on a prior assessment of risk. Observations made during the fact-finding mission in regions show that this reliance on complaints and conflicts is also very clear in local EFAs visited.

OEFA itself plans its activities and measures based on the risk level assessed through four main sources of evidence: a) dialogue with stakeholders in areas of socio-environmental conflicts, b) results of previous actions by OEFA, c) citizen's perceptions of environmental quality and d) prioritised information from other public agencies – (OEFA, 2018, p. 8[5]). While inspections' record and history are a recognised criteria widely used in good international practice and to be taken into account for planning of supervision-related activities, the use of the other sources of evidence mentioned above as main criteria raises questions.

While socio-environmental conflicts and complaints are factual in a sense (they are reported and recorded), it should be defined with certainty whether they represent real sources of harm or risks to the environment, as they usually reflect a mix of realities and perceptions, which can only be determined through the collection of hard evidence. Also, it is to be noted that the criterion "prioritised information from other public agencies" might be another form of complaint or channelling of conflicts.

Socio-environmental conflicts as source of evidence

The office of the Ombudsperson reports on a monthly basis, the existing social conflicts and their status. Over 79% of these conflicts in Peru are reported as being of socio-environmental nature (Defensoría del Pueblo, n.d.[6]). The relevant report issued in June 2019 lists 117 socio-environmental conflicts, out of which 87 are "active" (not yet solved) (Defensoría del Pueblo, n.d.[6]). In general, socio-environmental conflicts are generated by the grievances of communities over economic activities, as mining or hydrocarbons production and extraction, which cause pollution and affect negatively their own activities (e.g. agriculture, cattle breeding) and the health of their inhabitants. Politically speaking, these conflicts are extremely sensitive and create the need for various authorities, including OEFA, to intervene determining if the perception of harm or likely harm is correct.

OEFA chose 33 of the existing socio-environmental conflicts reported by the Ombudsperson's office to give attention during the calendar year 2019. In order to support this task, OEFA created an open, online tool designed to provide an overview of the main characteristics of the existent socio-environmental conflicts and their status with regard to OEFA's intervention. The OEFA's tool operates with information for the whole country at department and region's level publishing the existence of protected natural areas,

the number of population centres, degraded areas, complaints, regulated entities and OEFA's actions by sector (infrastructure, industry, mining, hydrocarbons, agriculture, amongst others) (OEFA, n.d.[7]).

The reason why socio-environmental conflicts are considered by OEFA as a prioritisation criterion is that these are one of the main barriers to the development of extractive activities, which are of crucial importance for the Peruvian economy. The results of inspection-related activities carried so far in these areas show that the perception of pollution has often been confirmed–i.e. the quality of water, air, soil is far from ideal.

The activities performed by OEFA have allowed shedding light on the causes for existing contamination, which were unknown to local communities, and the Peruvian State. Investigations carried out show that contamination has been caused by both natural and/or anthropogenic causes. In the latter, immediate measures to manage or mitigate risks have been enforced, accompanied by corresponding sanctions. As of today, over 200 administrative measures have been imposed (OEFA, n.d.[7]). Based on the results following inspection-related activities performed in socio-environmental conflict areas, in most cases OEFA found that in fact, there was a high-impact on water, air, soil, etc. Based on this trend, OEFA concluded that the probability of a harm occurring is very high.

While socio-environmental complaints are evidently a relevant source in terms of assessing the likelihood of a problem, they give only limited information (or information of limited reliability) about the potential magnitude or severity of the problem. For OEFA's supervision activities to be properly 'evidence-based', complaints information should be systematically combined with other sources. For example, an analysis of the actual impact of past violations, the potential effects of current economic activities, and the reliability of past complaints in terms of predicting the severity and magnitude of damage. OEFA thus, would need to further develop its assessment criteria to better differentiate between different conflict situations based on the quantifiable environmental impact.

It should also be pointed out that socio-environmental conflicts feature strongly among the criteria used by OEFA to define the level of risk of regulated establishments in a certain sectors – and subsequent planning of activities. Just to name an example, risk criteria used to plan inspection-related activities in the mining area are the following: a) mining exploration at risk of socio-environmental conflicts; b) high-risk cases for effluent discharge points into water bodies; c) presence of socio-environmental conflict; d) files with alleged infractions (subject to potential sanctions) entailing moderate and significant risk (OEFA, 2018[5]). In this case, socio-environmental conflicts are present in two out of four criteria used to plan inspection and enforcement activities. Complaints are also among the risk criteria to take into account for inspection planning for year 2019 in the solid waste area (OEFA, 2018[5]).

Complaints as source of evidence

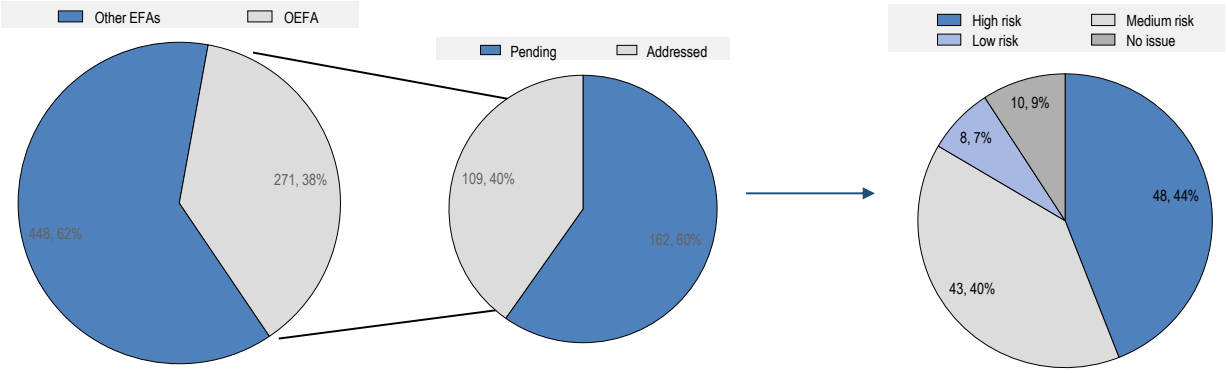
Both the General Law on Environment (Art. 43) and the Single Consolidated Text (TUO) of the Law on General Administrative Procedure[2] (Art. 116) require OEFA to address any complaints or grievances it receives. In particular, Art. 43.1 of the General Law on Environment foresees that "Public entities must establish in their Regulations on Organization and Functions, or other documents of management, procedures for the care of those complaints and ways of communication to the public, according to the parameters and criteria set by the Ministry of Environment and under the responsibility of its highest representative. The entities should send annually a list of complaints received and the solutions found […]". Art. 116.3 of TUE foresees that "Its filing [of a complaint] requires carrying out the necessary preliminary proceedings and, once its credibility has been proven, to initiate the respective inspection ex officio. The rejection of a complaint must be motivated and communicated to the complainant […]".

Based on this legal duty, OEFA has been undertaking efforts to develop a system to classify complaints received based on their characteristics, evidence submitted by the complainant, amongst others, in order to define the resources that need to be allocated to deal with the specific complaint. This classification

allows classifying the complaint as “high risk”, “medium risk”, “low risk”, “or no existing issue”. According to the result of the assessment, immediate action will be taken by OEFA (high risk), the information will be used to plan subsequent inspection-related activities (e.g. during next calendar year – medium risk), or no action will be undertaken. Figure 2.1 below shows the results of this assessment. For the time being 44% of complains analysed by OEFA in 2019 resulted – or will result – in an immediate inspection.

Sinada, the online tool that allows filing an environmental complaint is under improvement. One of the new functionalities is the interconnection with other existing registries (OEFA, n.d.[8]). OEFA’s management acknowledges in any case the need to perform an *ex post* evaluation of the complaints management system to improve and refine the assessment criteria currently used. A first *ex post* assessment was performed on the implementation of Sinada rules over the period 2009-2017 (OEFA, 2019[9]).

Figure 2.1. Management of complaints received by OEFA through Sinada



Source: OEFA (n.d.[10]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

Measurements, empirical data and inherent risks as evidence to support decisions

A wide range of useful and meaningful data and measurements on operators, pollution, etc. is now being collected through “preventive environmental assessments”, technical studies, automatic monitoring networks and information gathered during inspections.

The “preventive environmental assessment” is a meaningful inspection-related activity in terms of data collection and risk prevention. The procedure associated with such environmental assessment has seven steps; it includes the co-ordination, invitation and inclusion of interested stakeholders, as well as the organisation of events a) to propose the plan for the monitoring activity and b) to deliver of the findings and results of the activity. OEFA organises these “participatory environmental monitoring activities” whenever there is “environmental sensitivity”, a socio-environmental conflict, or other criteria considered within the relevant PLANEFA.

Data collected since 2017 through preventive environmental assessments, technical studies, automatic monitoring networks and information gathered during inspections are fully incorporated into the INAPS (Direct Inspection system). The INAPS is an information tool aimed at allowing to manage information on inspections performed on regulated subjects from the different economic sectors. The INAPS also contains various documents and material produced as a result of inspection activities. However, information on supervision-related activities performed under previous management of OEFA still needs to be reconstructed (for a more detailed description of IT tools developed by OEFA and use of data, see Chapter 9 on Information integration.

Additional consolidated data and information management systems would still be useful to make more evidence-based strategic and operational choices. However, the review shows that there are pending efforts at using the existing and collected data to full potential. For example, analyse past inspection results, monitoring data, assessments, measured impacts, amongst others, to plan activities and thus gradually relying less on reports of conflict and complaints. These are necessary steps to ensure that the inspection and enforcement framework and practices in the environmental sector of Peru evolves into a system fully based on evidence, leaving perception elements behind.

Use of indicators focusing on outcomes to inform choices

OEFA has developed a large number of indicators to assess the performance of regulatory inspections and enforcement (included in the PLANEFA and the current Strategic Plan). However, the profusion of indicators can lead to certain confusion and further explanations to ascertain which indicators are actually being used are required. In particular, whether those actually measuring the effectiveness of the authority in terms of outcomes are effectively used, as most of the numbers shown in OEFA's annual report are output results (activities performed), instead of outcomes in terms of risk reduction or environmental harm (OEFA, n.d.[11]). In addition, the performance of EFAs is evaluated based on the completion of the PLANEFA, which includes whether the inspections planned for the following year were actually performed, as well as indicators aimed at measuring institutional strengthening of the EFAs.

OEFA has reported that most of outcome indicators as those set in OEFA's PLANEFA for 2019 have not yet been measured – and will be measured starting from the end of this calendar year.

OEFA's PLANEFA for 2019 presents a series of indicators developed for each function of the organisation, as shown in Table 2.1.

Table 2.1. List of indicators in OEFA's PLANEFA 2019

Function	Activities	Products	Results	Impacts
Evaluator	No. Population surveys. No. Participatory workshops	Early environmental assessments	% improvement in citizen perception regarding the activities that are carried out	USD investment is made in a healthy environment and in harmony with the surrounding populations
	No. Specialised technical studies No. Diagnostics of environmental components	Environmental assessments that determine causality	% sources of affectation identified	% evaluation actions serve as input for the control of critical components or control stage
	No. Monitoring	Environmental monitoring reports	Number of days of alerts reported to deviations found in environmental monitoring	
Supervisor	No. Special supervision actions by sector/topic	No. Supervisory records concluded	% compliance with environmental obligations	% of decrease in concentration of contaminants in receiving bodies
	No. Regular supervision actions by sector/topic	% compliance with scheduled supervision	% control of highly identified components	Number of people directly benefited by the control of environmental risk
		% compliance with scheduled supervision		Improvement of perception of the population in the areas of influence of the activities carried out
Supervision and sanctioning	No. Resolution on initiation of sanctioning procedure	No. Cases sanctioned concluded	% compliance with Environmental obligations (by correction or cessation during the sanctioning procedure)	No. of hectares with achievement of compliance and/or cessation of conduct
	No. Final reports of instruction	% compliance with programmed sanctioning procedure		Millions of USD in economic value recovered on ecosystem services

Function	Activities	Products	Results	Impacts
	No. Director resolutions	-		Number of people directly benefited by the correction or cessation of behaviour
Function	No. of regulatory problems identified	No. Regulatory proposals made	% regulatory proposals approved	Regulatory problems identified solved by the legal instrument

(OEFA, 2018[5]), *Plan Anual de Evaluación y Fiscalización Ambiental del OEFA – PLANEFA 2019*, https://www.oefa.gob.pe/planefa/planefa-2019 (accessed 14 October 2019).

Such indicators have been developed reflecting activities, products, results and impacts of OEFA's activities. An in-depth description of indicators developed and used by OEFA is provided in Chapter 13.

Assessment

Both OEFA's mandate and mission reflect goals in terms of risk reduction and pursuing public interest; thus, efforts are being pursued to select requirements based on risks. Furthermore, in a continuous effort to progressively move on from the remaining formalism (compliance with formal requirements), processes and tools are being developed. However, priorities in terms of protection of the public welfare are largely concentrated in 'social-environment conflict' areas. While this is understandable, other environmental issues in areas where there is no population directly affected, or where the citizens are less well organised, may be neglected – particularly vocal groups may gain strong attention in some cases where environmental risk is actually moderate.

A number of newly introduced indicators (in strategic and operational documents) are based on strategic objectives, and aim at assessing the performance of OEFA in terms of outcomes, but measurements are not yet available. Currently, published documentation by OEFA only covers output indicators.

Choices in terms of planning, priorities, actions, strategy, etc. are for now informed by socio-environmental conflicts and complaints, amongst other criteria. Empirical evidence and data are being progressively collected, in particular through a series of inspection-related activities. Available data is not always being used as much as it could to analyse and quantify harms and risks. Improvements in data and analysis should gradually ensure that the inspection and enforcement framework as well as practices in the environmental sector of Peru evolves into a system fully based on evidence, leaving perception elements behind.

Recommendations

- Collect and increase the use of hard data as evidence, and effectively analysing available data, so that quantitative assessment of harms and risks is taken more into account in both *ex ante* and *ex post* regulatory processes.
- The performance of preventive environmental assessment should be multiplied, whenever possible in sites or in establishments located in social-environmental conflict areas. In addition, more specific guidelines need to be developed, so that it is clearer what these assessments are about and how to conduct them.
- OEFA should gradually make sure that it implements a system in which the enforcement and inspections activities in the environmental sector is based on a comprehensive assessment of risks in the complete Peruvian territory. Besides, OEFA should discuss further, in which socio-environmental conflict areas might be one of many focus areas to the extent that the hard evidence dictates.

- When presenting results of OEFA's activities and performance, there is a need to differentiate the types of measurements – i.e. which are outputs (activities), outcomes (performances) and which data points relate to which indicator.
- As the improvement of data collection and analysis become available, it is crucial to make sure that these actually inform the enforcement and inspections' policy in the environmental sector. Therefore, other elements such as socio-environmental conflicts and complaints would take a reduced role in setting priorities and planning activities.

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OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed on 14 October 2019). [10]

OEFA (n.d.), *Portal de Fiscalización Ambiental*, https://publico.oefa.gob.pe/Portalpifa/Intervenciones.do (accessed on 14 October 2019). [7]

OEFA (n.d.), *Servicio de Información Nacional de Denuncias Ambientales (SINADA)*, https://apps.oefa.gob.pe/sinada/ (accessed on 14 October 2019). [8]

Notes

[1] EFAs are public authorities – at the national, regional and local level – in charge of environmental inspections and enforcement on certain regulated subjects and/or objects.

[2] Decreto Supremo que aprueba el Texto Único Ordenado de la Ley No. 27444 – Ley del Procedimiento Administrativo General, Supreme decree No. 006-2017-JUS, published on 20 March 2017.

3 Selectivity

The chapter focusses on the selectivity principle, according to the *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections*. It presents the main insights of the principle in OEFA's practices and presents a general assessment of the practices and recommendations to improve OEFA's intervention in environmental policy.

> *Promoting compliance and enforcing rules should be left to market forces, private sector actions and civil society activities wherever possible: inspections and enforcement cannot take place everywhere and address everything, and there are many other ways to achieve regulations' objectives (OECD, 2014[1]), (OECD, 2018[2]).*

The principle implies that alternatives to state-led regulatory enforcement are considered in the impact assessment process, looking at whether direct inspections and enforcement would be needed at all, or whether evidence suggests that compliance could be achieved by other means (likelihood of voluntary compliance, insurance mandates, etc.). It also suggest consider what existing structures or mechanisms could support this aim or which new ones may be required. In case state-led regulatory enforcement is truly required, regulators should consider which compliance incentives exist or can be used.

Another key consideration is the nature of the potential harm that the regulation aims at preventing. If the harm can be remedied at a reasonable cost (i.e. remediation is not impossible, and not far more expensive than prevention), enforcement may be relatively less needed than when harm would be very expensive to remedy (far more than prevention) and/or would be impossible to remedy (irreversible damage).

What matters in all cases is creating structures (legal and institutional) by which alternative mechanisms can be used in cases where they offer the best combination of effectiveness and efficiency. Alternatives to state-led inspections and enforcement are often seen as belonging into two categories that can be combined: mandatory third-party certification and insurance, and litigation-based approaches (class action). There are more options, but these are not seen as real alternatives to direct enforcement as they are less known or not widely used. In order for such schemes to be effective, adequate resources (such as information) and legal foundations are needed (e.g. liability for private sector actors that would fail to abide by the rules).

The importance of prevention in environmental protection

The entire National System of Environmental Supervision (SINEFA) still largely relies on controlling what economic operators are doing, based on an approach that is aiming to become more proactive and preventive rather than reactive. Effectively moving towards a more preventative strategy is crucial, as violations over environmental regulation can potentially cause major and irreversible harm, with difficult, lengthy or unlikely remediation or compensation. Measures and activities initiated by OEFA, as the performance of 'preventive environmental assessments', automatic monitoring networks, data gathering from public authorities and businesses, and a more systematic and appropriate information sharing and co-ordination with licensing authorities (as SENACE) are valuable but they need to be reinforced and multiplied to achieve risk prevention. See also Chapter 11 on Compliance promotion for information on tools and measures to strengthen risk prevention.

In a regulatory area where preventive action is essential to achieve regulations' goals, it is particularly important to find ways to effectively prevent harm and promote management of risks. It appears that specialised prosecutors have an active role in ensuring that the enforcement actions are imposed (and that they are very active in reaching out to OEFA to get information and expertise in ongoing procedures). This means that there are efforts to make the deterrence effect of courts-based enforcement work; for example, the recent interactive portal launched by OEFA for specialised environmental prosecutors' offices (OEFA, n.d.[3]).

Alternatives to state-led regulatory enforcement

Environmental (private) consultants and consulting companies

During the review missions, some participants reported that the involvement of private consultants in the preparation of the 'environmental studies' to be approved by the licensing bodies did not worked for the best–i.e. low-quality environmental studies with outdated information and technical gaps and inadequate environmental management instruments (*instrumentos de gestion ambiental* – IGAs). In this regard, improving the system with an adequate liability system against the consultant or consulting companies to ensure that proposed IGAs are appropriate, at an early stage, as well as a stricter accreditation system (including withdrawing accreditation when inadequate work has been found) – would appear to be a direction to consider. There is a penalty regime[1] since 2016 for consultants or consulting companies that support regulated entities getting licenses from SENACE. According to this, sanctions are to be applied to consultants and consulting companies when these: a) are not registered in the relevant registry, the sector, or the information provided is not accurate; b) use information that is not up-to-date or not accurate when preparing IGAs; c) do not provide suitable training to their employees as per relevant rules. Violations are sanctioned with fines, suspension or removal from SENACE's registry of environmental consultants.

The liability system could be more effective if the IGAs designed by consultants were truly evaluated in their capacity to manage and reduce risks; for instance, a range of measures or sanctions can be applied to promote compliance and deter infringers. Consultants and consulting companies could be held liable: a) at the time of the assessment of IGAs by the relevant authorities, and b) if a negative impact on the environment occurs because of badly designed IGAs. The latter is already foreseen in the Single Consolidated Text (TUE) of the Law on General Administrative Procedure (Art. 140), and such rule could be further developed. It can however be expected that issues with environmental consultants will decrease if the number of *ex ante* requirements such as IGAs are reduced and substituted by relevant licensing reforms and these are only kept for really high-risk objects.

OEFA is competent for the supervision of environmental consultants.[2] Now, there is a dedicated unit in charge of the co-ordination of these types of activities. The recurrent problems with the appropriateness and quality of documents prepared by some consultants may deserve carrying out investigations and implementing a strategy to engage with the sector to find suitable solutions.

Other alternatives/complementary measures

OEFA has taken other alternative/complementary measures and mechanisms to ensure a better achievement of regulatory goals. These include the following:

- By means of a recent Decree published on 27 July 2019, sponsored by OEFA, operators from the manufacturing and internal trade sector operating without predetermined IGA can remedy the situation through a Declaration of Environmental Suitability (DAA) or a Programme of Environmental Suitability and Management (PAMA). These *ex ante* requirements are less burdensome and based on the level of risk of the performed establishment. See the Supreme Decree amending the Environmental Management Regulation for Manufacturing Industry and International Trade. While permits or environmental certifications are important devices, considering a thorough reform of the *ex ante* instruments in the environmental regulatory area would be needed in all sectors. This would help reduce unnecessary burdens on business and barriers to formalisation. It also helps at improving trust from business operators towards environmental authorities. It would involve maintaining the *ex ante* requirements only for operators or activities that pose the highest risks, but redesigning them if necessary to effectively ensure risk management and prevention. Today, the environmental certification is required even in cases where it is not necessary given the risk level; in other cases, the requirements could be lighter.

Additionally, the content of the resulting IGAs is in practice often inadequate. This means the process is burdensome and raises questions on its effectiveness. As a result, OEFA needs: a) reach out the licensing authority with amendments suggestions, and b) review the IGAs, prior to an inspection to select only those deemed necessary to check. Better institutional co-ordination i.e. with licensing authorities and the Ministry of the environment, is needed.

- OEFA has started implementing a scheme integrating some informal businesses (especially micro and small ones, as small mining operators) to ensure they not fall outside the scope of the regulatory system. This involves determining which the risks of the activity are and how to manage them instead of resorting to heavy licensing procedures (at most requiring a very simplified and streamlined permit).
- Substantial work aimed at strengthening prevention through compliance promotion or use of behavioural models approaches have been performed or initiated. A Behavioural Economic Working Group was recently created[3] to help at identifying and analysing the issues encountered in the performance of environmental inspections and enforcement, find alternative solutions through neuroscience, psychology and behavioural economics tools, design and implement experimental solutions, and assess the obtained results. Besides, a Registry of Good Environmental Practices[4] exists to promote their dissemination. Efforts have been made to engage with the private sector. However, its involvement at an early stage as an alternative to traditional "command and control regulations" is yet to be strengthened. Finally, a number of compliance promotion tools and measures have been developed (see Chapter 11 on Compliance promotion).

Assessment

While some alternatives to state-led regulatory enforcement exist, they are not implemented systematically or sufficiently during the *ex ante* or *ex post* assessment of regulation. They appear to be used in cases where traditional practices are not being effective.

Not all alternatives to state-led regulation used (such as the use of IGAs, or liability for environmental consultants preparing IGAS) seem to be effective. Some others alternatives are promising but still are at an incipient stage (Behavioural Economics working group, use of the Registry of Good Environmental Practices, integration of certain informal businesses), or are likely to have limited impact when irreversible harm has already occurred (enforcement actions by courts).

Recommendations

- Alternatives to state-led regulation need to be more systematically considered. In particular, OEFA should more systematically engage with the private sector (including regulated entities, managers, workers and other stakeholders) to find ways and channels to improve regulatory outcomes – starting at very early stages i.e. even before *ex ante* consultation on an already existing regulatory draft.
- Alternative/complementary mechanisms should be developed, but also evaluated in terms of effectiveness. This involves e.g.:
  - Intensifying the work of the Behavioural Economics working group and the use of the Registry of Good Environmental Practices to reinforce risk prevention.
  - Continuing and speeding the pace of integrating informal businesses – i.e. by determining the risks of their activities and defining how to manage them, instead of resorting to heavy licensing procedures.

- The MINAM should consider reforming existing *ex ante* requirements to keep them only for operators and activities that pose the highest risks, and make them more risk-focused.
- Carry out an assessment of the effectiveness and efficiency of the quality of IGAs in managing and reducing risks, to consider amongst other the Implementing a more appropriate liability system for environmental consultants. This assessment should also include the Registry of Good Environmental Practices.

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Notes

[1] Resolution of the Board of Directors No. 008-2016-OEFA/CD of 26 April 2016, http://www.oefa.gob.pe/wp-content/uploads/2016/05/res-008-2016-oefa-cd-peruano.pdf.

[2] See Preamble, section 2. Mandate and functions of OEFA.

[3] Approved by Resolution of General Management No. 071-2018-OEFA / GEG.

[4] Approved by Resolution of Board of Directors No. 034-2014-OEFA / CD.

4 Risk focus and proportionality

The chapter explains the relevance of the risk focus and proportionality approach, as a principle to enforce regulation and conduct effective and proportional inspections. It provides an analysis of OEFA's practices in line with this principle and concludes with an assessment and a series of recommendations to embed risk focus and proportionality in inspection practices.

> *Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk, and enforcement actions should aim at reducing the actual risk posed by infractions (OECD, 2014[1]), (OECD, 2018[2]).*

This principle entails that applicable legislation allows and requires risk-focus and risk-proportionality. Legislation should allow for selectivity in inspection visits and for differentiation in enforcement response. The former means that not the entire universe of regulated subjects should be inspected, while the latter implies allowing for adaptation to circumstances and proportionality, as long as criteria are clear.

The existence of a common approach to risk assessment and risk management is important. If a common approach is not possible, at least a similar understanding and practices across different sectors and regulatory domains is desirable.

Risk should be understood as a combination of the likelihood of some adverse event with the potential magnitude and severity of the consequences of this event (harm). High risk is thus very different from high likelihood of violation. It is important to have an official set of tools and methods to assess and rate risks and to determine the appropriate response.

In a good supervision system, the majority of inspections should be proactive and the targeting of inspections, effectively based on risk. Risk factors taken into account for targeting should include at least intrinsic risk of the activity, scope of operations, vulnerability factors (location, population served), and past track records. Even when receiving complaints or other information, a risk-based methodology should inform the undertaking of reactive inspections: reliability or credibility of the information, seriousness of the risk outlined in the complaint, and past track records and/or previous complaints, amongst others.

Enforcement decisions should be based on risk proportionality. The assessment of an establishment should consider any violation and their characteristics. The inspector must consider whether these violations are part of a pattern, if they reflect a deliberately reckless behaviour or these are mistakes that the operator is ready to correct at the earliest. The inspector must also assess if these violations actually create harm or serious risks for public welfare (e.g. the environment) and the magnitude of the risks. As much as possible, there should be official guidance clarifying how risk proportionality works and how enforcement decisions should be taken.

Risk-communication is essential, and one of its key elements is to make it clear that risk management cannot be done by inspectors alone. Thus, this approach should be clearly and actively communicated to all stakeholders, with a view to manage expectations and improve outcomes. In the case of inspections and enforcement activities, this means transparency about risk criteria to make discretion legitimate, clarity about limitations in risk prevention to ensure expectations are correctly managed, and better information about key risks to improve compliance with crucial requirements and improve outcomes. Such information should target all key stakeholders: business operators, consumers, workers, citizens.

Approach to risk: guiding principles and common understanding

Applicable legislation and internal OEFA regulations (and guidelines) allow for (and, in some cases, require) risk-focus and proportionality.

- The LGA foresees that the design and implementation of public policies shall consider the prevention of environmental risks and damages (Art. 11.d). It also provides for the proportionality of enforcement-related interventions (Art. 11.h).
- OEFA's *Regulation on Inspections* foresees a risk-based approach among its guiding principles: "When performing an inspection, the environmental risk that may be caused by the performance of the regulated entity's activity shall be taken into consideration, taking into account the impact level and the probability of the occurrence" (Art. 4.d).

- Risk is also an underlying principle in SINEFA Law (Art. 11 and 22.A.).
- The vast majority of provisions related to the imposition of sanctions and measures refer to risk as the fundamental factor on which they shall be applied and calculated.

OEFA's leadership shows a strong support for a risk-based approach. Art. 4 of OEFA's *Regulation on Inspections* provides for a definition of risk in line with good international practice. There are several examples of tools and methods adopted to ensure a common and harmonised understanding of risks. Risk criteria for the different sectors of competence of OEFA have been introduced – (OEFA, 2018, pp. 41, 45, 49, 53, 57, 61, 65, 69 and 73[3]).

It is to be noted that in the 2019 OEFA's PLANEFA, an effort has been made to use strictly empirical and fact-based criteria to plan inspection-related activities. These inspections relate to specific economic sectors under OEFA's coverage and are at contrasts with the experience of previous years, wherein planning was heavily reliant on socio-environmental conflicts. For instance, planning of industrial fishing and aquaculture establishments inspections relies on: a) the risk of impact on water due to effluent discharge; b) the risk of impact on air by emissions; c) the records with alleged infractions entailing moderate and significant risk (OEFA, 2018, p. 53[3]). This example shows the use of criteria that are based on hard evidence and reflect risks that are inherent to this particular economic area. This is also the case for other sectors such as electricity, hydrocarbons, manufacturing and internal trade (OEFA, 2018, pp. 49, 45 and 57[3]).

Most of the criteria reflect inherent risks for each sector. Some of the elements include dumping points in effluents by mining activities,[1] soils with presence of hydrocarbons, abandoned facilities and criteria generally taken into account in international good practices, such as the compliance history of economic operators. However, some could be revised and improved (see Chapter 2 on Evidence-based enforcement).

Guidelines for the inspections planning tool (i.e. *PLANEFA Guidelines* and relevant *Handbook*) based on risk prioritisation have also been prepared in a short period. Other tools that have been adopted include methodologies to: a) assess the severity of non-compliance based on pre-defined risk criteria and b) calculate fines reflecting risk-proportionality (for details see Chapter 5 on Responsive regulation). The Methodology to Assess the Environmental Risk (*Metodología para la estimación el riesgo ambiental*) is an online tool that takes into account the severity of the consequences and the probability of negative impacts happening to automatically calculate the level of risk (high, medium or low) (OEFA, n.d.[4]). To determine the severity of the consequences, OEFA considers factors such as the quantity, the amplitude, the level of hazard and the type of environment harm concerned, while that the probability of a negative impact is divided into five categories.

Based on the result of this assessment, the non-compliance will be considered as serious (for high and medium risk), or not serious (when the risk is assessed to be low). While this is a very useful tool, it would benefit from being refined, allowing more gradation between risk levels. More importantly, the way the calculation is done results in most situations corresponding to "serious infringements".

Table 4.1. Attendees to OEFA's risk methodology dissemination and training workshops

Year and topic	Regulatees	OEFA collaborators	Total attendees	Total hours
2017	**30**	**56**	**86**	**11**
Risk measurement methodology	30	56	86	11
2018	**305**	**138**	**443**	**56**
Risk measurement methodology	155	0	155	24
Risk measurement methodology and calculation of fines	150	138	288	32
Total	**335**	**194**	**529**	**67**

Source: OEFA (n.d.[5]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

OEFA is making an effort to inform the private sector and other stakeholders about the approach and methods it follows. The dissemination strategy includes the publication of relevant documents as well as workshops and conferences to communicate on risk measurement methodology and calculation of fines (see Table 4.1).

Proactive inspections aimed at preventing risks

As far as could be observed, on-site inspections performed by OEFA's inspectors are also focused on risks, at least to a significant extent. Prior to the inspection, the characteristics and available information on the regulated establishment (including established IGAs) are studied to identify elements that deserve special attention. Characteristics such as the management of risks in more sensitive production points, processes, and the IGAs are the focal points of the inspection. The result of this preparation process is an inspection's plan (*plan de supervision*), which is a list of the elements that require special attention during a specific inspection. However, some aspects of the inspection still tend to be formalistic. For example, the verification of formal requirement is high time consuming, for which the relevance for risk management vis-a-vis the burdens they create need to be assessed. There also remains to be ascertained to what extent other EFAs, especially local ones, use a similar approach and process.

Currently, OEFA considers socio-environmental conflicts, complaints, records of accomplishment and sanctions as risk factors and prioritisation criteria for the planning of inspections. Socio-environmental conflicts and complaints are likely to result from a mix of facts and perception, which may introduce confounding factors during the prioritisation exercise. Furthermore, there appears to be insufficient differentiation regarding the type of non-compliance and sanctions and, thus, on the level of entailed risks.

In practice, OEFA's PLANEFA for 2019 is based on four general prioritisation criteria: a) dialogue opportunities[2] related to socio-economic conflicts; b) results of past OEFA's actions; c) requests from other public entities; and d) public perception on environmental quality, measured by the number and content of complaints. Prioritisation criteria still require including elements that pertain to intrinsic risks and scope of operations, amongst others. The planning is more risk-based when using criteria for specific sectors, as a number of intrinsic risks (typology of activities) are considered. However, the assessment of management competence of operators remains mostly absent, as well as whether the operation is in a critically vulnerable location or not.

The majority of inspections that OEFA conducts are regular, proactive and planned ones. During the first quarter of 2019, approximately 40% of the inspections carried out by OEFA were special ones (OEFA, 2019[6]). The share of special inspections greatly varies from one specific sector to another. For example, the proportion of reactive inspections in the mining sector, over the first quarter of 2019, was of 77%, while special only represented 9% of those performed in the solid waste sector over the same period. Information shared by OEFA in July 2019 shows that approximatively 30% of special inspections carried out are based on complaints, 30% on environmental emergencies, and 20% on intervention requests from other public authorities, which are not further assessed.

A management system for complaints has been developed.[3] At a central level, officials assess the complaints received though the SINADA, the procedure mostly focuses on redirecting complaints to the competent authorities and making sure that they are formally complete. Afterwards, a number of criteria are considered for a deeper assessment of the complaint.

1. Risk of impact on the environment, or its components, to human health of lives within the relevant scope of competences
2. Existence of previous inspections
3. Existence of previous complaints
4. Presence of socio-environmental conflicts

5. Vulnerability of the area (natural protected area or urban area)
6. Credibility of the complaint
7. Impact in the media

A score to each criterion has been assigned depending on its "weight" in the overall assessment. The result of this assessment will determine whether an inspection is needed, and the kind of inspection depending on the level of overall risk obtained.[4] See Box 4.1 for an international example of a complaints management system.

Box 4.1. Complaint management in the 2018 Greek Law on Supervision

Complaints related to the activity of an economic operator or establishment may be submitted by any natural or legal person to the competent supervisory authority via any available means of communication (for instance, e-mail, in writing, or by telephone).

The complaints are evaluated according to the following criteria:

1. Compatibility with the scope of the supervisory authority's competence.
2. Their presumably unfounded or unsubstantiated content
3. Submission of the necessary data to allow for an on-site inspection or survey to be carried out
4. The principal assessment that the report constitutes a violation of legislation
5. The extent to which the incident is repeated
6. The time that has elapsed since discovery of the problem
7. Assessment of the degree of risk as regards the direct or indirect effects on the public, or another aspect of the public interest
8. The group of consumers who are exposed to danger and possible use by vulnerable groups
9. The results of the testing of a sample supplied
10. Their credibility when they arise from repeated submission by the same complaint without having demonstrated their accuracy during previous inspections

Following the evaluation outlined in the previous paragraph, and depending on the severity of the complaint, the supervisory authority shall proceed with one or more of the following actions:

a. Archiving of the complaint
b. Registration of the complaint for the activity in question, which may be examined within the context of the broader inspection schedule
c. Immediate priority investigation which may include an on-site inspection
d. Informing the competent authority if this pertains to a complaint lodged *ultra vires*

The supervisory authorities are not required to reply individually or to carry out an on-site inspection following each complaint, nor to send a reply to the complainant, unless the relevant legislation stipulates otherwise for a specific supervision area.

The supervisory authority shall provide the necessary human and material resources for management and assessment of complaints related to the activity of the economic operators. The supervisory authority shall provide suitable training to the staff carrying out assessment of the complaints.

The supervisory authority may also assess other information of which it is made aware on its own initiative, such as publications in the mass media, social networking media, or other media, which shall be handled according to the manner in which the supervisory authority assesses complaints.

Source: OECD own research, based on Greek practices and the Art. 140 of Law on Supervision, Part D of the Omnibus Law 4512/2018.

As acknowledged by OEFA's management during the fact-findings missions, inspection-related activities are yet to become more proactive and preventive, and are still to a large extent reactive. For an agency as new as OEFA, this is understandable. OEFA recently started working towards implementation of good practice principles, has made efforts to gather the relevant data and moves in a country where economic operations can have negative impact on the environment and on neighbouring communities. However, efforts should be actively pursued to ensure that the approach and subsequent operations move from reactive to preventive measures to prevent harm more effectively.

Assessment

Applicable legislation and internal OEFA regulation and guidelines allow for risk-focus and proportionality. These are among the guiding principles of inspection and enforcement activities. Risk is defined according to good practice.

OEFA has developed a series of tools (e.g. methodology to impose sanctions based on existing risks, prioritisation criteria for planning of inspections) to promote a common approach to risk proportionality and focus. However, some of the criteria employed (socio-environmental conflicts, complaints and requests from other authorities) should be reviewed to ensure that the elements to be considered pertain to hard evidence, in which perceptions components are left behind.

The majority of inspections are regular (planned). Targeting of inspections is based largely on risk for specific sectors, such as hydrocarbons or electricity. A complaints' management system is in place and currently it is being improved. However, efforts need to be pursued to ensure that planning of regular inspections takes into account intrinsic risk factors and quantitative data better. Moreover, the salience of complaints should be a less dominant driver of inspection planning.

OEFA has developed tools and methodologies to assess risks and the potential effects of non-compliance to ensure that enforcement decisions are based on risk proportionality. These methodologies should be further developed to allow for more risk differentiation and avoiding that most of the assessments classify as serious non-compliance.

Risks itself, the risk management strategy and the risk-based enforcement approach are communicated to stakeholders clearly and actively. Although OEFA considers the reactions from stakeholders, the agency would benefit from doing it, not only through *ex ante* consultations.

Recommendations

- There is a need for the SINEFA system to rely more on fact-based and empirical prioritisation criteria as data are collected. In addition, the risk posed should be taken into account systematically; for example, when using the number of sanctions as prioritisation criterion, the gravity of violations should be considered.

- Ensuring that planning of inspections is always based on risks, employing hard measureable evidence, the vulnerability of the location and the management of risks by the operator, should be taken into account. This applies not only to prioritisation criteria for specific sectors under the scope of responsibility of OEFA, but also to 'generic criteria'.
- Aim at increasing the share of risk–led inspections employing hard measureable evidence. This should lead to a reduction in the share of reactive inspections. Further refining of complaints' assessment and the management process is a step towards the improvement of the system. These refinements should consider adequate predefined criteria, the requests of intervention from other authorities and emergencies.
- The methodology used to assess risks, and the resulting seriousness of non-compliance, could be further developed and refined to differentiate more between risk levels and levels of non-compliance.

References

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OEFA (2018), *Plan Anual de Evaluación y Fiscalización Ambiental del OEFA - PLANEFA 2019*, https://www.oefa.gob.pe/planefa/planefa-2019 (accessed on 14 October 2019). [3]

OEFA (n.d.), *Metodología para la estimación del riesgo ambiental*, https://www.oefa.gob.pe/metodologia-para-la-estimacion-del-riesgo-ambiental (accessed on 14 October 2019). [4]

OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed on 14 October 2019). [5]

Notes

[1] N.B. this is not a fully clear criterion in any case – does it refer to dumping points being inadequate or lacking water treatment or to the dumping points being a key control point (in which case this would rather be a checklist point). Risk criteria would gain by being made more precise.

[2] This refers to communication, engagement and information efforts carried out and/or planned so as to resolve socio-environmental conflicts, and which involve the different actors, in particular

[3] OEFA, *Lineamiento de Atención a Denuncias* (relevant Guidelines), which is to be incorporated into the *Manual of Inspections' Procedures*, currently being prepared.

[4] It is to be noted that there are inconsistencies in the information obtained on the complaints management system regarding some of the criteria used for the assessment, and on how inspections will be scheduled based on the assessment.

5 Responsive regulation

This chapter describes the practices followed by OEFA to design inspections based on the actions of the regulated subjects. It also addresses the legal instruments available that grant OEFA the possibility of implementing differentiated regulatory responses based on a series of criteria and considerations. Additionally, this chapter presents an assessment of the practices followed by OEFA and proposes areas for further improvements.

> *Enforcement should be based on "responsive regulation" principles; that is, inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses (OECD, 2014[1]), (OECD, 2018[2]).*

The principle of responsible regulation involves allowing legislation for (or, at least, not prohibiting) a differentiated (responsive) enforcement, providing an appropriate framework for discretion – including boundaries and accountability. Responsive regulation delivers better outcomes than uniform sanctioning.

Enforcement response should depend on the circumstances and consider elements such as the seriousness of the violations in terms of risk, record of accomplishment, overall situation in establishment, readiness to comply and improve, intent or lack thereof, dissimulation and openness. Discretion should be allowed, but it has to be restrained by the application of principles and criteria, as risk-proportionality and accountability.

The gradation of available sanctions should be adequate to allow credible deterrence through escalation – light enough to use it when needed, strong enough to outweigh potential profits from non-compliance. Legislation should foresee a range of differentiated responses. At the same time, inspectorates should ensure that inspections are followed-up on to guarantee compliance in cases of the use of softer responses.

Clear distinction, but also effective articulation, is needed between regulatory activities focusing on promoting compliance, and law-enforcement activities focusing on fighting crime. Regulatory inspections should be clearly distinct from law enforcement in the criminal sense; however, effective articulation between both activities is required in order for the system to avoid gaps.

Enforcement practices should differentiate responses according to the regulated subject's track record, risk assessment, effectiveness of different options and date of establishment of the business – with new businesses treated distinctly. This means considering the impact of the enforcement response on future compliance, both inside and outside the establishment. While the former reflects the possible response of staff and management to the enforcement actions, one example of the latter is the exemplarity effect. Sufficiently detailed guidance and strong professional skills for inspectors are indispensable to assess the situation on site properly.

Responsive (proportionate) enforcement

The principle of responsive regulation is embedded in OEFA's Regulation on Inspection. The document foresees that inspections should be carried out in a 'modulated manner', depending in particular on the type of requirements that are being checked, the seriousness of the alleged non-compliance, the track record of the regulated business and other factors allowing a proportionate intervention towards compliance with regulatory requirements (Art. 4.h).

The greatest effort concerning the implementation of this principle has been made in the area of responsive, or proportionate enforcement. The legislation allows for different conclusions from the inspections and, therefore, for differentiated measures or sanctions.

Art. 245.1. of the Single Consolidated Text (TUE) of the Law on General Administrative Procedure allows for different possible conclusions of an inspection. The following outcomes are included in the Law: 1) certification or record of compliance; 2) recommendation of improvements or corrections; 3) warning of the existence of non-compliance without administrative liabilities; 4) recommendation to initiate a procedure to determine administrative liabilities; 5) adoption of corrective measures; 6) other possible conclusions as provided for by special laws.

Relevant laws and regulations (e.g. Art. 135ff LGA, and Art. 22ff of OEFA's Regulation on Inspections) provide for different sanctions and measures with the objective of creating a credible deterrence through escalation of sanctions. It implies a flexible approach, a light enforcement when needed and strong enough actions to outweigh potential profits from non-compliance.

A classification of non-compliances and sanctions based on the relevant risk level found and the potential negative impact of the non-compliance enables to determine if these are minor, serious or very serious (or minor and serious, depending on the source document). OEFA prepared Fines Calculation Methodologies[1] for different sectors under its competence. Such methodology seeks to deter violations through escalation of sanctions taking into account at least the following elements: illicit benefit, probability of detection[2], and damage (potential and actual).Additional factors may be taken into consideration, for instance a) when there is available information to determine the market value of the damage, b) when aggravating and mitigating factors exist.

A list of aggravating and mitigating factors is also available for the imposition of fines (Presidencia del Consejo de Ministros, 2013[3]), (OEFA, n.d.[4]). For instance, when an operator remedies voluntarily the non-compliance before the enforcement process, the sanction is reduced;[3] by contrast, the amount of the fine is increased in case of recidivism or intentionality, and depending on how many environmental aspects or contamination sources are impacted. The fine is also proportionate to its environmental impact, as well as to the reversibility of such impact. A Manual explaining the approach, the different aggravating and mitigating factors, amongst others factors has been prepared and is freely available to the public (OEFA, 2012[5]).

However, available instruments (such as the ones mentioned above, including the 'methodology to assess the environmental risk') do not seem to bring clarity on whether aggravating and mitigating factors are to be taken into account for enforcement actions and measures other than fines. If so, this should be clarified, as well as the rules on how these factors are to be considered; otherwise, it is recommended that OEFA also considers implementing such factors for sanctions and measures other than fines. Some exempting or extenuating factors are already foreseen in the Single Consolidated Text (TUE) of the Law on General Administrative Procedure (Art. 257) and would deserve to be further developed, and guidance on their implementation prepared.

Consideration of the characteristics of regulated entities

OEFA's Regulation on Inspections and new Guidelines on Environmental Inspections foresee that inspections' planning and conduct need to consider the track record of businesses (OEFA, 2019[6]). This principle is made clear in Art. 4.h) of the Regulation. Information about the track record of inspected subjects is available, from a negative perspective, on the Registry of Environmental Violators (RINA). In addition, it is clear that recidivism is an aggravating factor when a fine is calculated; however, the implications of a positive track record are uncertain in practice. For instance, does a business with an impeccable compliance history deserve a different treatment, in particular when it comes to imposing measures? Moreover, the impact of aggravating and mitigating factors in measures and sanctions that are not fines is unclear.

Micro and small newly-established businesses are entitled to "guidance inspections" based on Art. 245.2. of Single Consolidated Text (TUE) of the Law on General Administrative Procedure. Specifically, it foresees that inspection authorities "shall try to perform some inspections solely with guidance purpose".[4] OEFA followed the route opened up by the legislator to develop further the concept of 'guidance inspections".

According to Art. 13 of OEFA's Regulation on Inspections, these are inspections focused on guiding the operator on how to achieve compliance with key regulatory requirements, without punitive purposes. Based on this provision, a guidance inspection may be performed only once, and if no previous inspection has ever been undertaken in the case of natural persons running a business or micro and small businesses. OEFA introduced this new kind of inspection based on findings indicating that this group of operators often are not aware of the regulatory requirements they must comply with, as they do not have enough information and have never been inspected before. However, besides the introduction of the 'guidance inspection' itself, nothing indicates that these types of businesses need to be treated distinctly during normal inspections, or when deciding on an enforcement measure.

Effectiveness of different options

In theory, enforcement actions and inspection decisions are based on the effectiveness of the different available options, but this has not yet been implemented. Meaningful results and impacts are being measured for the first time, *ex post* evaluations of strategies and tools implemented under the current management are yet to be performed, and previous information is not entirely available and/or reliable.

A common approach on the evaluation and decision making regarding possible enforcement decisions would add value to OEFA's work. Besides, it would help govern the necessary use of a certain degree of discretion during inspections. The United Kingdom Health and Safety Executive's Enforcement Management Model could be a good example (see case study in Chapter 14 on International experience on inspection policies and enforcement. Even though, it would be advisable to develop a simpler and shorter tool to avoid overwhelming inspectors.

In practice, the use of "responsive regulation" by OEFA (and the SINEFA) – i.e. having a variety of intervention choices that can be selected and used depending on the characteristics and behaviour of the operator so as to meet regulatory goals – is yet to be further developed. The regulatory system still relies largely on a traditional control scheme based on: 1) authorisation; 2) inspection; 3) verification of compliance; 4) imposition of sanctions for non-compliance (or decide not to).

There has been an ongoing effort under the current management of OEFA to guarantee transparency and communication and to provide advice to the private sector. This work, however, needs to be continued and deepened so as to successfully and progressively move from an approach where complementary solutions to secure compliance are looked into and developed, to a clearer and more holistic strategy on the development of intervention choices (see Chapter 3 on Selectivity and Chapter 11 on Compliance promotion).

Assessment

Applicable legislation provides for differentiated conclusions from an inspection, leading to differentiated enforcement measures or sanctions (e.g. Law of General Administrative Procedure and OEFA Supervision Regulation). Methodologies exist to impose and calculate fines based on the determination of the seriousness of non-compliance and other elements.

Different sanctions and measures are applied based on the results from the inspection. Non-compliances and sanctions are classified as minor, serious and very serious, based on the relevant risk level and potential negative impacts. The Fines Calculation Methodology takes into account appropriate criteria, allowing for responsive enforcement. It remains to be defined whether and how some factors (for instance, mitigating and/or aggravating) are also applied to measures and sanctions other than fines. Further clarification is needed on whether and how a positive track record is taken into account.

In theory, enforcement practices should use differentiated responses based on the characteristics of the inspected subject. A number of measures have been developed, and are applied, to ensure this. Nonetheless, there is no clear guidance yet on how to consider the effectiveness of the different options, and how exactly and when the characteristics of inspected subjects must be taken into account must be clarified.

Recommendations

- Consider developing a comprehensive framework to manage discretion and responsiveness in enforcement inspired e.g. by the UK HSE's Enforcement Management Model.
- Clarify and establish specific rules on the use of discriminating factors, such as aggravating and mitigating ones, in the determination of measures and sanctions other than fines.
- Consider developing guidelines on how to consider the effectiveness of different enforcement options.
- Clarify the rules of guidance inspections and consider broadening their use to other kinds of businesses, when appropriate. The guiding document should include information on the mandatory use and planning of guidance inspections.
- Consider taking into account characteristics of the regulated establishments when conducting regular or special inspections and develop clear rule. These characteristics could include the age of creation of the business, the size of the company (SMEs), and track record.

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Notes

[1] Available at: http://www.oefa.gob.pe/wp-content/uploads/2013/03/SE2013031200.pdf.

[2] From the consultation of the methodology, there is no way to understand why this criterion is used, nor how it is assessed, nor whether it is an aggravating factor or other.

[3] By 20% if there was no harm done and by 10% if harm already occurred before the infraction was remedied.

[4] The entire provision in Spanish reads as follows: “Las entidades procurarán realizar algunas fiscalizaciones únicamente con finalidad orientativa, esto es, de identificación de riesgos y notificación de alertas a los administrados con la finalidad de que mejoren su gestión.”

6 Long-term vision

Long-term vision is an important component of a good enforcement and inspections policy. This chapter presents an overview of OEFA's long-term strategy, its vision and mission, and addresses the use of indicators by the agency. Moreover, the section includes an evaluation of the elements that guide the functioning of OEFA and proposes changes or areas for improvement with the intention to further develop the institutional mechanisms and objectives that OEFA follows.

> *Governments should adopt policies on regulatory enforcement and inspections, and establish institutional mechanisms with clear objectives and a long-term strategy (OECD, 2014[1]), (OECD, 2018[2]).*

Some of the requirements to achieve this are an official vision, strategy and/or legal framework, that sets the goals, objectives and key principles, and that provides a shield from short-term, conflicting priorities.

Mechanisms and practices, such as regulatory impact assessment, exist to avoid or limit the occurrence of "Risk-Regulation Reflex". The former are situations and decisions whereby, following an incident, state authorities urgently adopt new regulations, inspections and enforcement measures, without proper consideration of the extent of the risk, the adequacy of the proposed solutions and their costs. A good, risk-based inspections and enforcement system needs to be protected from such "reflex" decisions.

The long-term vision shall have practical effects, inform key reforms, legislation and decisions and should be embedded by an institutional framework that limits the possibility of short-term policy swings.

Official vision and strategy

OEFA and the MINAM share their vision of Peru as "a modern country that harvests sustainably their natural resources, constantly endeavouring to conserve the environment, by reconciling economic development with environmental sustainability for the benefit of their citizens" (OEFA, n.d.[3]), (Ministerio del Ambiente, n.d.[4]).

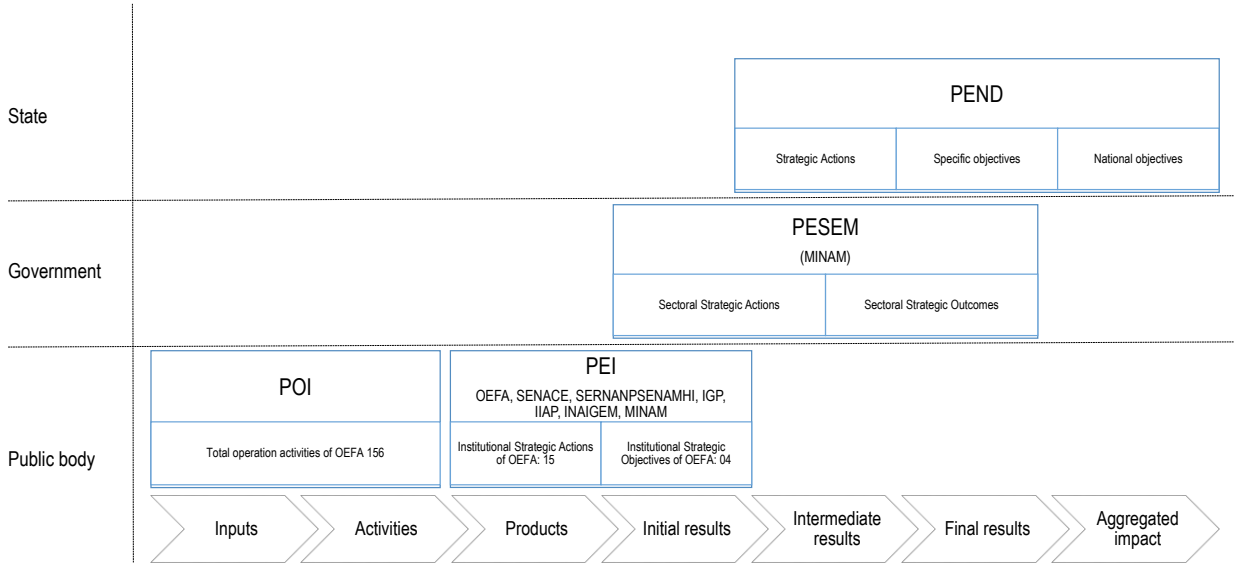
OEFA's strategy for regulatory inspections and enforcement for the 2019-2022 period is spelled out in its current Institutional Strategic Plan (PEI). The PEI and the Institutional Operational Plan (POI) (OEFA, 2018[5]) are set in line with the National Environmental Action Plan for 2011 – 2021 (PLANAA)[1] and the Multiannual Strategic Plan for the Environment for 2017 – 2021 (PSEM),[2] both prepared and approved by MINAM. The PEI clearly sets the institutional policy, mission, strategic objectives and actions of OEFA for the relevant period.

The first element of the institutional policy is to 'contribute to the improvement of the quality of the environment and the health of the people through the promotion of compliance with environmental requirements by the articulated and effective action of the SINEFA and according with a preventative approach to risks, by implementing the appropriate promotion or deterrence strategy, with reasonable and proportional criteria'.

Strategic indicators designed against the abovementioned institutional objectives are also included. The latter are defined as: 1) strengthening OEFA's performance; 2) enhancing compliance with regulatory requirements among regulated subjects; 3) modernising OEFA's institutional management; and 4) reducing OEFA's vulnerability with regard to risk of disaster. Such objectives and indicators do not include fundamental elements such as performance in term of protection of the environment and the health of the people, or resources devoted to preventive and reactive actions.

It must me noted, however, that the Guidebook for Institutional Planning prepared by the Nacional Centre of Strategic Planning (*Centro Nacional de Planeamiento Estratégico* – CEPLAN) states the scope of objectives and indicators that are to be developed by each type and level of public authority (the PSEM) (CEPLAN, 2019[6]). In particular, the Strategic Plan of National Development (*Plan Estratégico de Desarrollo Nacional* – PEDN), applicable to the legislative and judiciary branches and to other government entities, defines objectives in terms of "intermediate and final results", as well as "aggregated impact". The PSEM, developed by, and applicable to, the different ministries, is to set objectives in terms of 'initial, intermediate and final results'. Finally, public bodies – such as OEFA – shall establish in their PEI (and POI) objectives that relate, at most, to 'initial results' within the results chain (see Figure 6.1).

Figure 6.1. Design of objectives within the "results chain"



Notes: Given that, institutional strategic objectives (OEI) relate to an initial result. OEIs and their indicators must be at the same stage of the result chain. Given that, institutional strategic Activities (AEI) relate to products, the relevant indicator shall also reflect to a product. AEIs and their indicators must be at the same stage of the results chain.
Source: CEPLAN (2019[6]), *Guía para el Planeamiento Institucional*, CEPLAN, Lima, https://www.ceplan.gob.pe/wp-content/uploads/2018/11/Gu%C3%ADa-para-el-planeamiento-institucional-_26marzo2019w.pdf (accessed 15 October 2019).

Further mechanisms to avoid regulatory "reflex" and short-term policy swings

The adopted long-term strategy and objectives, indicators, planning of inspections, amongst others, are mechanisms and tools that should help avoid "an overreaction by government to a risk or (public safety) incident by imposing more regulation and more oversight than necessary to control the risk at an acceptable level" (named "Risk-Regulation Reflex", RRR), (Government of Netherlands, 2015[7]).

The management system for complaints is another instrument that could be further refined – which helps determine, following an assessment, if an immediate reaction is needed, or not. According to PLANEFA Guidelines, EFAs are obliged to report annually on all inspection-related activities carried out over the course of the calendar year, including "the performance of special or unplanned inspections in the event of environmental complaints, environmental emergencies or other circumstances that may so require" (Art. 10.1).

OEFA's institutional set-up includes a Directorate for Policies and Strategies in Environmental Enforcement in charge of regulatory assessment and providing feedback for the preparation of new regulations. Also, OEFA regularly carries out consultations with stakeholders when preparing regulations, and RIA methodology is now being applied for new regulations

An additional concern is the mandatory use of "special" inspections following another authority's request. The overall number of reactive 'special' inspections suggests that overreactions in OEFA are still present. While OEFA has adopted a Regulation on the Reporting of Emergencies,[3] the procedure with regard to the relevant assessment of the event amongst others, is unknown.

OEFA has recently undergone an internal institutional reshaping aimed at better reflecting the new vision and mission of the agency. The Directorate for Policies and Strategies in Environmental Enforcement (which is also in charge of regulatory assessment and of providing feedback in the preparation of new

regulations) should be responsible for ensuring that the functioning of the agency is consistent with OEFA's objectives. The institutional set-up could be further improved to reflect the central and transversal aspect of: 1) risk-analysis and assessment and 2) compliance promotion in inspection and enforcement, by setting up two transversal directorates in charge of these. Furthermore, structure, processes, and resources of OEFA in general can be further improved to enhance performance[4]. It means it would be advisable to conduct a review of staffing vs.: a) the number of establishments to supervise; b) the level of risks; and c) a gradual restructuring/reassignment of resources amongst others.

Assessment

The official vision and mission of OEFA set the fundamental regulatory goal of protecting the environment through the promotion of compliance according to a preventative approach to risks. However, key aspects of the fundamental goal and of the approach to achieve it run the risk of being undermined by several limiting factors. These factors include: the formalistic nature of regulation in Peru, the still early stage of development of methods and tools, and the structure that is still yet to be reformed further.

Recommendations

- In addition to the assessment of complaints against a pre-defined list of criteria, equivalent methodologies must be applied to intervention requests from other authorities and for emergencies, if not available.
- The Directorate for Policies and Strategies in Environmental Enforcement (which is also in charge of regulatory assessment and of providing feedback in the preparation of new regulations) should be responsible for ensuring that the functioning of the agency is consistent with OEFA's objectives. The institutional set-up could be further improved to reflect the crucial and horizontal aspect of 1) risk-analysis and assessment as well as 2) compliance promotion in inspection and enforcement, by setting up two transversal directorates in charge of these.
- OEFA is still a relatively young institution, and the move to more risk-based, compliance-focused approaches is recent. Longer-term sustainability and continuation of improvements will have to be ensured.

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OEFA (n.d.), *oefa.gob.pe*, https://www.oefa.gob.pe/somos-oefa/vision-y-mision (accessed on 14 October 2019). [3]

Notes

[1] Approved by Supreme Decree No. 014-2011-MINAM, available at: http://www.minam.gob.pe/disposiciones/decreto-supremo-n-014-2011-minam/.

[2] Approved by Ministerial Resolution No. 385-2016-MINAM, available at: http://www.minam.gob.pe/disposiciones/resolucion-ministerial-n-385-2016-minam-2/.

[3] Approved by Resolution of Boards of Directors No. 018-2013-OEFA/CD.

[4] E.g. different inspection directorates correspond to previously distinct functions that were merged into OEFA.

7 Co-ordination and consolidation

This chapter covers the institutional mandates and structures in place to foster co-ordination among enforcement and environmental agencies in Peru. Co-ordination is a key element to avoid duplication of functions and increase efficiency in the delivery of regulation. The section presents OEFA's role and attributions as an enforcement and co-ordinating agency. It provides recommendations in line with the OECD's best practice principles to improve information sharing and promote the consolidation of inspection functions.

> *Inspection functions should be co-ordinated and, where needed, consolidated: less duplication and fewer overlaps will ensure a better use of public resources, minimise the burden on regulated subjects, and maximise effectiveness (OECD, 2014[1]), (OECD, 2018[2]).*

Institutional mandates, structures, and co-ordination, should be taken into account at the regulatory drafting stage and in the Impact Assessment process. Avoiding the proliferation of different inspecting institutions, ensuring clarity and coherence, preventing the emergence of areas of conflicting competence are all essential, including during the drafting of new regulations.

Duplication of functions is to be avoided and mandates and responsibilities should be clear among institutions, and government levels. Unicity of functions–one institution responsible for an entire regulatory area, or at least for a regulatory area in a given sector–is preferable whenever possible. When several institutions are involved or cover related fields, there should be clarity as to who is responsible for particular regulations and establishments, especially between different geographic levels. This prevents establishments from being subject to repeated and potentially conflicting inspections, and public resources are not wasted on uncoordinated and duplicating activities.

Different inspection and enforcement structures should share information and records, participate in joint alert systems, and co-ordinate "on the ground", particularly in related regulatory areas. Good inspections and enforcement practices include joint alert systems, systematic sharing of information and records on establishments under supervision, and co-ordination of inspections to the extent possible (by sharing plans or performing joint inspections, amongst others,). Different inspection structures can collaborate to increase their efficiency and their ability to assess risks by agreeing to act as "eyes and ears" for each other.

Finally, allocation of resources and strategic planning should take into account all structures active in a given regulatory area. Allocation of resources between inspection and enforcement should be done based on evidence, and in a way proportional to risk. When doing so, it is essential to consider all the different institutions, structures, and levels that may be involved, not just one particular agency.

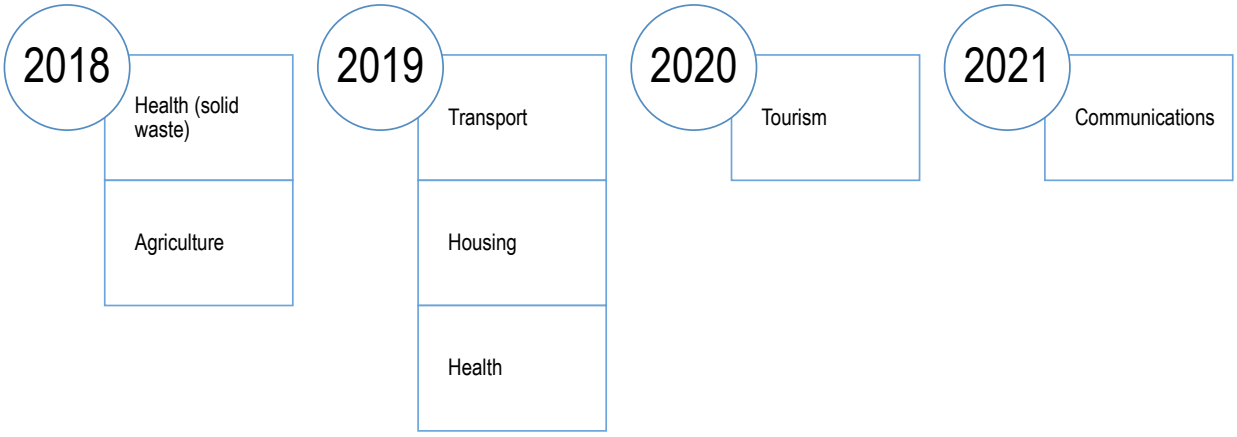
A common regime for Environmental Supervision to ensure "harmonisation" and "homogeneity"

The Common Regime of Environmental Supervision in force since 2013 was introduced to address previously existing fragmentation and lack of co-ordination, to achieve greater clarity of mandates of functions, and to increase co-ordination in the environmental protection sphere. One of the objectives of the Common Regime of Environmental Oversight is to establish the guidelines, principles and common foundations of environmental inspections and enforcement in the country, as well as the general provisions that must be obeyed by all EFAs within the SINEFA. This aims at ensuring coherence, co-ordination and effectiveness of inspections. Also, according to Art. 3, all EFAs shall co-ordinate the performance of their responsibilities by joining forces and avoiding overlaps, duplications and gaps in the performance of their activities.

In line with these principles, the direct responsibilities of OEFA have expanded over different sectors (Figure 7.1).[1]

Enlarging the scope of OEFA's direct responsibilities can help gradually improve the coherence of the system across all economic sectors, as well as more homogeneous approach to regulatory delivery, standardised processes, tools and methods in the environmental regulatory field.

Figure 7.1. Overview of competences transfer process from relevant Ministries to OEFA



Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

OEFA is responsible for directing and overseeing the Common Regime of Environmental Supervision and reports to the Ministry of the Environment, which sets the long-term strategic objectives, as well as high-level policy directions and regulatory goals to be followed by all EFAs (including OEFA). These are stated in particular in the National Policy on Environment and the PLANAA.

However, significant challenges remain in terms of integration of the environmental supervision field, which requires further efforts to eliminate remaining fragmentation. This fragmentation is particularly visible through the existence of a variety of national and local EFAs, which OEFA has the challenging mandate to co-ordinate. Divergence of approaches and methods is still manifest in many EFAs. In addition, OEFA has started delegating some competences to OEFA's regional offices, for example in the mining sector. Such decentralisation process can help address local needs and priorities better and allow the offices the opportunity to identify emerging risks. However, it may also entail a number of challenges that OEFA will have to take up in terms of ensuring consistency and coherence of approach and methods, and adequate allocation of resources between regions.

Efforts have been made by the Government of Peru to gradually build a coherent environmental regulatory system (the SINEFA) with the intention of improving efficiency and effectiveness. However, in practice, co-ordination issues still remain post-reform. In particular, conflicts of competence or competence gaps have resulted in conflicts, and even disputes, between different public authorities, as reported by concerned parties during the technical missions. Furthermore, some confusion regarding informal or illegal activities, for instance in the mining sector,[2] is another source of problems post-reform.

The consolidation appears to be contested as some EFAs appear unsure of their participation in a partnership with OEFA, and others regretting 'shotgun' arrangements. In addition, relationships with regional and municipal level regulators do not appear to be very strong, a problem also observed in other regulatory areas in Peru (OECD, 2016[4]).

Clarification of mandates and responsibilities to achieve co-ordination

Availability of tools to clarify responsibilities

In order to bring clarity over responsibilities and mandates within the SINEFA system–to regulated entities, the public, and to the numerous EFAs–OEFA has developed different tools. This work includes, first, the preparation of Competence Handbooks on Environmental Supervision, at the national level (OEFA, 2018[5]), the regional level (OEFA, 2015[6]), and the local level (OEFA, 2016[7]).

The Consultation Service of Competencies in Environmental Inspections (*Servicio de Consulta de Competencias en Fiscalización Ambiental*, SECONFIA) makes it now possible to search online which authority is competent for a given inspection object or situation, at all state levels (OEFA, n.d.[8]). Developing this tool was a considerable undertaking, which is an indicator of the complexity of the current regime. The instrument covers all the types of competences and of authority levels. SECONFIA allows to get a result (i.e. the exact competent authority, including address and telephone number, and the relevant legal basis). Research on SECONFIA is based on the following elements:

- the type of environmental issue (issues with garbage or solid waste; issues related to water pollution; issues related to non-compliance of requirements approved by means of IGAs; amongst others)
- the reason underneath the issue (e.g. inappropriate management, for issues with garbage or solid waste at the municipal level)
- the economic sector (agricultural, internal trade, electricity, amongst others)
- the type of activity (irrigation, production of agricultural products, amongst others)
- the type of area (e.g. rural area); and (6) the location (region, province or district)

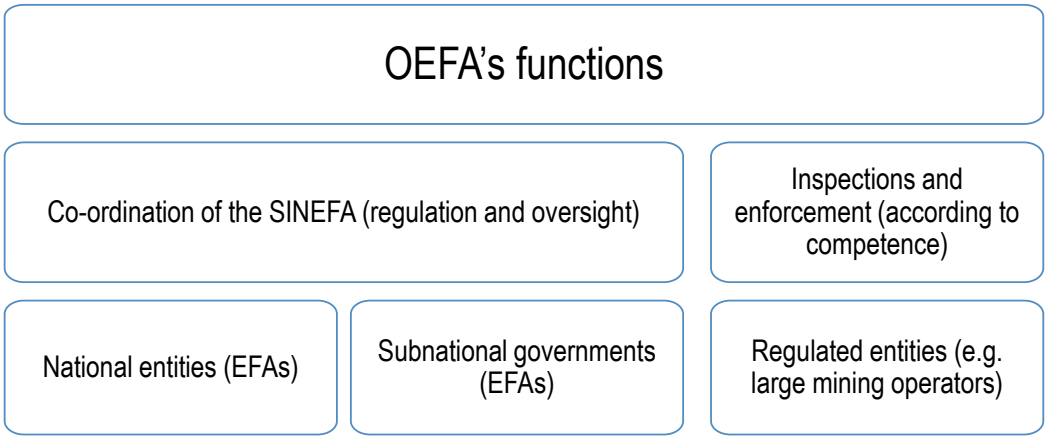
Online searches with use of SECONFIA show that in many cases the competent authorities are more than one (up to three), or that no competent authority could be found.

This suggests that further streamlining and consolidation of environmental supervision is needed, including consolidation of functions into fewer structures with a broader mandate.

OEFA's role in the co-ordination process

As already mentioned[3], in addition to its role in directly performing regulatory inspections and enforcement of certain sectors and sub-sectors, OEFA is the governing body of the SINEFA (see Figure 7.2).

Figure 7.2. Functions of OEFA (excluding "regulatory feedback")



Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

As such, OEFA has a regulatory function and it oversees the activities of other EFAs. Oversight duties include checking if the EFAs carry out inspections and enforcement according to the relevant instruments and methodologies, evaluating their performance, checking inspection planning amongst other activities. The PLANEFA is the main tool that allows OEFA to a) ensure homogeneity in a number of practices, b) help EFAs manage and carry out their activities based on pre-established rules, and c) assess how they perform them. Each EFA has to submit their PLANEFA for the next calendar year (OEFA, n.d.[9]).

Despite this role, OEFA does not have the authority to compel EFAs to respect their obligations, to impose measures on them or to force them to change approach or tools. If needed, OEFA can notify the Comptroller General of the Republic in cases where it considers that EFAs have breached their duties, giving rise to an administrative liability. In view of this, the actual role of OEFA is rather of monitoring whether EFAs are carrying out their activities in line with applicable regulations and OEFA's guidance regulation, to issue recommendations, and to provide information on how to improve.

In practice, OEFA and its regional delegations train EFAs, especially local ones, on how to develop the PLANEFA and verify if it is correctly prepared and executed. The EFAs receive recommendations on how to improve the content and/or the implementation of the PLANEFA, how to define the priority issue to plan next year's inspections, what documents and tools should be used, amongst others. The exercise is subject to formalistic procedures, with a severe administrative burden – a large amount of documents, paperwork and legal formalism. OEFA checks identification documents of the personnel, the organisation chart, and the profile of the inspectors, the planning of the budget, and the record of all complaints for each EFA. It remains to assess the extent to which the process can be simplified, without endangering the achievement of the underlying policy objective.

Currently, OEFA is developing the SUPEREFA project, which seeks to solve part of the issue presented in the previous paragraph. The system would enable EFAs to compile online all the necessary information and OEFA would perform its oversight function remotely. This should allow OEFA to focus more on methods and processes aimed at introducing a risk-based approach in other EFAs rather than focusing on formal elements. This would imply a move towards more suitable management of complaints, assessment of risks, prioritisation of issues that deserve inspections and enforcement, and collection of data on establishments.

One of the issues reported by OEFA is the high turnover of staff in EFAs, especially after changes in administrations following elections. This situation hampers the provision of more in-depth training or support in the preparation of the PLANEFA because contact people and teams keep changing. This also hinders effective co-ordination. Regional delegations of OEFA reported that in many cases they had train from the beginning the person in charge of the PLANEFA because of changes on personnel within the EFA.

Finally, local EFAs expressed interest in having more joint/training inspections organised with OEFA to improve their practice, as well as to be able to use materials such as measurement devices form the regional delegations of OEFA.

Sharing of information and joint activities with other authorities

Efforts have been undertaken to gradually improve information sharing within the SINEFA. Practices such as the mandatory publication of the PLANEFAs by each EFA and the provision of free access to technical and objective information resulting from sampling, analysis and monitoring (Art. 13.A. of SINEFA Law) are a step in the right direction. EFAs have access to OEFA's information available on the Organisation's Interactive portal for environmental enforcement (PIFA), the Registries of administrative acts (RAA) and of environmental offenders (RINA), as well as to public reports prepared by the institution–which are also available to the public (OEFA, n.d.[10]).

Recent inter-institutional agreements with other national EFAs or with authorities in charge of closely-related regulatory areas are good signals of the willingness of OEFA to strengthen co-ordination. The most salient agreements are:

- Agreements signed with the National Superintendence of Labour Inspection (SUNAFIL) (OEFA, 2019[11]) and with the National Water Authority (ANA) (OEFA, 2019[12]), which enable the performance of joint inspections and/or to act as "eyes and ears" for the other, among other activities.[4]
- A Protocol for the performance of joint inspections and the performance of inspections for the other authority in emergency cases between OEFA and SUNAFIL as well as a template for inspections report. This Protocol also establishes the procedure in case of emergencies, by email, SMS, or telephone.
- Inter-institutional Cooperation Agreement signed by OEFA and SENACE on the use of ICT tools. For instance, the Integrated System of Administrative Management (*Sistema Integrado de Gestión Administrativa*, SIGA) is a tool aimed at automatising administrative procedures and, in particular, at sharing electronic documents digitally signed (OEFA, 2017[13]).

Other activities have been carried out in an attempt to strengthen co-ordination with other EFAs. An example are the joint trainings delivered together with the Directorate General of Environmental Health and Food Safety (Digesa) on the disposal and handling of hospital waste from January 2019.

Such examples are encouraging, since co-ordination is yet to be improved and appears to be based on personal relationships between senior managers and executives. This means in other terms that the "systemic" aspect of the SINEFA still requires important efforts to be fully developed. According to some ministries met during the technical mission, as a policy, OEFA does not provide open access to information in its possession to other public institutions.

Apart from the information mentioned above (available in particular on PIFA, RAA and RINA), considered as public information and freely available to the public, EFAs cannot access OEFA's other ICT tools and databases, in particular those with information on inspections. The reason for this is the prohibition to publicly disclose information related to ongoing investigations performed in the exercise of the power to impose penalties by the public administration (Art. 15.g of Law No. 27806 on Transparency and Access to Public Information[5]). However, the question can be raised as whether this applies to automatically sharing, or providing access to, information when it comes to other authorities. Requests for information are made on a case-by-case basis, and often through a very formal process, which is provided for in the Law on Transparency and Access to Public Information.

There is no evidence of joint alerts systems for environmental emergencies, apart from the procedure mentioned by email, SMS or telephone. Better and more systematic information sharing with authorities in related regulatory areas is needed. Sharing of information on regulated entities between public authorities is at its early stages and progressively becoming an institutionalised practice through the use of information and communications technology (see Chapter 9 on Information integration).

Assessment

Despite the establishment of the Common Regime of Environmental Supervision seeking to achieve greater co-ordination and consolidation, the overall distribution of mandates and tasks within the SINEFA still presents some confusion, conflicts or gaps of competence.

Despite positive steps made towards information sharing, further improvements are still needed in this domain. Consolidation and co-ordination with other EFAs should include more systematic information sharing (i.e. through existing database and ICT tools), joint alert systems, and 'on the ground' co-ordination and co-operation. The SINEFA has improved considerably from the previous situation, but important efforts are still required to fully develop it into an articulated system.

Recommendations

- Implement better and more systematic information sharing with other EFAs, and possibly with other closely-related regulatory inspection and enforcement agencies, in particular by:
  - Continue the efforts to sign agreements for information sharing with other institutions
  - Implement “real” (whenever possible, automated) joint alert systems
  - Consider allowing other users access the IT tool on inspections (INAPS) – by interpreting the prohibition to disclose information of inspections as “public disclosure” only. Information sharing upon request already exists and is carried out, but in a very burdensome way.
- Continue efforts related to finding inter-institutional agreements on joint inspections and inspections on behalf of another authority.
- The Government of Peru may want to consider further consolidation or strengthened co-ordination within the environmental regulatory function. This could involve reconsidering all competences – including scope of competencies – of EFAs against real risks to ascertain which ones should be excluded (for instance, very low-risk activities). The SINEFA system is the result from an attempt to improve the coherence and co-ordination among the relevant actors that were already part of the environmental regulatory landscape, without questioning the competences of an inherited system.
- Consider going further with the consolidation of the environmental supervision functions in a single authority (OEFA), and/or significantly strengthening the powers of OEFA over other EFAs–while also ensuring that all EFAs (including OEFA) use the same information systems. This could be a longer-term objective towards which the above points would contribute.

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Notes

[1] See preamble of this Review.

[2] Competences are split with subnational governments. For instance, OEFA supervises big mining operations, while local EFAs supervise small and 'artisanal mining activities. This means that in practice, several authorities are in charge of inspection and enforcement in a concession area (granted to a firm).

- OEFA is responsible for inspections and enforcement on the large-scale mining activities carried out by the firm.
- If there are small miners exploiting specific areas of the concession (regardless of whether the concessionaire has signed an agreement with them, or not), these fall under the competence local EFAs.
- Informal activities can fall under the competence of OEFA or local EFAs, depending on the size of the operations.
- There is no clear understanding about who is in charge of supervising illegal mining.

[3] See Preamble, section 2 of this Review.

[4] Single Consolidated Text of the Law on General Administrative Procedure (Art. 239.1) allows inspection authorities to coordinate so as to perform joint inspections and carry out inspection activities for other competent authorities.

[5] See: https://www.peru.gob.pe/normas/docs/LEY_27806.pdf.

8 Transparent governance

Transparency is one of the elements that fosters trust, reduces conflicts of interest and limits the possibility of new social conflicts arising. This chapter covers the practices and organisational structures that OEFA has in place regarding the appointment of officials, funding schemes and its relationship with other institutions, which aim at increasing the transparency and accountability of the agency. Moreover, this section includes an assessment of the governance structures and policies in place and offers recommendations to further improve the performance of OEFA.

> *Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management. The execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be* rewarded *(OECD, 2014[1]), (OECD, 2018[2])*.

Senior management of enforcement and inspection institutions should appointed in a transparent way, based on professional competence, and minimising political interference. Chief executives and other senior managers in charge of inspection and enforcement structures should be selected for their professional competence, specifically as managers. To this aim, selection and appointment processes should be transparent, including clear criteria, open advertisement, balanced selection committee rather than appointment by one sole senior political official without scrutiny to minimise political interference.

Key decisions, changes in processes, procedures and structures should require collegial decisions and/or external scrutiny, avoiding excessive instability and discretionary managerial power. Strategic focus requires that senior managers have only limited powers to impose changes single-handed to inspection institutions. Significant changes should require decisions by a collegial body–preferably an external, independent board.

Stakeholders should be consulted and represented in the governance of inspection and enforcement institutions, e.g. through a management board or similar structure. Consultation of stakeholders should be the norm at least for strategic decisions. This can be done through formal ad hoc consultations and/or through permanent representatives in a board-type structure.

Inspection and enforcement structures should have missions, powers, procedures and funding mechanisms that exclude, to the extent possible, conflicts of interest and conflicting goals. There are many ways in which mandates and missions, or funding mechanisms can create conflicts of interest for inspection and enforcement. For example, when funding is linked to the number of inspections, or when an agency provides payable, competitive services and has simultaneously regulatory enforcement powers, amongst others.

Decisions at all levels should be made based on transparent criteria and processes, allowing for consistency in enforcement decisions, and accountability. The aim is not only to ensure consistency between different officials, regions, amongst others, but also accountability.

Strategic decisions and changes should continue to require political approval from the legislative and executive branch. However, operational decisions should be made “at arm’s length” and shielded from political interference. Strategic decisions include defining the institution’s goals and objectives, performance indicators, risk and compliance strategies, methodological documents, structure, high-level resource allocation, and terms of reference of staff. The executive or legislative branches of government, as appropriate, should approve the latter. Operational decisions, which implement these strategic decisions, should be left strictly to the professional staff and management, without interference from political office-holders or other parties.

Management of OEFA

OEFA reports to the Ministry of the Environment and quarterly and annual statistical reports are duly published (OEFA, n.d.[3]), (OEFA, n.d.[4]). The Ministry of the Environment approves the National Plan of Environmental Action and the Multiannual Strategic Plan of the Environment Sector and OEFA is responsible for the preparation of the Institutional Operational Plan and Strategic Institutional Plan of the agency.

The relevant legislation and institutional regulation (e.g. SINEFA Law and OEFA Functions Organization Regulation[1]) foresee the appointment rules for OEFA’s management. The President of the Board of Directors is appointed by means of a Supreme Resolution based on a proposal from MINAM.[2] The

appointment of OEFA's management is to be done in a transparent way, based on professional competence, following a public call for tenders, and minimising political interference. Senior management is appointed by resolution of the Board of Directors, following a competitive recruitment process. In practice, members of OEFA's leadership–i.e. the President and the members of the Board of Directors, as well as Directors–demonstrate competence, understanding of their mission and commitment to transformation of the institution.

OEFA's Board of Directors approves collegially the institutional policy, strategic plan, supervision and enforcement rules on processes and procedure (see in particular Art. 9 of the Functions Organization Regulation) to avoid excessive instability and discretionary managerial power.

The current members of the Board have academic and consulting background. However, there is no legal requirement to have stakeholder representatives from the public and private sectors, civil society, or academia in the governance of OEFA, such as in the capacity of members of an advisory body, different from the board. *Ex ante* public consultation on regulations prepared by OEFA is carried out as foreseen by the relevant regulation (Art. 21ff of the Regulation on Transparency, Access to Environmental Public Information and Citizen Participation and Consultation in Environmental Matters[3]). In 2018, feedback on draft regulations appeared to be regularly received from the private sector, the civil society and the general public (78 comments on a total of eight drafts, based on data provided by OEFA). As mentioned in Chapter 4 on Risk focus and proportionality, all legal acts, regulations and instruments prepared and adopted by OEFA are made accessible to the public for *ex ante* consultation. The online publication is often followed by Commentators' meetings. Responses to comments provided are publicly available through the comments' matrix published online.

Systematic engagement with stakeholder groups in the governance of OEFA – even only in an advisory capacity – in addition to *ex ante* consultation would be beneficial. Indeed, this would be an important step forward to build trust among the different actors, ensure that their needs and views are heard and considered (not only when preparing a draft, but during regular operations of the agency), and to overall increase the transparency and independence of the institution and of the environmental enforcement system more broadly.

Measures to avoid conflicts of interest and conflicting goals

The gradual consolidation and transfer of functions into OEFA as the main inspection and enforcement authority in charge of protecting the environment and as the governing body of the entire system reflects the political will to avoid conflicting powers and missions between different public institutions in charge of the same regulatory area.

One of the stated objectives of the reform process is also to separate for the same regulatory sector (i.e. environment) licensing powers from inspection and enforcement powers In this sense, licensing powers will remain in the ministries and OEFA will consolidate the inspection and enforcement efforts. While a number of countries have pursued similar reforms, there is no strong evidence that this separation is beneficial from an effectiveness perspective. It could conceivably be beneficial in particular cases, when licenses are strictly revenue generating (e.g. mining concessions), and there would be a risk of conflicting purposes between licensing (revenue) and inspections (safety, environmental protection). In many cases, dividing licensing and inspections has led to increased fragmentation, reduced availability of professional competences at the licensing stage, and made information sharing and management more difficult. The institution in charge of safety inspections can issue safety-focused licenses, as the two processes are aligned and not in conflict.

The objective of separating licensing from inspections is thus not reflected in the OECD Regulatory Enforcement and Inspections Toolkit (OECD, 2018[2]), nor in this Review criteria. Rather, the review team noted that environmental licensing and permitting appears still far too pervasive, which is likely to contribute to high administrative burden and informality (see Chapter 3 on Selectivity).

OEFA receives funding from the budget allocated by the government and from the Regulatory Contribution paid by companies operating in the energy and mining sectors, which represents approximatively 80% of the resources, according to OEFA[4]. The corresponding fee is calculated through a transparent and published methodology approved by Supreme Decrees No. 096 and 097-2016-PCM[5] and on the basis of the monthly turnover of the regulated entity, after deduction of relevant taxes (in particular the Tax on general sales). The payment digital.

Additionally, OEFA is partly funded by imposed fines (up to approximatively 7% of its total budget, as reported by OEFA). The SINEFA Law, Art. 27.c establishes this mechanism. International experience has shown that the use of penalty fines to fund enforcement institutions bring strong perverse incentives. This applies even when fines only represent a relatively minor part of the total financial resources. First, this methodology does not ensure a stable, long-term funding, as the volume of income collected from fines is not (or should not be) predictable.[6] Second, it incentivises the institution to find as many violations as possible, and to impose fines in all cases, thus contradicting objectives of risk-proportionality and compliance promotion. On the contrary, if compliance is maximised, violations will fall–and if sanctions are risk-proportional, fines will not be imposed in all cases.

OEFA argues that the functional and administrative management of the institution has been designed to ensure that such perverse incentives do not occur in practice–i.e. first instance decisions can be reviewed by three levels of independent tribunals and the rate of decisions upheld by the judiciary are of over 90%. Nonetheless, international experience strongly suggests that this practice is not appropriate and another funding source should be used, to avoid such bias in incentives. This recommendation does not only apply to OEFA, but to any other inspection and enforcement authority in Peru.

On the positive side, OEFA seems to benefit from long-term support from the government, translating into an adequate and generally stable budget allocation. However, this may not necessarily be true for all EFAs.

OEFA has been developing processes, guidelines and criteria to ensure consistency and independence from political interference in planning and operations–e.g. PLANEFA and corresponding guidelines, regulation and guidelines on inspections, methodology to assess non-compliances, and calculation methodology for fines, amongst others,

There are however several areas of potential improvement:

- The criteria triggering ‘special’ inspections based on requests from other authorities could be further clarified, as interference in OEFA’s operational decisions could take place.
- Prioritisation criteria and data analysis need to be improved, to promote data-driven planning and reduce the influence of the political salience of complaints.
- While there is a well-established procedure for businesses to report emergencies, the subsequent assessment process to decide whether a ‘special’ inspection is needed remains uncertain. Moreover, reports on emergencies may come from other sources, and the relevant reporting procedures are often unclear. Instances were reported where there was in fact no real emergency, whereas staff were already sent on site because of lack of proper prior assessment. Clear and specific criteria for assessing emergencies could help avoid or reduce such instances. This would also help limit the risk of excessive executive discretion on this matter.

Assessment

Governance structures and strategic decision-making processes of OEFA support transparency and accountability. However, OEFA could benefit from systematically including representatives of different stakeholder groups (private sector, civil society, amongst others,) in the governance of the agency, particularly when it comes to discussing strategic priorities and transformations.

Although OEFA's funding comes primarily from the governmental budget and regulatory contributions from companies in specific regulated sectors, all other funding mechanisms should exclude conflicts of interest and incentives. It is preferable to avoid using fines as a source of funding.

OEFA has displayed significant efforts to develop processes, methods and criteria for consistency and independence of operational decisions. These efforts should be continued. In particular, mechanisms for "special" inspections should be made more transparent.

Recommendations

- Consider stakeholders' systematic engagement in the governance of OEFA. This would be an important step forward to build trust among the different actors, ensure that their needs and views are heard and considered, and to overall increase the transparency and independence from political influence of the institution and of the environmental enforcement system more broadly. Options that might be considered include setting up an advisory body, strengthening the participation of stakeholders in the preparation of regulatory instruments and in asking for feedback on public reports.
- Fines, ideally, should be excluded as a source of funding to avoid any bias in incentives for the agency. The Government of Peru may consider withdrawing allocation of fines to fund the agency from the legislative framework.
- An assessment system of intervention requests from other authorities should be developed and used. It is important to consider reforms to the legal framework, which obliges to systematically trigger an inspection in the face of such requests. Criteria for both cases should be very clear to ensure transparency and accountability.

References

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OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264208117-en. [1]

OEFA (n.d.), *Memoria Institucional OEFA 2018*, https://www.oefa.gob.pe/publicaciones/memoria-institucional-oefa-2018 (accessed on 14 October 2019). [4]

OEFA (n.d.), *OEFA en cifras*, https://www.oefa.gob.pe/publicaciones/oefa-en-cifras (accessed on 15 October 2019). [3]

Notes

[1] *Reglamento de Organización y Funciones del OEFA*, approved by Supreme Decree No. 013-2017-MINAM, http://www.oefa.gob.pe/?wpfb_dl=26390.

[2] There are currently three members in OEFA's Board of Directors, in addition to its President (see: https://www.gob.pe/institucion/oefa/funcionarios). However, the relevant legislation and regulation however provide for an additional member of the Board, also appointed on the basis of a proposal from MINAM.

[3] Reglamento sobre Transparencia, Acceso a la Información Pública Ambiental y Participación y Consulta Ciudadana en Asuntos Ambientales, approved by Supreme Decree No. 002-2009-MINAM, http://www.minam.gob.pe/disposiciones/decreto-supremo-n-002-2009-minam/.

[4] This funding mechanism is established by law (Law No. 30011, amending SINEFA Law, http://www.minam.gob.pe/disposiciones/ley-n-30011/).

[5] See: http://www.minam.gob.pe/disposiciones/decreto-supremo-no-096-2016-pcm/; and http://www.minam.gob.pe/disposiciones/decreto-supremo-no-097-2016-pcm/.

[6] If it becomes predictable, as seen in some countries, it means that the institution is setting a "fines target", and inspectors "find" violations on its basis. This is a practice contrary to the core principles on enforcement and inspections promoted by the OECD.

9 Information integration

Data and information sharing allow regulatory delivery agencies to increase co-ordination and efficiency, helps inspectors target better site visits and reduces administrative burdens for citizens and businesses. This chapter goes over the technological tools and internal arrangements that OEFA has set in place to promote information integration, exchange and management. This chapter also provides recommendations with the objective of facilitating data availability and interoperability among institutions.

> *Information and communication technologies should be used to maximise the focus on risks, promote co-ordination and information sharing and ensure an optimal use of resources (OECD, 2014[1]), (OECD, 2018[2]).*

Inspection and enforcement structures need adequate and up-to-date data and IT tools allowing for effective risk-based planning and follow-up on previous inspections. Proper risk-based targeting requires a comprehensive database of objects under supervision, including their fundamental characteristics with regards to risk – activities, scope, location, track record. For effective enforcement, a system of case management, records and workflow management is a considerable asset. Combining both is the best option to ensure optimal efficiency and targeting.

Data should be shared regularly between different inspection structures and/or records of other structures should be easily available. Preferably, data should be fully integrated in a single database among different inspection structures. This is particularly the case if several inspection structures are active in the same regulatory field. Ideally, several (or all) agencies should use the same database, with different agencies being responsible to fill in different data points, but all able to consult the others' data.

Sharing and exchanging of data should ideally go beyond the "narrowly defined" inspection and enforcement field and include business registration, licensing, public health, amongst others. For instance, obtaining data on contamination cases or illnesses from public health services is essential to improve risk-based targeting. Likewise, to have an up-to-date list of objects under supervision requires a constant interface with business registration, licensing and permit systems.

IT tools to ensure data collection, availability and management of activities

OEFA has invested significant financial and human resources in the development of a variety of information and communication technology (ICT) tools – including core and support information systems, mostly for OEFA internal use, and some other tools aimed at sharing information with the public. Table 9.1 shows the available ICT tools.

Table 9.1. OEFA ICT tools

Main information applications in use by OEFA

	No.	Application name	Functionality description	User	Access link/access
CORE INFORMATION SYSTEMS	1	Information on inspections (Direct Inspection System)	Allows to keep track of inspections, its documents and other related components.	Some directorates within OEFA	https://publico.oefa.gob.pe/sisud Username and password
	2	Sampling system (SIMUES)	Registry of custody chains, sampling points and laboratory results for inspections or monitoring.	Some directorates within OEFA	https://publico.oefa.gob.pe/simues Username and password
	3	Complaints system (SINADA)	Filing of complaints validated and managed by specialist. System for internal use and web form for filing. New system has been developed with better functionalities.	General public/relevant OEFA directorate	http://apps.oefa.gob.pe/sinada http://apps.oefa.gob.pe/sinada/faces/registroDenunciaWeb1.jsp Username and password
	4	PLANEFA recording system	EFAs to record PLANEFA templates. OEFA inspectors have access to this information	Some directorates within OEFA	http://apps.oefa.gob.pe/planefa/ Username and password
	5	Environmental tools registry (RIA)	Registry of IGAs, monitoring reports and other relevant information by regulates.	Relevant OEFA directorates	Client-server Username and password
	6	Environmental information system (SIIA)	Recording of assessments/ inspections planning and of ToRs that may be needed for sampling.	Some directorates within OEFA	http://publico.oefa.gob.pe/siia/Login.aspx Username and password
	7	Environmental surveillance (VIGAMB)	Validation and quality of data from air monitoring stations.	Relevant OEFA directorates	https://sistemas.oefa.gob.pe/oefa-vigamb-aire-pro/ Username and password

	No.	Application name	Functionality description	User	Access link/access
	8	Online inspection system (SISO)	Regulatees can register their requirements checked during inspections (for the moment, regulatees from hydrocarbons internal trade)	Relevant OEFA directorates	https://sistemas.oefa.gob.pe/oefa-siso-web/ Username and password
	9	Directorate for enforcement and incentives imposition operator (GESTOR DFSAI)	Management of DSAI files	Relevant OEFA directorates	Client-server Username and password
SUPPORT INFORMATION SYSTEM	10	OEFA Integrated administrative management system (SIGA-OEFA)	Requests related to services and goods from all OEFA sectors. Recording of needs through POI registry. Budgetary control of needs from all sectors	OEFA	https://sistemas.oefa.gob.pe/sigaoefa Client-server Username and password
	11	Electronic management system for documents (SIGED)	Automation of documents management with digital signature.	OEFA	https://sistemas.oefa.gob.pe/siged/ Username and password
	12	Integrated human resources system (SIA RRHH)	Employees management (recruitment and training; attendance control; salaries and holidays)	OEFA	http://publico.oefa.gob.pe/oefa-portal-web/comun/paginas/login.jsfClient-server Username and password
	13	Interoperability (INTEROPERABILIDAD)	Services published by state interoperability platform that can be useful	Some directorates within OEFA	http://publico.oefa.gob.pe/interoperabilidad/Page/Login/login.xhtml Username and password
	14	New fines settlement system (NCONMUL)	Recording, control and follow-up of fines.	Some directorates within OEFA	http://sistemas.oefa.gob.pe/oefa-nconmul-frontend Username and password
	15	Regulatory contributions system (SAPR)	Monthly sworn Declaration by businesses. Implements regulatory contributions collection process	Relevant OEFA directorates	https://apps.oefa.gob.pe/srcar/ Username and password
	16	Implementation of online collection system regulatory contributions system (ASBANC)	On line collection of payments	Relevant OEFA directorates	http://servdesajbossesb1.oefa.gob.pe:9000/cxf/pasarelaOEFA?wsdl http://10.1.1.171/pasarela-pagos-apr-ws/restAPR/administradows/ http://10.1.1.171/pasarela-pagos-apr-ws/restAPR/deudaws/ http://10.1.1.171/pasarela-pagos-apr-ws/restAPR/pagows/ http://10.1.1.171/pasarela-pagos-apr-ws/restAPR/anularextornarws/ Username and password
INFORMATION	17	Intranet	Institutional information of OEFA's employees	OEFA	https://intranet.oefa.gob.pe/ Username and password
	18	Interactive environnemental inspections portal (PIFA)	Inspections procedures Interactive platform	General public	https://publico.oefa.gob.pe/Portalpifa/ Public
	19	OEFA Open data portal (PDAO)	Open data from OEFA	General public	http://datosabiertos.oefa.gob.pe/home Public
	20	Digital repository (REPDIG)	Decisions on sanctions, public reports, administrative measures decisions from Environmental Inspections Tribunal	Some directorates within OEFA/general public	https://publico.oefa.gob.pe/repdig Public
	21	Consultation Service of Competencies in Environmental Inspections (SECONFIA)	Research of competent EFA and legal basis for a given environmental issue.	General public	https://sistemas.oefa.gob.pe/oefa-seconfia-web/#/invitado/inicio Public

Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

The status of these tools vary as some of them are still partly under development, are being upgraded or improved, or are being created (for example SUPEREFA – see Chapter 4 on Risk focus and proportionality). The Applied Information System for Supervision (INAPS) is the tool used by OEFA to collect information on inspections, regulated businesses, documents and other components developed during the inspection process. Although the INAPS is used by OEFA to plan inspections, it appears that assessing priorities for planning requires data from a number of other systems. Inspections are monitored on a monthly basis, and the relevant information is summarised and published in the quarterly statistical reports. Efforts to systematise data started in 2016. Previous information is considered incomplete and/or unreliable.

The database of establishments under supervision (housed in the INAPS system) aims at being comprehensive for the sectors initially under the competence of OEFA. Data on competence sectors that have recently been transferred to OEFA still need to be completed (e.g. industry sector). Apart from data on "fully formal" businesses, information on subjects against which a complaint was filed and/or have already undergone an inspection by OEFA, censuses are carried out in an attempt to have a full picture of regulated entities, including informal businesses. It remains to determine how effective censuses are at gathering data on illegal businesses.

OEFA could benefit from introducing a simple notification system for all businesses to indicate the start of their operation, which could be made part of a broader reform where such a notification replaces licenses and permits for a number of low-risk businesses. Otherwise, it could request a notification restricted to formal businesses, i.e. based on actual start of operations upon obtaining the required licenses and permits – or while license/permits applications are still pending, as it can be reasonably assumed that a number of businesses that have not obtained a license/permit, but have applied for it, are operating anyway. Ideally, OEFA would obtain an automatic notification of license/permit applications from the competent authorities, rather than imposing the notification obligation on businesses.

ICT tools introduced by OEFA aim at systematising data about their activities, which include data on inspections and businesses, sampling and monitoring, IGAs, sanctions and measures. They also gather information needed for the functioning of the organisation such as human resources and training, and provide a platform to oversee the performance of all EFAs, by recording the PLANEFAs. As general principle, data points needed on establishments should be reviewed and revised for all areas of competence in line with the risk-based approach. Currently OEFA uses primarily indicators related to socio-environmental conflicts, so more assessment of data and measureable evidence is needed to achieve a balanced risk-based planning of inspections. A review of data points would allow ensuring that all the information required for the improvement of risk-based planning is available.

Furthermore, available information, including inspection minutes and reports, should be systematically recorded in a way that allows for their further analysis and use. This is an issue that has been taken into account and OEFA is actively working on a tool to be used by their staff during inspections allowing this. Introducing inspection checklists is a useful practice that could be considered to this aim. Finally, whenever possible, automated risk-based planning of inspections based on the database of establishments, risk profiles and scoring is a good practice that could be implemented. See Box 9.1 for examples of shared inspection management solutions.

ICT tools to support the management of complaints and payment of duties by regulated entities subject to the Regulatory Contribution also exist. Advanced technologies and instruments already in use include geographic information system and geo-localisation equipment or automatically generated codes allowing businesses to verify online the identity of inspectors.

Box 9.1. Common features and functionality of shared inspection management solutions

Basic solutions: incorporate information about businesses and entrepreneurs, their characteristics (e.g. locations, size, and industry, amongst others) and previous inspection results to allow for simple planning of future inspection activities. These systems typically provide a full inspection history by business and location and use a checklist to obtain consistency across inspections. Solutions in this category may share information across several inspectorates; however, there is typically very limited automation or system-to-system integration.

Intermediate solutions have functionality to trigger follow-up activities based on the outcome of an inspection and allow for automated integration of inspection practices across inspectorates. Ideally, they are integrated with government business registries or other sources of enterprise information to identify the location, sector and other key attributes of a business. Intermediate solutions may also include limited mobile inspection capabilities and support some level of automated inspection plan creation based on previous inspection results.

Advanced solutions include a variety of other features and functions such as:

- **Risk-based inspection planning** allows for the scheduling and planning of inspections based on a risk assessment of the business. It includes key information such as size of the business, previous inspection results, industry, geography, and data form other inspectorates or government information sources.
- **Automated of real-time integration with other information sources,** which generally fall under two broad categories: (i) registry information (e.g. business/company registration information, licences and permits); and (ii) risk information (e.g. business/company risk based on its activities and profile, results of inspections or reports from other inspectorates).
- **Comprehensive mobile inspection capabilities** include tools and technologies that give inspectors the ability to view schedules and inspection records as well as record inspection results while onsite. The study revealed that a number of jurisdictions leveraged mobile computing platforms to support inspections in the field. The approaches varied from using notebooks, tablets and handheld devices to full online access using web-based applications. Technology adoption by inspectors, however, proved to be a challenge in many jurisdictions as significant training was required. The age and technical background of the inspectors were typically contributing factors.
- **Performance management capabilities enabled through business analytics** aligned with risk-based planning and provides capabilities for inspectorates to monitor the efficiency and output of their inspection programme and individual inspectors.
- **Public portal capabilities** involves providing access to businesses and the general public to view inspection requirements and results, submit complaints, and appeal an inspection.

Source: Wille and Blanc (2013[4]), *Implementing a shared inspection management system: insights from recent international experience, Nuts & bolts*, World Bank Group., Washington D.C.

Data sharing

As shown in Table 9.1, most of the ICT tools (either core or support applications) introduced by OEFA are for internal use. The INAPS covers inspection objects and subjects under OEFA's competence and can be only accessed by OEFA (including regional delegations of OEFA). As previously mentioned in Chapter 7 on Co-ordination and consolidation, access to other EFAs is not considered as an option as OEFA is not allowed to disclose information related to ongoing inspections and enforcement procedures.

From a review of the contents of the law, it is not clear why this clause should be held to apply also to information on past, closed inspection procedures, and to information-sharing within government bodies and not with the public.

Information on OEFA's activities that can be disclosed (including monitoring data, fines, and inspection reports, amongst others) is shared with other authorities and the public through PIFA. The latter is the Interactive Environmental Monitoring Portal, where OEFA has built a viewer that is currently used for emergencies and allows interacting with information from other organisations and sharing data in real time.

However, it must be highlighted that not allowing access to the INAPS database is a barrier to a real consolidation of SINEFA, to its efficiency, as it does not allow for an optimal use of resources and effectiveness in terms of protection of the public well-being. Having an integrated database, or granting EFAs access to it, is all the more important given that a significant number of local EFAs do not seem to have an adequate database. In some cases, EFAs do not have any electronic database, information on establishments is very partial, and often do not really know which type of data on businesses they should be collecting.

The objective of the National Environmental Information System (SINIA) is to be a technological and institutional integration network to facilitate the systematisation, access and distribution of environmental information (Ministerio del Ambiente, n.d.[5]). However, it requires further development to meet its goals, as it only provides a limited number of information items. The system includes environmental indicators (concentration of specific air and other pollutants in specific areas), thematic maps, common documents, but does not contain information on economic establishments, inspection, amongst others,

Art. 76 of the Single Consolidated Text of the Law on General Administrative Procedure foresees that public authorities shall collaborate with each other by providing data and information they possess, regardless of their legal nature.

To implement the latter, the Peruvian government has implemented interoperability solutions through the State Interoperability Platform (PIDE) that allows OEFA to access information from the National Identification Registry, Customs and Tax administration and National Meteorology and Hydrology Service of Peru, among others. Recently, access was granted to platforms of SENACE. This means, among other things, that a) OEFA has committed to provide SENACE with access to the database on environmental consultant/consulting companies, and that b) OEFA can enter the licensing registry of SENACE on "environmental certification".[1] This creates new opportunities for OEFA to obtain up-to-date data on active businesses, and thus, to build a much more comprehensive database, as well as to obtain additional information to build establishments' risk profiles.

The organisations involved in the interoperability system in February 2019 were the following:

Table 9.2. Authorities operating on PIDE

Authority
Ministry of the Presidency of the Council of Ministers
Ministry of Women and Vulnerable Populations
Ministry of Production
Ministry of Transport and Communications
Ministry of Foreign Trade and Tourism
Ministry of Culture
Ministry of Energy and Mines
Ministry of Defence
Ministry of Foreign Affairs
National Meteorology and Hydrology Service
Environmental Assessment and Enforcement Agency

Authority
National Centre for Strategic Planning
Peru Sea Institute
Purchase Agency of the Armed Forces
Ministry of Agriculture And Irrigation

Such interoperability provides the possibility to exchange information in a digital form easily, but does not mean that all involved ministries and institutions have transformed their systems to make use of it yet. As a result, OEFA depends on other agencies to have the data available and the technology that allows it to be accessed. In addition, an agreement is in process with the Ministry of Health for the exchange of information on public health in areas where OEFA has warnings of negative impacts on the environment.

Assessment

OEFA has made significant progress in the development, introduction and use of ICT tools, including GIS-related. As additional competences are transferred to OEFA, active work has been done to collect data on regulated subjects mainly by performing censuses on the universe of establishments covered. However, risk data on establishments are to be further completed. Planning of inspections is insufficiently automated. Moreover, other EFAs have considerably less developed data and information management systems.

Finally, OEFA may suffer from a proliferation of different IT systems, with incomplete inter-operability among them. This situation makes it more difficult to improve risk-analysis, risk-focus, and overall efficiency and effectiveness.

Box 9.2. Health and Safety Executive System for Regulatory Targeting (UK)

Use of Evidence Sources in Good International Practice

Measuring outputs

The Health and Safety Executive (HSE) is a non-departmental (autonomous) public body that reports to the Department for Work and Pensions with the core purpose to reduce work related injuries and ill-health. It operates from a number of sites across Great Britain and employs over 2 500 people.

Internationally, the HSE has long been at the forefront of innovation in regulatory delivery methods, in particular in terms of risk-based targeting, risk-proportional enforcement and the use of data and compliance promotion through guidance, collaboration with industry, and long-term engagement. Over time, however, a large amount of data on different topics accumulated in a number of formats and repositories and it became difficult to use them effectively to create intelligence for risk-based decision making.

Features and functionalities of key complementary instruments

In order to improve its regulatory targeting capability, to secure the greatest impact on reducing work-related risk, HSE developed two key complementary instruments. They aim together at improving intelligence on businesses to refine regulatory interventions:

- Organisation and address matching algorithms, which allow HSE to match business datasets together without the requirement for unique identifiers. These approaches utilise the site location and the numerous names used by a business to link regulatory and administrative data held about a business entity.

- A web application (Find-It), which is custom-developed based on open source components, and has a number of ways to interrogate the linked data.

HSE Science Division researchers consulted various regulatory delivery bodies while working on the concept, such as local authorities; Fire and Rescue; Department for Environment, Food and Rural Affairs; and Employment Agency Standards.

Inspectors no longer have to self-select sites to identify high-risk premises. A number of algorithms match GIS information about the location of the site, the numerous names used by a business, regulatory and administrative data about a business kept in various databases within and across organisations.

The main sources for the GIS information tool are:

- HSE Notices & Prosecutions
- HSE Accident database
- HSE Ratings
- HSE Sites
- HSE Concerns
- Companies House – (Limited Companies)
- Adverse Insurance reports
- AddressBase Premium – National Address Database
- Telephone Directory
- Valuation Office Agency Data
- Other regulatory data including:
  - Environment Agency
  - Animal and Plant and Health Agency
  - Rural Payment Agency

HSE has data on almost 150 000 sites related to 'general inspections' (this excludes therefore construction and major hazard sites). The system has the possibility to access other data, from other organisations: Companies House – the Inter Departmental Business Register from which they use data only for statistical purposes – and MINT-UK – a platform which provides access to over 2 000 000 active businesses.

Source: World Bank (n.d.[61]), *The Future of Business Regulation: Case study: Making better use of information* (forthcoming).

Recommendations

- The MINAM could benefit from introducing a simple notification system for all businesses to indicate the start of their operation. This could be made part of a broader reform where such a notification is introduced to replace licenses and permits for certain low-risk businesses. Ideally, the MINAM would obtain an automatic notification of license/permit applications being received/granted from the competent authorities, rather than imposing the notification obligation on businesses in addition to the license/permit procedure.
- Access to at least certain data recorded in OEFA's inspections ICT tool should be allowed within SINEFA. This does not mean publicly disclosing data that are protected by the law, but that access could be granted to EFAs only and with regard to specific data points that are needed.

- OEFA would benefit in particular from fully digitising data and information to ensure that improved risk analysis, planning and automation are possible. Following this, they may consider introducing automated planning of inspections, as the universe of establishments covered in the system and relevant risk data are progressively expanding.
- Whenever possible, interoperability and information sharing should be opened to other public entities (starting with other EFAs). This process has already started and should be continued and strengthened.
- Review internal OEFA systems and assess opportunities for greater integration and/or consolidation – avoid further proliferation of systems for specific tasks. Ways forward could involve greater data sharing between different institutions, gathering of more risk-related data points on each establishment, and gradual automation of processes (in particular planning)–as well as greater internal consolidation and integration of systems. The example of data integration and management in the UK's Health and Safety Executive can provide useful inspiration.

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World Bank (n.d.), *The Future of Business Regulation: Case study: Making better use of information (forthcoming)*.. [6]

Note

[1] See Work plan, framework agreement for institutional cooperation between OEFA and SENACE *(Plan de trabajo, Convenio marco de Cooperación institucional entre el OEFA y el SENACE*), July 2019.

10 Clear and fair process

This chapter dives into the decision-making process and challenge possibilities inside OEFA. Clear and transparent rules and actions ensure a better delivery of regulation and promote compliance, as citizens and businesses are more likely to abide by the regulations that they understand. This section describes the legal instruments that OEFA has adopted to guarantee that inspections and inspectors follow a set of defined steps and procedural rules. Additionally, this chapter covers the management of complaints by OEFA and offers recommendations to increase transparency and fairness in the inspection process.

> *Governments should ensure that rules and processes for enforcement and inspections are clear. Coherent legislation to organise inspections and enforcement needs to be adopted and published, and the rights and obligations of officials and of businesses, clearly articulated (OECD, 2014[1]), (OECD, 2018[2]).*

Legislation on inspection and enforcement should be consolidated as much as possible and laying out rights, obligations, powers and procedures clearly. This allows to make it clearer, more transparent and formalises best practice principles such as risk management, compliance focus, and responsiveness in a single document (or at least a limited set of documents).

A comprehensive list of inspection agencies, structures or functions should be available, setting out clearly who controls which sectors and issues. This is essential for predictability, for regulated subjects to exercise their rights, and for the public to demand accountability.

There should be well-publicised, adequate and trusted possibilities to appeal decisions and to file complaints – and data on appeals and complaints should be regularly assessed and taken into account. It is essential to make appeal procedures easy and give regulated subjects possibilities (e.g. through administrative review boards or similar) to have their case reviewed rapidly and independently from the administration that took the original decision. Likewise, possibilities for trusted, anonymous complaints against abuse need to be present. Conversely, citizens, consumers, workers and other stakeholders should have well-publicised, simple to use possibilities to file complaints against regulated subjects and know how they are handled.

Decision-making processes, rights and obligations, and powers of inspectors should be clear for all, transparent, balanced. This provides a sound foundation for risk-proportional decisions, with adequate but bounded discretion. The processes for decision-making, powers and rights and limitations of inspectors, rights and obligations of regulated subjects, as well as appeal and complaint procedures should be made clear. They should be easily accessible. While inspectors should have sufficient powers to fulfil their duties effectively, it is important that adequate limitations are in place to avoid abuse and protect fundamental rights of regulated subjects. Explicit reference should be made to proportionality and risk, and clarifications given on the limits of the exercise of discretion.

Guiding principles, rules and processes for inspections

The Common Regime of Environmental Supervision sets out the guiding principles of environmental inspections and enforcement. These are: coherence; transparency; efficacy (i.e. the need for all EFAs to have the necessary tools and resources to adequately perform their duties–appropriate planning, conduct and evaluation of activities); efficiency; effectiveness; and continuous improvement.

Rules and processes for regulatory inspections and enforcement are set in the relevant legislation[1] and OEFA regulations, guidelines and in the Code of Conduct of the OEFA's inspector (OEFA, 2018[3]). OEFA's Regulation on Inspection and recently published relevant Guidelines define the inspection process step by step, determine principles of inspections, definitions, indications on the types of sanctions and measures amongst others. On the other hand, the Code of Conduct is meant to reinforce ethical values–e.g. responsible and transparent behaviour, ethical conduct and integrity from OEFA's officials, and in particular inspectors, who are at the frontline. On this topic, OEFA has initiated the process to get ISO 37001 Anti-bribery management systems certification.

OEFA's Regulation on Inspections was adopted at the beginning of 2019 after public consultation, is available online and is written in clear and understandable language, following a simple and consistent structure. The Regulation foresees the scope of the SINEFA and OEFA; their goals; the principles of inspection; the rights and obligations of inspectors and of inspected subjects; the types and planning of inspections; procedural rules related to the conduct of the inspection; measures that can be applied following an inspection; and remedies. Additionally, OEFA has prepared Guidelines for Environmental

Inspectors that have recently been published. These guidelines consolidate all applicable provisions on the conduct of an inspection and explain in a detailed, user-friendly fashion the different steps, processes, and methods (from the planning to the decision, and including rights and obligations of the parties).

OEFA has also prepared a Standard Regulation for inspections, enforcement and sanctions for Regional Governments[2] to make sure that these specific functions are consolidated into a single legal text also at the regional level. According to numbers provided by OEFA, by the end of 2018, 58% of regional governments had approved regulatory texts based on the model established by OEFA.

Decision-making process and challenge possibilities

The decision-making process and potential measures that can be imposed following an inspection are set in relevant OEFA regulations. Overall, the regulations and legal framework outline the different procedural steps, the types and methodologies for sanction and fine calculation, and the types of precautionary and corrective measures. Rules exist on aggravating and mitigating factors and on how to assess the severity of non-compliances based on the relevant risk level.

Clear guidance on how to consider aggravating and mitigating factors when deciding on measures other that fines is missing. Moreover, it is important to define if the size or other inherent characteristic of a business (e.g. recent creation) are to be taken into account in inspections.

Applicable legislation and regulation (Single Consolidated Text of the Law on General Administrative Procedure; OEFA's regulations on *Administrative Sanctioning Procedure*[3] and on *Inspections*) foresee different possibilities to appeal, both to the decision-making authority and to the Tribunal of Environmental Supervision. General rules of administrative law apply (Art. 217ff of Single Consolidated Text of the Law on General Administrative Procedure) – meaning that remedies of reconsideration (Art. 219), appeal (Art. 220), and re-examination by the Judiciary (Art. 228) can be used by the regulated entities.

OEFA's quarterly statistical reports reflect the level of uptakes of appeal possibilities. The latest report indicates that 58% of the appealed OEFA's decisions were confirmed (OEFA, 2019[4]).

Other transparency means

The Guidelines on Rights of Inspected Subjects are another valuable tool to promote transparency and fairness (OEFA, 2014[5]). They were prepared to compile, systematise and disseminate the set of rights of regulated entities within the environmental inspections and enforcement "macro-process". The latter includes all the procedures related to the environmental assessment, inspections, and sanctioning. Regulated subjects that are found compliant with applicable requirements also have the right a) to be incorporated into the Registry of Good Environmental Practices, and to b) request the conduct of an inspection from OEFA, when no inspection has been undertaken during the corresponding calendar year (Section VII of the Guidelines). OEFA should define more clearly the role and use of the Registry of Good Environmental Practices, and explain for what purpose regulated subjects would want to request an OEFA inspection.

The Guidelines also foresee the right to submit a complaint on any behaviour violating the relevant rules to the Coordination for Integrity, Liability, Ethics and Anticorruption (in addition to other complaint and remedies' procedures – see Art. VIII), (OEFA, n.d.[6]).

Regulated subjects can file a complaint on the grounds of 'defect' in the handling of a procedure against a civil servant or against a member of the Tribunal of Environmental Supervision.[4] A complaint can be filed to rectify procedural defects when a decision on an administrative measure or a sanction is being made. The grounds for filing such complain can be unjustified suspension of the procedure; non-compliance with

established time limits; non-compliance with functional duties; omission of procedural steps, amongst others (see Art. 6 of the relevant Rules). The complaint is to be submitted to the next official superior in rank (Art. 8 of the Rules). The review team was not able to assess the level of uptake of complaint possibilities, their effectiveness or the satisfaction of stakeholders (this applies to both complaints to the Coordination for Integrity, Liability, Ethics and Anticorruption, and complaints on the ground of "defect" in the handling of a procedure).

As mentioned in Chapter 7 on Co-ordination and consolidation, handbooks have been prepared to clarify mandates and responsibilities within the SINEFA. These documents are available to the relevant authorities and to the public. The SECONFIA online tool, also described in Chapter 7, is an additional instrument developed to make responsibilities between different EFAs clearer, and make the information more user-friendly. While these are meaningful efforts towards the transparency of SINEFA, further clarification is required to avoid confusion from an outside perspective about which authority is competent for an inspection object or subject under the current legislation. In some cases, two or more authorities are competent, while in other cases none of them seems to be (see Chapter 5 on Responsive regulation and its section on Consideration of the characteristics of regulated entities, and in particular reported issues on this topic). This confusion is not due to a lack of efforts to communicate by OEFA, but it derives from a lack of clarity in the regulations themselves.

Assessment

Rules and processes for inspections and enforcement have been developed to ensure that they are clear, transparent and fair. However, the ideal decision-making process should take into account the characteristics of the operator and the risks posed by the situation more adequately and/or clearly in order to decide which measure would be the most effective in a given situation. Clear and detailed guidance on enforcement aimed at 'framing' discretion, while promoting compliance and ensuring that the measure is effective would be a valuable tool.

Despite the creation of the SINEFA and the gradual transfer of competences to OEFA, some confusion about which authority is competent for a given inspection-related activity remains, suggesting that consolidation and clarification should be continued, especially at the government level. Overall, reformed processes appear generally clear – but the responsibilities of different agencies ("who is in charge of what") are much less so.

Recommendations

- Data on complaints for behaviour against the rights of inspected subjects should be disclosed. In addition.
- Data on appeals and complaints should be used as an element to assess and improve OEFA's practices in terms of professionalism, compliance promotion, amongst others.
- OEFA would benefit from developing a specific step-by-step guidance for decision-making, based on risks found and on the characteristics of the establishment (e.g. following the example of HSE's Enforcement Management Model).
- OEFA should benefit from reviewing to what extent regulated entities effectively make use of the appeal system.

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Notes

[1] SINEFA Law, in particular.

[2] *Modelo de Reglamento de Supervisión, Fiscalización y Sanción en materia ambiental del Gobierno Regional*, approved by Resolution of Board of Director No. 036-2017-OEFA/CD, available at: https://www.oefa.gob.pe/avisos/resolucion-036-2017-oefa-cd.

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[4] See Rules for dealing with complaints filed on the grounds of defect in the handling of the procedure by OEFA, *Reglas para la atención de quejas por defectos de tramitación del Organismo de Evaluación y Fiscalización Ambiental*, approved by Resolution of the Board of Directors No. 009-2015-OEFA/CD.

11 Compliance promotion

The most basic assumption for any regulatory instrument is compliance. Without a systematic compliance practice from regulated entities, policy objectives will not be reached. This chapter addresses the promotion of compliance as a principle of the enforcement process. The chapter first describes the principle and relevant international practices and tools. Furthermore, it assesses compliance practices promoted by OEFA and provides recommendations to improve regulatory enforcement.

> *Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists (OECD, 2014[1]), (OECD, 2018[2]).*

Promoting and supporting compliance should be considered a duty of inspection and enforcement activities, than relying on an "everyone should know the law" approach, or seeing advice and guidance as activities that should be left only to private consultants. In response to new risks and growing demands from citizens, the state is developing and imposing new and frequently complex regulations. In this framework, it is inadequate to assume that business operators or citizens can get to know and understand what is expected from them without any assistance. This is the case in modern regulations, covering increasingly technical topics, which are often set in terms of performance and outcomes, amongst others. Rather, promoting and supporting compliance should be a key priority and function of inspection and enforcement structures. The former should be anchored in legislation and in the official mandates of these structures, and significant resources should be allocated to develop and spread guidance and information to regulated subjects, particularly those lacking the resources to obtain or understand the information themselves, e.g. SMEs.

Regulators, inspection and enforcement structures should analyse barriers to compliance and work to overcome them, actively and regularly, in particular if they relate to information. Reviewing and assessing barriers to compliance is essential and should be a core activity. Legal foundations should exist for inspection agencies to give advice and for it to provide regulated entities regulatory certainty ("assured advice").

A variety of complementary tools related to advice and information can be delivered through guidance documents, "on-the-ground" information, etc. Different channels need to be used according to the issues and audiences, and inspection structures should use all of them actively. Practical and clear guidance documents should be prepared covering the most widespread business activities and regulatory issues as well as the key risks – and be actively disseminated, including through consolidated internet portals. Active outreach to new businesses, business associations or sectors with most identified difficulties should be organised using visits, conferences, web-based information, etc. Besides, inspection visits should be used as key moments to inform, explain and provide advice. Guidance must be elaborated and given with great care.

Legal foundations should exist for the practice of "assured advice" and it should be used as much as possible to increase regulatory certainty. It consists in giving legal guarantees to regulated subjects that, if they follow the advice officially given by the regulator, they will not be held in breach of their duties, even if at a later point another official reaches a different conclusion. However, this practice must be designed in a way that it does not limit the willingness of the inspectors to share their opinion in more informal communications with the regulated subjects. Providing this kind of advice should not take off the responsibility from inspected subjects. When provided with an "assured advice", the regulated subject should not need to follow conflicting advice from other sources. Hence, the "assured advice" should be made available to other enforcement authorities, e.g. through a shared information system.

Compliance promotion: guiding principles and tools

All legal acts, regulations and instruments prepared and adopted by OEFA are systematically made accessible to all stakeholders for *ex ante* consultation. These include guidelines to EFAs and inspectors, amongst others. All of these documents are published online with a deadline for stakeholders to provide comments. Following this, a 'Commentators' Meeting' (*Reunión de Comentaristas*) is organised. The document approved is then published online together with a comments' matrix where the various comments received are addressed one by one.[1]

Compliance promotion has recently become a guiding principle of environmental inspections and enforcement in Peru. It is now entrenched in legal acts, and OEFA's management regularly communicates about the need to inform regulated entities about their obligations. For instance, OEFA Regulation on Inspections clearly states among the guiding principles of the inspections' function that its performance shall promote guidance and persuasion with regard to compliance with regulatory requirements and the correction of infringements (Art. 4.h of the Regulation).

A number of measures to ensure effective compliance promotion have been taken by OEFA. Trainings, workshops (e.g. 151 training activities organised by the Academy of Environmental Auditing in 2018 on regulatory requirements, inspection strategies and instruments used by OEFA) and other events addressed to, or including, business operators are being carried out. These include in particular events with the National Society of Industries [2] and the National Society for Mining, Petroleum and Energy.[3]

A 'matrix of environmental requirements' has been developed and made accessible online. Queries can be addressed to OEFA through an online form,[4] by calling one of the toll-free phone numbers provided by OEFA, or by going in person to an office of OEFA. During the calendar year 2018, OEFA (both OEFA's headquarters in Lima and provincial delegations of OEFA) dealt with a significant number of queries, as shown in Table 11.1.

Table 11.1. Number of queries handled by OEFA in 2018

	Online	Phone	On-site
Lima	1 882	4 250	2 140
Province	294	1 547	13 951

Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

Also, as mentioned in Chapter 5 on Responsive regulation, the *Fines Calculation Methodologies* developed by OEFA establish that an operator who voluntarily remedies a non-compliance found before the enforcement process would not be sanctioned. On the other hand, recidivism or intentionality are a ground to increase the amount of the administrative fine.

Relevant legislation (Art. 257 of Single Consolidated Text of Law on General Administrative Procedure) has a provision that corresponds to some aspects of "assured advice" – i.e. an error induced by the Administration, or by a confusing or illegal administrative provision, is a case where the economic operator will not be held liable for the violation. This has been reported to be applicable also with regards to the responses to queries.

The measures mentioned above are an important foundation, but a variety of additional and complementary tools and activities should be developed and used in the future – e.g. toolkits, guidelines and manuals for business operators, standardised risk-based checklists, amongst others. For instance, checklists are a valuable tool from different perspectives: they help inform business operators on the requirements they should comply with and allow greater transparency, enhanced homogeneity during inspections, and better focus on the elements that are crucial from a risk-based perspective. Standardised risk-based checklists would be especially useful for EFAs, where the paradigm shift towards a risk-based approach and compliance promotion is in many cases still at early stages. In turn, this should improve confidence towards inspection and enforcement authorities.

In practice, it has however been observed that there is a paradigm shift that is yet to be entirely completed (especially in local EFAs, but also to some extent in OEFA itself) and that relates to *why* compliance should be promoted – not just to do what the rules say, but in order to protect the environment and the public well-being. This is explained to some extent by the formalism of the regulatory system in Peru, but it also needs to be considered by OEFA's management to ensure an actual transformation in practice. This has an

impact on how information is communicated while promoting compliance: which are the most important regulatory requirements to comply with, how to do so, and why. As mentioned above, preparing manuals, guidelines, toolkits (with simple explanation in clear and plain language, drawings and pictures), but also for instance talk shows on the radio targeting MSMEs could be considered.

Securing compliance and "going beyond"

Advisory inspections' are now allowed by applicable legislation. The Single Consolidated Text of Law on General Administrative Procedure[5] foresees that within the compliance promotion approach advisory inspections may be carried out. As explained in OEFA's Regulation on Inspections (see Article 3 of the Regulation), this type of inspection is aimed at promoting compliance with environmental requirements by sharing knowledge about regulatory requirements applying to the specific inspection subject, and has no punitive purpose. It can be carried out only once. Subjects of 'advisory inspections' can be regulated entities that have never undergone an inspection, micro and small enterprises, or they can be used in other situations where OEFA considers it appropriate to improve the management of environmental risks. The activity consists in informing the operator about the requirements they must comply with, and in performing the relevant checks. No sanctions can be imposed, unless "damages or significant risks' are found, or 'the effectiveness of environmental enforcement is endangered".

While the introduction of "advisory inspections" is a valuable idea – only recently allowed by the legislation in force – their use could be improved to ensure that their objective is met. While the conditions, procedure and rules of such inspections are apparently clear within OEFA, from an outside perspective a number of elements should be clarified. In particular, the exceptions to imposing sanctions could be further explained as they seem too wide and vague (and thus risk discouraging businesses from requesting such advisory visits). Additionally, there is no known planning of such inspections; the conditions, processes, amongst others, need to be more detailed – in particular Art. 13 of OEFA's Regulation on Inspections states that advisory inspections may be carried out on certain circumstances, but the language used is not that of an obligation to perform such inspections when the defined circumstance are met. OEFA's decision to perform these inspections on micro and small businesses is understandable, as these operators are more likely to be unaware of applicable regulatory requirements and of the best compliance strategy to manage their risks, especially when they have not yet undergone any inspection. OEFA might want to consider that larger businesses may also need this kind of advice. These businesses could be included in such a scheme, on a cost-recovery basis.

In addition to the introduction of advisory inspections, OEFA has adopted further measures aimed at supporting and guiding compliance. For instance, by means of Resolution of the Boards of Directors No. 030-2018-OEFA/CD[6] it was decided that the imposition of sanctions on business operators of solid waste facilities was to be done only after the performance of an advisory inspection, based on risk, proportionality and step-by-step improvement.

Some other measures ('incentives') have been introduced with the purpose to encourage compliance. First, as mentioned in Chapter 5 on Responsive regulation, when an operator remedies voluntarily a non-compliance before the enforcement process starts, no sanction is applied. This is a novelty, as in this case the operator is excluded from administrative responsibility – instead of such remediation being a simple attenuating factor. Second, the amount of the fine imposed can be reduced a) if the business operator makes a clear statement in which they recognise their responsibility, or b) pays the fine within 15 days.[7]

The "discount" for speedy payment of fine tends to decrease appeals, but may reduce the overall perception that the system is fair (operators are pushed to pay regardless of whether they agree, as delays mean higher penalties). OEFA may want to also consider other incentives to promote good practices – for instance, celebrating or rewarding compliant operators by implementing tools such as a publicly-advertised rating of the level of compliance (and risk management). The incorporation of compliant businesses into

the Registry of Good Environmental Practices, currently in use, is an interesting initiative – although OEFA still requires clarifying further how exactly it makes use of it. Incentives could even be applied to EFAs with good practices in terms of compliance promotion – but also of risk prevention and management amongst others, A good practice example of the latter is the introduction on the 'Declaration on first year of business' in Lithuania by the nine larger inspectorates with the support of the government (see Box 11.1). The government announced the adoption of the Declaration in the presence of the signatory inspection, enforcement bodies and the media.

Box 11.1. Declaration on first year of business (Lithuania)

The "Declaration on first year of business", introduced in 2011, is an innovation that was part of the inspections in Lithuania. The nine largest regulatory delivery bodies signed a joint declaration by which they committed to use sanctions only as a last resort measure when performing inspections on businesses that have started to operate less than one year before the date of the inspection visit. The purpose of the statement was to allow enough time for new businesses to get acquainted with relevant regulations and how to comply with them. Although regulatory delivery bodies were not required by law to sign the declaration, the major ones saw it as an appropriate tool to ensure the necessary balance between the need to protect public interests and adopting a collaborative approach to their relationships with businesses, and a way to promote compliance. The declaration also received the Prime Minister`s strong support. Data from the Labour Inspectorate shows that 78.26% of companies received advice from inspectors during the first year of their operation. In 2014, 50 regulatory delivery agencies out of 60 had voluntarily signed the declaration.

DECLARATION
on the first year of business
14 September 2011
Vilnius

We, the undersigned business supervisory institutions (hereinafter referred to as supervisory institutions), represented by the supervisory institution heads, in seeking to increase the state's competitiveness, improve the business environment and business supervision functions, encourage job creation and retention, and decrease the administrative burden on businesses and residents.

Having determined that businesses starting operations need methodological assistance and consultation and that supervisory institutions are competent to provide such assistance, in seeking to help new businesses operate successfully in a competitive environment, noting that the most important supervisory task is ensuring adherence to acts of law and that fines and other sanctions are only one means toward this end, rather than an end in itself, recognising that fines are not the most suitable means to apply to new businesses, especially small ones, obligate ourselves:

- *to refrain from applying punitive measures (fines, restrictions on activity, and so forth) during the first year of a business (no less than twelve months from the moment when the business – natural person, legal entity, or other organisation or a subsidiary of a legal entity or other organisation undertaking legally regulated economic activity within the territory of the Republic of Lithuania – or its activity came under the supervision of a supervisory institution) and, upon identifying a violation, to first determine an appropriate deadline for correcting the violation, a deadline which can be extended in the event of objective circumstances;*
- *to devote resources for consultation and providing methodological assistance to businesses during their first year of operations (for example, contacting a new business and offering consultations services, preparing consultative seminars, answering businesses' inquiries and requests, amongst others).*

Appreciating that acts of law grant supervisory institutions the right to apply punitive measures without restricting their discretion in applying them through this declaration, we jointly obligate ourselves to apply punitive measures to businesses during their first year of operations only in exceptional cases, as a last resort, after first evaluating whether adherence to acts of law cannot be ensured by other means (for example, by issuing an order or by consulting), and only when they are necessary and unavoidable in seeking to prevent harm to society, the interests of other persons, or the environment when such harm or danger is of great significance.

Source: World Bank (n.d.[4]), *The Future of Business Regulation: Case study: Making better use of information* (forthcoming).

To properly decide which "incentives" – or other compliance promotion measures or tools– would be the most adequate and effective and how to articulate and use them. OEFA would benefit from following best international examples and developing a vision for, or a strategy on, compliance promotion. This could, amongst others elements, be based on a) a periodic analysis of barriers to compliance, b) research on alternative options/channels to promote compliance, as well as c) active engagement with the private sector and other stakeholders.

OEFA is also making efforts to organise, or join, groups and events set to reflect upon possible improvements related to their regulation and activities. One example of these is the *Ex post* Evaluation Working Group.[8] Another example is the participation in the "Workshop on strengthening environmental management", held in November 2018. OEFA should seize these opportunities – including meetings and work of the Behavioural Economic working group[9] – to analyse barriers to compliance, possible communication channels, and early engagement with stakeholders amongst others. See Box 11.2 for an example from the United Kingdom to promote compliance using behavioural insights.

Assessment

Compliance promotion is a new principle in Peru. OEFA has done substantial efforts to develop tools and measures to promote compliance. However, further work is needed to secure the actual cultural shift from a formalistic approach to compliance to a result-oriented approach – i.e. compliance being checked and promoted to effectively protect the environment, and not for the sake of performing checks. This is especially true for EFAs other than OEFA.

Relevant legislation foresees that an error induced by the Administration (e.g. providing erroneous guidance) cannot be subject to liability. This applies also to queries submitted to OEFA.

In addition to the positive measures taken by OEFA's management to effectively promote compliance, further tools can and should be developed – such as toolkits, guidelines and manuals for business operators, and standardised risk-based checklists (to be used e.g. for inspection objects of lower risk and/or by other EFAs). To decide which compliance promotion measures, tools would be the most adequate and effective, OEFA would benefit from developing a strategy on compliance promotion.

Recommendations

- Despite the use of inspection plans by OEFA for each inspection performed, and the development of a tool aimed at allowing to record data and information in a way that allows for further analysis and use, standardised risk-based checklists would be a valuable tool to be considered. Standardised (and published) risk-based checklists inform businesses operators on the requirements they should comply with, allow greater transparency, enhance homogeneity during

inspections, and ensure that inspectors focus on the elements that are crucial from a risk-based perspective. They also allow determining the updated risk rating of the establishment directly from the checklist results. Standardised risk-based checklists would be especially useful for other EFAs, where the paradigm shift towards a risk-based approach and compliance promotion is in many cases still at early stages. This should in turn improve confidence towards inspection and enforcement authorities. A first step to build these lists would include SENACE sharing with OEFA the environmental obligations of the subjects under the inspections scheme.

- OEFA should use the *ex post* evaluation and behavioural economic working group (and other resources if/as necessary) to regularly analyse reasons for non-compliance, as well as alternative and complementary information and engagement channels with stakeholders.
- OEFA should consider the introduction of additional tools such as toolkits, guidelines/manuals for business operators, simple illustrated brochures for MSMEs, that could be used by OEFA to help inform business operators on a) which are the key regulatory requirements they need to comply with, b) why this is important, and c) how they can comply.
- Considering that the 'advisory inspections' are a relatively new tool, OEFA should assess its effectiveness after a reasonable period of implementation. The assessment should consider clarify the relevant procedure, planning, amongst others, for such inspections.
- OEFA may want to consider some additional incentives to promote good practices – for instance, rewarding compliant operators by implementing a publicly-advertised rating of the level of compliance (and risk management). See Box 11.2 for an example from the UK. The incorporation of compliant businesses into the Registry of Good Environmental Practices currently in use, is a good example of "incentives" that can be used, provided that information on this is adequately disseminated and the Registry advertised. Incentives could be applied to EFAs with good practices in terms of compliance promotion – but also of risk prevention and management.

Box 11.2. UK Health and Safety Executive's regulatory approach to construction: an example of use of behavioural insights

Application to the construction industry and characteristics thereof

Traditionally, construction is one of the highest risk sectors. Given its nature, it presents numerous challenges and hazards on top of a fragmented supply chain that involves numerous contractors and subcontractors. Poor occupational safety and hygiene performance meant the industry tended to have one of the highest rates of fatal occupational accidents, and inadequate attention to risks create longer-term health effects.

Key elements of HSE's regulatory approach

As a way to involve different stakeholders of the construction sector, the HSE organised a "Summit", where the industry was challenged to 'Turn Concern into Action'. In advance of the event and in partnership with HSE, various stakeholder groups drew up Actions Plans designed to deliver a range of changes. The approach was designed to encourage the industry to show ownership of the risks it creates and to work better in partnership across the supply chain to manage them. It required the industry to move from a reactive approach focused on what happened on construction sites to a more strategic, proactive approach, covering upstream aspects. This created the opportunity and need for HSE to revise its regulatory approach for construction.

HSE created a new Construction Division (CD) to develop the approach mentioned above and to ensure its efficient and consistent delivery. In 2001, the HSE gradually developed an intervention strategy focused on prevention, guidance, specific interventions for small companies, supply chain approach and greater enforcement consistency.

The -key objectives of the revised approach included:

- securing industry ownership of OSH challenges and a commitment to action and engagement with workers;
- engaging with key intermediaries, stakeholders and other regulators to enable cultural change towards risk management;
- improving and clarifying the regulatory framework;
- developing a communication strategy, guidance and clear standards for the construction industry and SMEs in particular;
- targeting critical points of the supply chain.

A central element to achieve these objectives was the reliance on an Influence Network (IN) model.

The Influence Network (IN) model

The IN model was crucial in shaping and prioritising HSE interventions. The HSE focused first on larger companies and their supply chains and then it engaged with harder-to-reach small businesses and sites. The emphasis was on fostering proactive risk management by risk creators themselves rather than HSE using most of its resources carrying out inspections to tell industry what it should be monitoring.

This model incorporated 39 human, hardware and external factors through four influence levels:

- Environmental: political, regulatory, market, social influences that affect strategic decisions.
- Policy: internal culture, contracting strategies or company management and structure.
- Organisational: training, planning, procedures, supervision, which influence the “direct” level and reflect the culture, way of working and behaviour in organisations.
- Direct: competence, risk perception, equipment operability and maintenance or operating conditions, which directly influence the probability of adverse outcomes.

Each factor was given a performance rating. Afterwards, factors were assigned a weight to assess how influential each one was on the overall performance in the next layer. A factor with a poor rating and significant influence was given a higher priority in the Intervention Strategy than factors with the same rating, but less influence.

This data served as basis to calculate an overall risk index and identify the most influential factors. In addition, the analysis allowed HSE to track variations in ratings and index, and determine “critical influence paths”, and thus understand variations in factors, and why and where interventions were effective (or not).

Early use of the IN led to the an intervention strategy emphasising:

- Early engagements with clients, designers and contractors on large projects;
- Supply chain interventions (e.g. defining issues and solutions with industry, clarifying enforcement expectations and applying them consistently by inspectors);
- Sustained contact with key players with wide (national/multi-site) influence (e.g. contractor head office/CEOs, repeat clients like internal traders);

- Tracking back from findings during site observations to address shortcomings strategically at their source – e.g. with suppliers, designers or clients, or at board level with contractors, to secure real engagement on improvement;
- Co-operation with trade bodies or groups of similar suppliers to achieve shared understanding of safety requirements (encouraging innovation and standards development by the industry) and making the playing field more even;
- Delivering a range of initiatives targeted at SMEs
  - Accessible guidance (e.g. Absolutely Essentials, Busy Builder leaflets)
  - "Working Well Together" national initiative delivering "Safety and Health Awareness Days" to engage locally and raise awareness and competence
  - Intensive inspection activity or "blitzes".

HSE shifted some resources away from site inspections to early engagement in the supply chain (with clients, designers and contractors) and joint development of industry guides and codes. This led to a reduction in the number of site inspections, but not in overall resources. The model offered flexibility and, thus, sustainability.

Source: Blanc, Myers and Ottimofiore (n.d.[5]), *Using behavioural approaches in regulatory delivery: the experience of Britain's Health and Safety executive in a comparative perspective* (forthcoming).

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Blanc, F., K. Myers and G. Ottimofiore (n.d.), *Using behavioural approaches in regulatory delivery: the experience of Britain's Health and Safety executive in a comparative perspective (forthcoming)*. [5]

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OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed on 14 October 2019). [3]

World Bank (n.d.), *The Future of Business Regulation: Case study: Making better use of information (forthcoming).*. [4]

Notes

[1] See an example of comments' matrix available at: http://www.oefa.gob.pe/wp-content/uploads/2018/02/res-006-2018-oefa-cd-matriz.pdf.

[2] See for instance https://www.oefa.gob.pe/noticias-institucionales/oefa-realizo-conferencia-sobre-su-funcion-de-supervision-a-las-empresas-de-la-industria-quimica; https://www.oefa.gob.pe/noticias-institucionales/oefa-participa-en-conversatorio-organizado-por-la-sociedad-nacional-de-industrias; https://www.oefa.gob.pe/noticias-institucionales/oefa-participa-en-conversatorio-organizado-por-la-sociedad-nacional-de-industrias-2.

[3] See for example https://www.oefa.gob.pe/noticias-institucionales/presidenta-del-consejo-directivo-participo-en-conversatorio-de-la-sociedad-nacional-de-mineria-petroleo-y-energia.

[4] Available at: https://www.oefa.gob.pe/contacto/formulario-de-contacto.

[5] See Chapter II of Title IV of the Law, and in particular Art. 228-G.2.

[6] Available at: https://busquedas.elperuano.pe/normaslegales/disponen-publicacion-del-proyecto-de-resolucion-de-consejo-d-resolucion-n-030-2018-oefacd-1723870-1/.

[7] The recognition of responsibility as incentive to encourage compliance is based on the Single Consolidated Text of Law on General Administrative Procedure Art. 257.

[8] See in particular Preamble and Section 2 of this Review.

[9] See Chapter 2 of this Review.

12 Professionalism

This chapter describes the relevance of promoting professionalism and capacity building of inspectors for the regulatory enforcement process and the achievement of expected outcomes. The chapter describes the professionalism principle and relevant practices to train inspectors. It presents OEFA's actions to professionalise its inspection team and provides recommendations.

> *Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency (OECD, 2014[1]), (OECD, 2018[2]).*

The profession of "inspector" needs to be defined as such, and required competences should include a combination of technical (field-specific) skills and "core" skills linked to risk management, compliance promotion, amongst others, This requires substantial training on both aspects as well as official guidelines for inspectors to help ensure consistency and fairness. Only professional inspectors, with a full understanding of their mission and of the tools available to fulfil it (and of their limitations) can adequately exercise discretion. Such a framework for the inspection profession should be officially stated, and form the basis for recruitment practices, job descriptions, training, professional assessments and performance evaluation for staff.

It is crucial is to ensure that inspectors receive the adequate technical training (and regular "refreshers") and training on their functions and how to best exercise them (and updates on new findings and methods during their career).

Competency of staff members and the overall capacity of the organisations where they work, should be regularly assessed and efforts should focus on continuously enhancing them. Such assessment should be used to identify gaps and needs, and achieve improvements.

Professionalism of inspectors

Although OEFA's Regulation on Inspections simply defines the inspector as the 'natural or legal person that exercises the inspection function as per the legislation in force' (Art. 5.m of the Regulation), it also provides for a more comprehensive principle of professionalism. Such principle includes a combination of technical skills and competencies related to risk management and compliance promotion to ensure consistency and impartiality during the conduct of inspections (Art. 4.f).

As already mentioned in other chapters of this Review, a number of guidelines, handbook and other tools have been prepared by OEFA – e.g. on environmental inspections, methodology to assess non-compliances, calculation methodology for fines, as well as a Code of Conduct for inspectors–to ensure fairness, ethical behaviour, proportionality, and homogeneity in inspections.

Training of inspectors

The sub-directorate for Capacity Building in Environmental Supervision is responsible for capacity building within the agency (and beyond). It manages in particular the Academy of Environmental Supervision, OEFA's library, "Knowledge Routes", and the Peoples' development plan (PDP) (OEFA, 2018[3]). Diagnosis of training needs are carried out. The Academy (OEFA, n.d.[4]) organises courses to improve competencies in particular in Law, Biology, Economics, and Environmental Engineering. For each course, different dimensions (strategical, technical-operational and interpersonal) and different levels of training exist, as well as specialised levels by economic sector. A Virtual Campus provides training material for self-learning activities.

The sub-directorate for Capacity Building is also responsible for designing a Knowledge Route for each profession, where additional training and capacity-building opportunities are proposed to OEFA's officials. The Academy offers certification upon satisfactory completion of the training. The Review was not able to assess the level of development and implementation of this "Knowledge Route" model.

OEFA has developed a PDP (Personnel Development Plan) (OEFA, 2018[3]). The PDP is a strategic document on capacity-building management based on the environmental sector's vision, OEFA's institutional mission and one of the objectives set in the Institutional Strategic Plan – 'modernising' OEFA's institutional management.

The PDP acknowledges that human resources are the most important resources within an organisation, as the behaviour and performance of the personnel has a direct impact on the quality and optimisation of the services delivered by the institution.[1] Depending on the position and responsibilities of the official, a general competency objective, and three specific objectives (administrative systems, environmental management, and soft skills – understood as teamwork competencies), are set. The advantage of this model is that not only inspectors, but all OEFA's staff are considered. The budget is reported to be allocated accordingly.

In addition, OEFA uses the Performance Model developed by the Nacional Authority of Civil Service (SERVIR), which sets a methodology to assess the teams and individual's objectives in terms of competencies (Autoridad Nacional del Servicio Civil, n.d.[5]). This methodology is related to a) training management and b) performance management. The Review was not able to assess to which extent this methodology is adequate for OEFA's purposes.

According to the rules in force,[2] all public servants who have access to training schemes that are part of the existing PDP – which is the case of OEFA's personnel–have to take the relevant trainings. In addition to this, new staff are introduced to the position from the first day of work.

Information reported by OEFA suggests that objectives of managerial staff's performance are based on indicators established in OEFA's strategic and operational documents. In particular, each strategic objective established by the PEI will be under the responsibility of certain directorates of OEFA, and the performance of the personnel of such directorates will be evaluated accordingly, based on their level of responsibility within the Directorate.

Courses and workshops for EFAs are based on the needs identified by OEFA, as follows:

- Local governments: environmental inspections and enforcement; solid waste management; environmental noise; fines calculation methodology
- Provincial governments: sanctioning administrative procedure; formalisation and enforcement with regard to informal mining operators; fines calculation methodology
- National government (including OEFA): public management and environmental policies; environmental compliance promotion; sanctioning administrative law.

Efforts and activities to ensure professionalism do not only strictly relate to OEFA, but also to other EFAs, so as to ensure that new principles and methods of professionalism "percolate" throughout the system, including in regions, and that all inspectors are effectively (and regularly) trained. Nevertheless, the titles of the different trainings seem to suggest that the focus is still rather reactive than preventive and proactive and that a high percentage of the capacity-building activities relate to enforcement, fines, and sanctions.[3]

The list of "core competencies for regulators" in the United Kingdom can serve as a model to further refine which abilities and aptitudes are needed for inspectors, see Box 12.1.

Box 12.1. Core competencies for regulators, Office for Product Safety and Standards, United Kingdom

Effective local regulation depends upon the professionals involved. Reviewing their development needs is essential, as the nature of their roles and the legislation that they enforce change over time. OPSS thinks there is a set of core competencies relevant to all regulators, regardless of the level and nature of their work.

Context

- Understanding of the role of regulation as a tool of Government
- Ability to work within the wider regulatory framework
- Ability to work towards your organisation's regulatory objectives
- Ability to work with the legislation relevant to your regulatory function(s)
- Ability to work within your organisation's regulatory policies and procedures
- Understanding of the role and responsibilities of partner organisations

Risk assessment

- Ability to assess regulatory risks
- Ability to gather, analyse, use and share data to inform risk assessment
- Ability to use risk assessment to guide your activities
- Understanding of risk management in a business context
- The term 'business' is used throughout to denote a regulated entity. Some regulated entities are not businesses but could be individuals acting in a private capacity. Many of the core competencies will apply equally in these cases.

Understanding those you regulate

- Understanding of the current business environment and the business sector(s) regulated
- Understanding of how regulation and the way it is enforced can impact business communities and individual businesses regulated
- Understanding of the factors that affect business approaches to compliance
- Ability to engage constructively with business
- Ability to tailor your approach to businesses and individuals that you interact with

Planning your activities

- Ability to act within your role and area(s) of responsibility
- Ability to make appropriate intervention choices, drawing on your understanding of the context in which you operate, of those that you regulate, and of the use of risk-based approaches so as to have the greatest impact
- Ability to work effectively with other organisations
- Ability to plan your work, and that of your team, so as to deliver your responsibilities efficiently

Checking compliance

- Ability to prepare appropriately for checks on compliance
- Ability to conduct checks in a proportionate manner
- Ability to be responsive to the circumstances encountered
- Ability to make informed assessments of compliance and risk
- Ability to follow-up on checks on compliance in an appropriate manner

Supporting compliance

- Understanding of the need for compliance support amongst those you regulate
- Ability to promote the importance of compliance, and your organisation's role in supporting compliance

- Ability to communicate in appropriate ways to suit the circumstances
- Ability to provide the information and guidance that is needed by those you regulate
- Ability to provide the tailored advice that is needed by those you regulate, where appropriate

Responding to non-compliance

- Ability to select proportionate responses to non-compliance and potential non-compliance
- Ability to communicate effectively with businesses that have failed to comply
- Ability to conduct thorough investigations of non-compliance and allegations of non-compliance
- Ability to prepare and implement effective responses to non-compliance
- Ability to provide appropriate support for those adversely affected by non-compliance

Evaluation

- Ability to monitor and report on your activities and performance
- Ability to evaluate your activities in relation to your regulatory objectives and your organisation's strategic priorities
- Understanding of the value of feedback from those you regulate, and the beneficiaries of regulation in informing future activities.

Source: Government of the United Kingdom (2016[6]), *Core competencies for regulators*, https://www.gov.uk/guidance/core-competencies-for-regulators (accessed 15 October 2019).

Assessment

OEFA has placed professionalism at the centre of its efforts. Guidelines and tools to ensure fairness, ethical behaviour, proportionality, homogeneity in inspections have been prepared. Training and capacity-building opportunities have been developed, especially through the Academy of Environmental Supervision. As concepts such as risk management, compliance promotion and proportionality are still new, additional guidelines on risk analysis, on how to frame the use of discretion and on all inspection-related activities (when not available), should be considered. Additionally, these tools allow inspectors and other staff to self-assess their competencies against a well-defined set of aptitudes and capabilities designed in line with good international practice. These tools could also be useful to embed new methods, and settle the paradigm shift towards a result-oriented approach to regulatory inspections and supervision.

Training and capacity building is systematically and regularly delivered to new and existing staff, and there is a clear effort in setting the objectives of such activities based on strategic goals of the agency, as set in the relevant Strategic Plan. A diagnostic of training needs is also performed on different types of EFAs and training is being delivered accordingly. To ensure that OEFA's efforts to nurture professionalism actually deliver the expected outcomes, the emphasis on training and capacity building should be gradually put on prevention rather than on reaction (calculation of fines, methodology to assess type of non-compliance, amongst others), as well as on competencies internationally recognised as being key in inspectorates that are modern, effective and risk-oriented.

Recommendations

- Further efforts would be desired to develop more guidance tools as these are needed not only for inspectors, but also for other employees of the OEFA and the EFAs who deal with risk analysis and assessment, environmental evaluations, enforcement and planning. The former is particular

relevant as it is important to take into consideration the characteristics and the behaviour of the regulated subjects when deciding on measures and sanctions other that fines and when defining advisory inspections.

- OEFA would benefit from putting a special emphasis on the following areas of competencies and skills: result-oriented risk management, 'soft' and communication skills–especially towards business operators and stakeholders–compliance promotion techniques, and stakeholder engagement techniques, amongst others,
- In a context where concepts such as risk management, compliance promotion and proportionality are still new and in the process of being translated into tools and practices, and where formalism and burdensome procedures permeate the regulatory framework, it could be interesting and useful to consider developing some of the following, and reflecting on international experience in this regard:
  - Regulations, or at least guidelines, on all supervision-related activities of OEFA, such as advisory inspections, environmental impact assessments amongst others,
  - A risk assessment methodology, including if possible a) how to conduct the overall risk identification, analysis and evaluation process, as well as b) the process of prioritising inspection-related efforts and actions based on evidence-based risks.
  - A tool enabling inspectors and staff of OEFA and other EFAs to self-assess their competencies.
  - Develop guidelines, when not already available, for all inspection-related activities, as well as a general risk-assessment methodology.
  - If the development of standardised risk-based checklists is considered (see Chapter 11 on Compliance promotion), the preparation of guidelines to prepare them based on risk-assessment is also recommended. This will ensure that all checklists are developed following the same method, in line with good practice international experience.
  - Develop a list of core competencies needed by inspectors. Such competencies shall include all aptitudes and capabilities that are crucial for an inspector to perform their work based on the new guiding principles of environmental regulatory inspections and enforcement. Emphasis of training activities should be put on these competencies, and on risk prevention rather than enforcement.
  - Consider developing a tool for OEFA and the EFAs' staff to self-assess their competencies against a well-defined set of aptitudes and capabilities designed in line with good international practice (see previous recommendation).
  - In general, training and capacity building organised and provided by OEFA should emphasise competencies as result-oriented risk management, "soft" and communication skills, compliance promotion techniques amongst others. Moreover, the focus of the training should gradually move from methods and techniques related to reaction (for instance, calculation of fines and assessment of the gravity of violations) to prevention.

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Autoridad Nacional del Servicio Civil (n.d.), *Gestión del Rendimiento (SERVIR)*, https://gdr.servir.gob.pe/ (accessed on 15 October 2019). [5]

Kingdom, G. (2016), *Core competencies for regulators*, https://www.gov.uk/guidance/core-competencies-for-regulators (accessed on 15 October 2019). [6]

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OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264208117-en. [1]

OEFA (2018), *Plan de Desarrollo de las Personas 2018*, https://cdn.www.gob.pe/uploads/document/file/224650/RES-NRO-025-2018-OEFA-SG.pdf (accessed on 15 October 2019). [3]

OEFA (n.d.), *Academia de Fiscalización Ambiental del Organismo de Evaluación y Fiscalización Ambiental*, https://www.oefa.gob.pe/academia (accessed on 15 October 2019). [4]

Notes

[1] See *op. cit.*, I.3.

[2] See resolution of Executive Presidency No. 141-2016-SERVIR-PE.

[3] This is also shown in OEFA's webpage on regulations in force and draft regulations–most of available documents are related to sanctions and fines. See: https://www.oefa.gob.pe/normas-y-proyectos-normativos.

13 Reality check

This chapter focuses on the fact checking derived from institutional intervention. It presents the principle and international practices to evaluate outcomes, describes OEFA's view in the designing performance indicators and presents an assessment and recommendations aimed at helping OEFA be at the performance level expected by stakeholders.

> *Institutions in charge of inspection and enforcement, and the regulatory enforcement and inspection system as a whole, should deliver the levels of performance expected from them – in terms of stakeholder satisfaction, efficiency (benefits/costs), and overall effectiveness (safety, health, environmental protection amongst others,) (OECD, 2014[1]), (OECD, 2018[2]).*

Key indicators of performance should be regularly tracked: satisfaction and trust (among regulated subjects, citizens, consumers, amongst others,), efficiency (costs to the budget, burden to regulated subjects) and effectiveness (safety, health, environmental protection amongst others). While there are significant challenges and costs involved in data collection, performance tracking is indispensable for the good functioning of the system and its improvement.

The level of stakeholder satisfaction and trust should be stable or improving. Satisfaction and trust from regulated subjects is to be balanced by the perspective of those that are expecting protection from regulation (citizens, consumers, workers amongst others,) in terms of effectiveness. The level of stakeholder satisfaction should not be the only indicator of success since a lack of information among stakeholders or their bias might play a role when expressing their satisfaction.

Performance in terms of safeguarding social well-being and/or controlling risks should be stable or improving (correcting for possible external shocks). Inspections and enforcement have only an indirect and limited influence on the goals they seek to protect (e.g. safety, health), thus their performance should be assessed in terms of trends and correcting for external shocks. It is also crucial to correct for the quality of data and ad hoc studies when the existing ones are insufficient.

Efficiency in terms of social well-being balanced with costs for the state and burden for regulated entities, should be stable or improving. Inspections and enforcement create costs for the state and burden for regulated subjects. These costs should to be tracked regularly in order to balance them against performance in terms of effectiveness.

Proliferation of indicators and data points

OEFA has set a number of indicators – in particular in OEFA's Institutional Strategic and Operational Plans, as well as in OEFA's PLANEFA – aimed at assessing the efficiency and effectiveness of the agency, as well as stakeholders' satisfaction. Indicators are rather numerous, which may lead to misperception as there are many indicators in different documents, some documents overlap (e.g. PEIs for 2017-2019 and 2019-2022).

Results currently included t in Institutional Memories of OEFA reflect outputs – e.g. number of complaints, types of violations, number of fines, number of administrative measures imposed, non-compliances remedied. Publication of the number of sanctions and other measures imposed contribute to transparency and accountability, but does not reflect the agency's approach in terms of public welfare, and OEFA has asserted that this is not their purpose. A similar situation applies to most of the results for 2018 contained in the Assessment Report of PEI 2017-2019 – in particular, percentage of business entities inspected, percentage of violations confirmed in the second instance – as well as other indicators, for instance those set in the POI for 2018 and in the PEI for 2019-2022.

Similarly, OEFA's bulletin (OEFA in Figures) provides statistics and data on the agency's activities on a quarterly basis, but currently mostly in terms of outputs – not outcome indicators. In addition, the results of measurement are not always easy to find, and it is often unclear to which indicator(s) relate the data that are made available to the public (for instance in OEFA in Figures).

The former is mainly because most indicators are recent introductions (e.g. those set in OEFA's PLANEFA for calendar year 2019) and have not been measured yet. Furthermore, for the moment, OEFA's quarterly statistical reports do not differentiate among different types of "results". OEFA's yearly and quarterly reports do not only report on indicators – such as the compliance rate – but also give information needed e.g. for

accountability purposes (on the activities of the agency, such as the number of comments received during consultation processes).

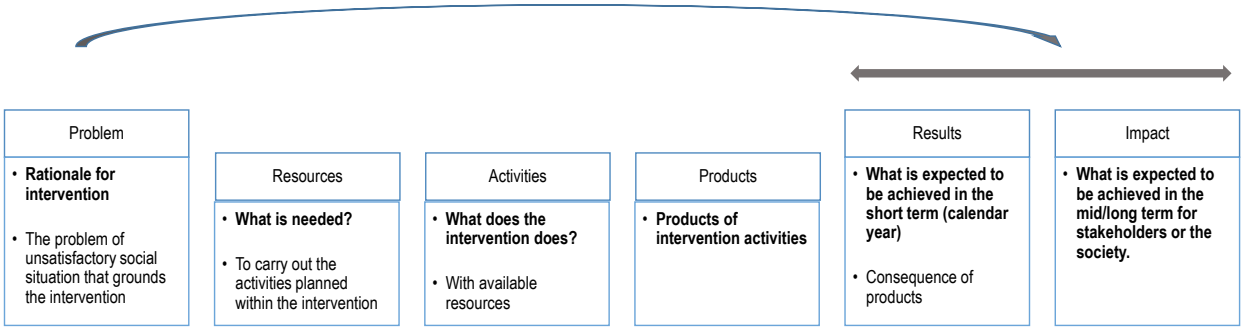
While the effort made by OEFA to ensure transparency concerning its activities, actions amongst others, is remarkable, the proliferation of numbers, graphs and various information creates some confusion when looking for meaningful data related to OEFA's performance. OEFA has reported to have acknowledged the need to "clean up", or better categorise, the information provided in quarterly and annual reports. Results of measurements reflecting outcomes of the agency should start being available at the end of this calendar year. Moreover, in the process for the definition of indicators, OEFA could clarify where and when relevant measurements can be found for each set of indicators.

Newly-introduced performance indicators

Several indicators have been set to measure OEFA's performance in terms of safeguarding social well-being and/or controlling risks.

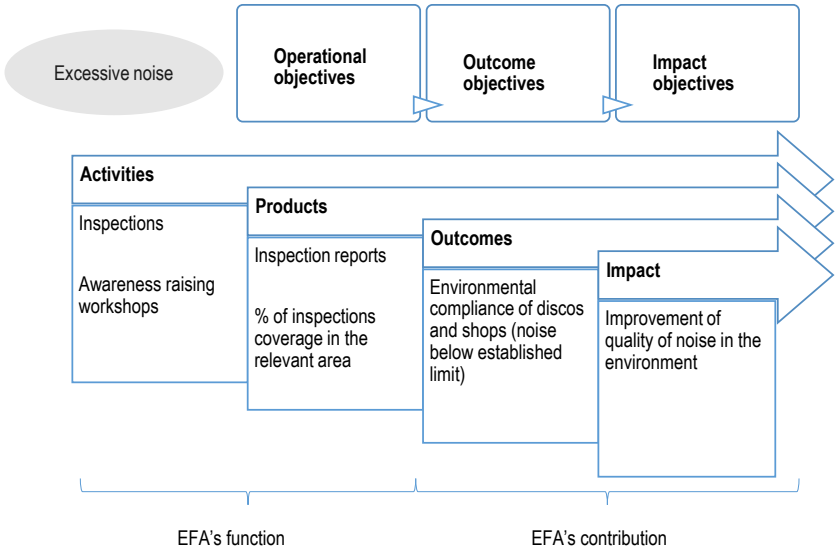
PLANEFAs prepared for all EFAs for fiscal/calendar years 2019 and 2020 aim at introducing indicators developed based on a theory of change, as shown in Figure 13.1, Figure 13.2 and Figure 13.3. Workshops on the preparation of these indicators have been/are being delivered.

Figure 13.1. Theory of change used to design the PLANEFA indicators



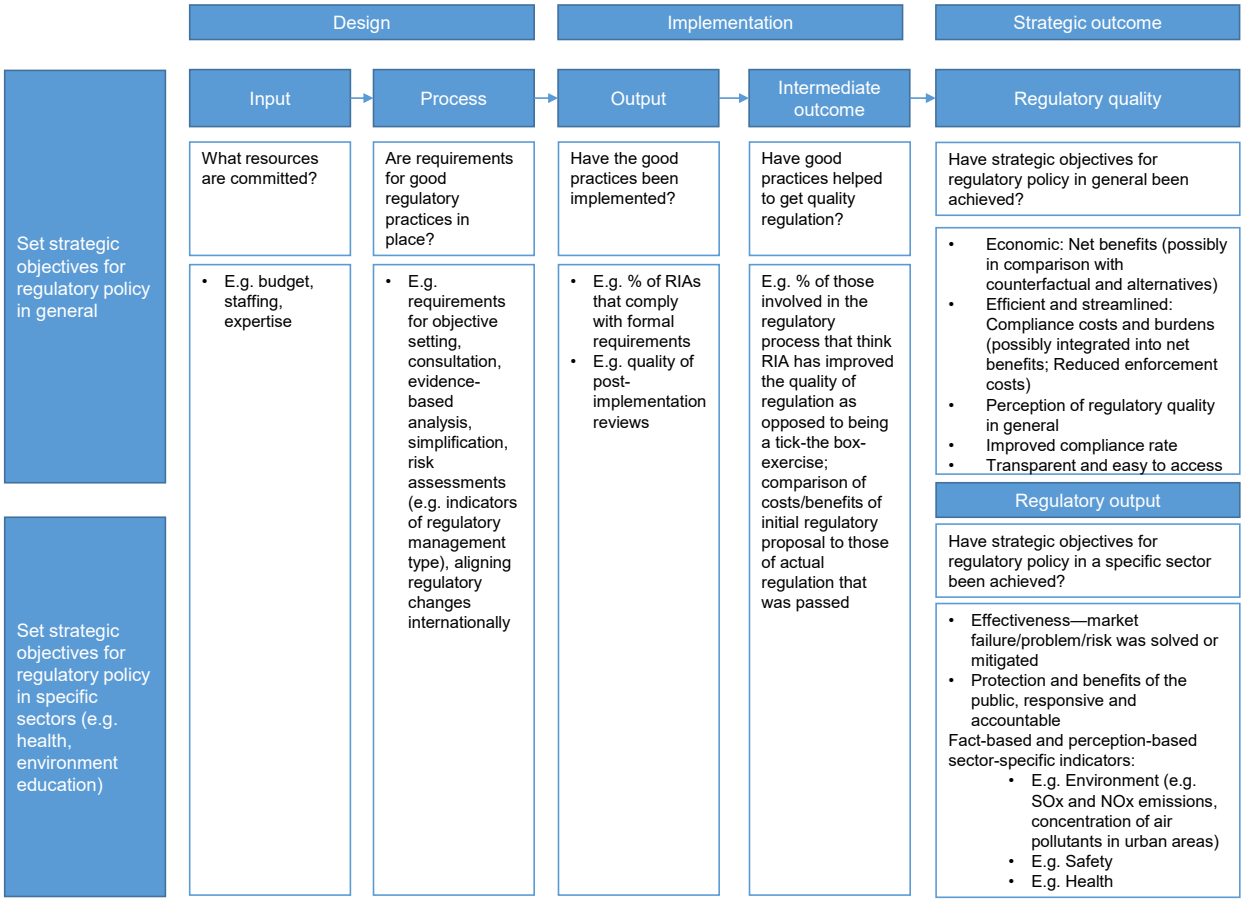
Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

Figure 13.2. Practical example on noise



Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed 14 October 2019).

Figure 13.3. The framework for regulatory policy evaluation



Source: OECD (2014[4]), *OECD Framework for Regulatory Policy Evaluation*, Paris, https://dx.doi.org/10.1787/9789264214453-en.

OEFA has developed the methodology to design indicators in PLANEFAs based of a series of sources,[1] including the OECD's *Framework for Regulatory Policy Evaluation* (2014), as reproduced in Figure 13.3. PLANEFA *Guidelines* establish that EFAs must have indicators that allow measuring the effectiveness of the performance of environmental inspections and enforcement, such as the reduction of risks and damage prevention with regard to the environmental issue that has been identified, in order to increase social welfare.[2]

OEFA's current PLANEFA has impact indicators. Examples of these are: decrease in concentration of contaminants (%), improvement in the population's perception in the area of OEFAs' influence, number of hectares with achievement of compliance, number of people directly benefitted by OEFA's intervention, amongst others, (see Chapter 2 on Evidence-based enforcement and OEFA's PLANEFA for 2019, p. 36). Indicators in terms of 'results' (or outcomes), often in terms of compliance achieved are also included. Then specific indicators are established for each sector of responsibility of OEFA, based on the same method.

We can see in OEFA's *Institutional Strategic Plan* a real effort in establishing indicators, based on the four strategic objectives set for the 2019-2022 period. As said in Chapter 6 on Long-term vision, such objectives are 1) strengthening OEFA's performance; 2) enhance compliance with regulatory requirements among regulated subjects; 3) "modernise" OEFA's institutional management; and 4) reduce OEFA's vulnerability with regard to risk of disaster.

The indicator set for strategic objective (2) is the average percentage of compliance with regulatory requirements checked in inspected operators. Then each indicator is combined with several institutional strategic actions to support the expected outcome. To continue with this example, the relevant institutional strategic actions are the following:

- (1) Percentage of preventive and responsive[3] environmental assessments serving as technical input to environmental enforcement actions
- (2) Percentage of administrative measures imposed at the inspections' stage complied with by the regulated subjects
- (3) Percentage of recommendations in inspections' reports confirmed by OEFA's directorate in charge of enforcement and incentives imposition
- (4.1) Percentage of decisions determining administrative responsibility confirmed upheld at first instance
- (4.2) Percentage of infractions upheld at second instance
- (5) Percentage of commitments made by OEFA in dialogue platforms that have been met

This is a useful and well-constructed set of indicators, which aspire to measure compliance, although it does not necessarily measure actual environmental protection.[4]

However, as already mentioned in Chapter 6 on Long-term vision, such objectives and indicators could be taken further, considering that two main Sectoral strategical objectives set by the Ministry of Environment are a) "improving the conditions of the quality of the environment to protect peoples' health and ecosystems", and b) 'strengthening environmental awareness, culture and governance'. While PLANEFA's sectoral indicators take more systematically into account fundamental elements such as performance in terms of protection of the environment and the health of the people, the PEI (Institutional Strategic Plan) somewhat fails at getting to the bottom. Percentage of resources devoted to a) preventive and b) reactive actions (with the objective of reducing the latter) should be included.

According to CEPLAN's *Guidebook for Institutional Planning*, OEFA should limit itself to objectives that relate, at most, to 'initial results' of public policy. From this perspective, a number of objectives, and indicators, set by OEFA in their PEI and PLANEFA go beyond these instructions. The CEPLAN guidelines seem to limit the capacity of OEFA to continue and expand the efforts started in the design and adoption of objectives and indicators in terms of outputs, to focus and the effectiveness of the agency in terms of protection of the regulatory goal. Indicators and data used to assess the performance of the activities of inspection and enforcement authorities should be focused on outcomes and impact – i.e. reducing risks and the number of accidents and other incidents, protecting objects of value. They should help to understand whether activities carried out are useful in terms of regulatory goals. Measuring outputs is not meaningful. It is a circular indicator, which shows the achievement of certain activities. On this topic, see Box 13.1.

Box 13.1. Measuring outputs and compliance

Measuring outputs

Many regulatory delivery institutions use outputs, and particularly inspection numbers, as a performance indicator. It is, however, a circular reference: increasing the volume of work will automatically lead to assuming performance has increased if the two are equated, and will miss the purpose to assess whether the work was effective or not.

In fact, output measures provide no information as to the timeliness of an enforcement intervention. Measuring only outputs means that the more an agency produces 'activity', the higher its 'rating' will be, even if it completely fails at its mission. However, this often happens in regulatory delivery, based on an assumption among many that 'more' automatically means 'better', that more inspections and sanctions will invariably create higher compliance and better outcomes. This is anchored in purely deterrence-based models of compliance, and in the assumption that better compliance is identical with better outcomes (e.g. safety). Moreover, giving incentives to inspectorates to inspect (and use enforcement measures) as much as possible distracts them from considering actual outcomes – both in terms of the public welfare goals they are supposed to help achieve, and of the social and economic impact of their activities.

Measuring compliance

Measuring compliance levels, and using their variations to assess regulatory delivery performance, would appear to relate directly to regulatory mandates and the aim of delivery activities. However, it can be problematic.

First, there is the imperfect link between compliance and desired results: only 'prescriptive' technical norms would seem to give the certainty that what is required from the business corresponds to the intent of the regulation. However, these norms leave business uncertain as to how to reach the desired result and put inspectors in a difficult situation due to time-lags or third-party effects.

The second problem is the difficulty of obtaining reliable compliance data. Businesses have an imperfect understanding of what full compliance would be, and are reluctant to report fraud and violations. Inspectors have a number of incentives to report compliance levels that may differ from reality, and of course never have a full view of the level of compliance in any given business, even one that they inspect. A raw compliance rate is not enough in any case, as it should be corrected by the level of risk or harm created by different violations.

A third reason for caution is that maybe full compliance with all regulations is not always a desirable goal. Though it may theoretically be so, achieving full compliance may lead to excessively high enforcement and compliance costs.

Source: Russell and Hodges (2019[5]), *Regulatory Delivery*, Hart Publishing.

Operational and strategic documents of OEFA also reflect an attempt to set indicators to measure the efficiency of the agency.

The Institutional Memory of OEFA shows a significant decrease in the duration of the preparation of inspection reports – from 274 days on average in 2016 to 57 days in 2018 – as well as in the number of pending reports – from 11 185 in September 2016 to 49 in December 2017. However, there is no indicator reflecting the performance in terms of social well-being balanced with costs for the state and burden for regulated entities. Also, the there are no indicators whether these tasks contribute to actual positive outcomes for regulated entities.

Interesting indicators have been set in the PEI in term of strengthening capacities within OEFA, and gender-oriented human resources' management. These are to be measured starting in 2019.

Measurement of stakeholder satisfaction

The level of stakeholder (businesses, civil society) satisfaction and trust is being measured to some extent. A first survey on "Perception the Performance of Environmental Supervision in Prioritized Socio-environmental Conflict Areas" carried out on 2017 showed that 80% of respondents – out of 723 respondents who knew about OEFA – did not trust the agency (OEFA, n.d.[6]). The survey was conducted soon after the new management of OEFA took over, and is to be conducted again at the end of 2019. In parallel the level of satisfaction with regard to citizens' attention services has also been tracked – as an indicator established in the PEI – through surveys carried out by the staff in charge of Assistance to Citizens in OEFA and in local delegations of OEFA. The proportion of respondents satisfied was of 95.94% in 2018, somewhat higher than that of 2017 (94.68%). However, to increase the reliability of the data, such surveys should be administered by others instead of the staff for which they are a performance indicator.

These results suggest that OEFA is seen as responsive to citizens' queries, but that trust in its activities is being challenged in socio-environmental conflict areas. What is missing is measurement of trust by stakeholders also in areas that are not sensitive from a social and political perspective, as well as satisfaction and trust among inspected subjects.

Assessment

OEFA has set a number of indicators aimed at assessing the efficiency and effectiveness of the agency, as well as stakeholders' satisfaction. Indicators on trust and satisfaction could also include inspected entities' feedback – and OEFA needs to pay attention to the quality of collected data.

Significant efforts have been made to ensure that the performance of OEFA is measured though a number of indicators. Available results mostly show measurements mostly in terms of outputs, as most 'effectiveness' indicators in terms of outcomes have been set recently, and have not yet been measured.

"Effectiveness" indicators should aim at measuring the impact of the agency's operations in terms of environmental situation to understand whether activities carried out are useful in terms of regulatory goals, and how to adjust/improve them. OEFA's scope to do so is somewhat limited by the fact that it is MINAM who has the responsibility to define and report on effectiveness indicators related to environmental protection, and this is something that needs to be reconsidered by the Peruvian government (and this applies to all inspection and enforcement authorities).

Indicators aimed at measuring the efficiency of the agency should be further improved, to effectively consider the performance in terms of social well-being balanced with costs for the state and burden for the private sector.

Recommendations

- There is a variety of indicators of OEFA's performance, as well as a multitude of data on OEFA's activities (including within the agency). There is a need for OEFA to differentiate and classify better the reported indicators, as well as to clearly communicate to the public when and where these can be found. OEFA may also want to consider informing the public and stakeholders about the different types of indicators, why and in which document they are set out (e.g. by displaying this information clearly on their website, by means of a section within the annual report amongst others).
- It is indispensable to strengthen the focus on actual results indicators (effectiveness). A clear difference between indicators of volume of activities and outputs and effectiveness indicators should be made.

- The MINAM should consider allowing OEFA to develop performance indicators more oriented to measure effectives of their activities on the environment and other key policy objectives. “Effectiveness” indicators should aim at measuring the impact of the agency’s operations in terms of environmental situation so as to understand whether activities carried out are useful in terms of regulatory goals, and how to adjust/improve them. Based on this, it is recommended that OEFA refine their current indicators and develops new ones to ensure that they focus on what is meaningful – number of accidents and other incidents, amount of illegal discharges, percentage of resources devoted to a) preventive and b) reactive actions, amongst others,
- OEFA should reconsider the method used to measure the level of satisfaction with regard to citizens’ services, by including the measurement of trust from stakeholders in general, as well as the satisfaction and trust among inspected subjects.
- Indicators aimed at measuring the efficiency of the agency should effectively consider the performance in terms of social well-being balanced with costs for the state and burden for the private sector.
- The way information is communicated in quarterly/annual reports need to be improved to ensure that performance indicators are clearly distinguished from indicators that relate to activities and outputs.
- Clarify whether reactions of stakeholders for processes different from *ex ante* consultation of OEFA’s documents and regulations are being assessed and taken into account. If this is not done, develop such a practice.

References

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OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, https://www.gob.pe/minam/oefa (accessed on 14 October 2019). [3]

Russell, G. and C. Hodges (2019), *Regulatory Delivery*, Hart Publishing. [5]

Notes

[1] OEFA has established this methodology by using different sources: Banco Mundial (2011) *La evaluación de impacto en la práctica*; CEPAL (2005) *Manual para la evaluación de impacto*; IVALUA (2009) *Colección Ivalua de guías prácticas sobre evaluación de políticas públicas*; JPAL (2017) *Implementing randomized evaluations in government*.

[2] See Art. 11 of the relevant *Guidelines*.

[3] Responsive environmental impact assessments are carried out following the occurrence of a negative impact on the environment to establish the responsibility of the accident/incident/amongst others.

[4] Compliance cannot be equated with results in terms of environmental protection, because norms are inherently imperfect and can never entirely predict environmental (or other) results.

14 International experience on inspection policies and enforcement

This chapter presents three international case studies on regulatory enforcement and inspections: the Environmental Protection Agency in Ireland, the United Kingdoms' Health and Safety Executive and the Lithuanian State Food Veterinary Service. All case studies present the institutional background, followed by practices before, during and after the inspection process.

Ireland: Environmental Protection Agency

The Environmental Protection Agency (EPA) is the institution in charge of protecting and improving the environment in Ireland. The Irish government established the agency in 1993 as a regulatory and oversight body under the Department of the Environment (now the Department for Communications, Climate Action and Environment, DCCAE). The agency's board is composed of a Director General and five directors, each in charge of one of the five offices – Office of Environmental Enforcement, Office of Environmental Sustainability, Office of Evidence and Assessment, Office of Radiation Protection and Environmental Monitoring, and Office of Communications and Corporate Services.

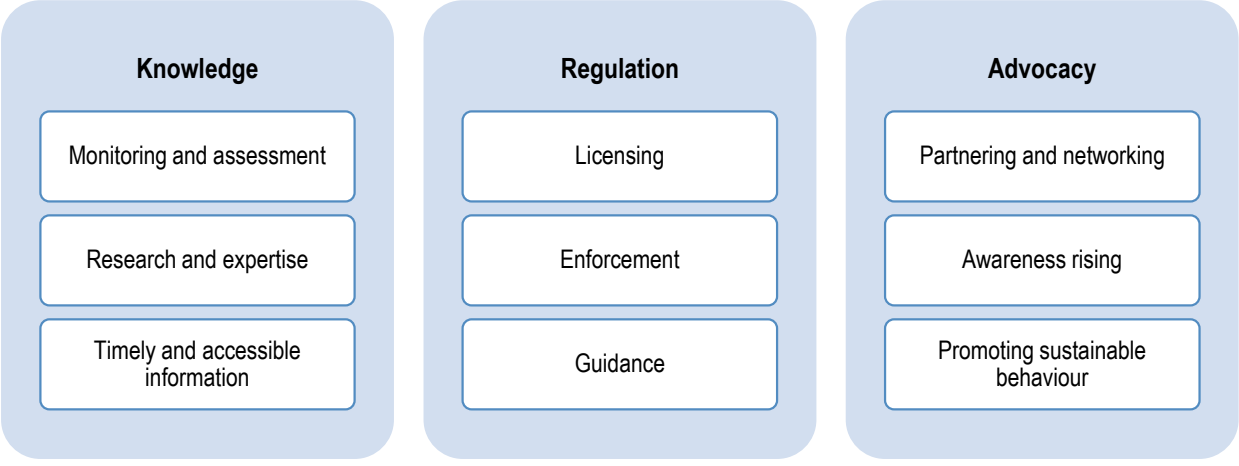
According to the Environmental Protection Act (1992), the EPA is responsible for:

- Environmental licensing, regulation and control of activities
- Monitoring the quality of the environment
- Providing support and advisory services to local authorities and other public institutions
- Promoting and co-ordinating environmental research
- Liaising with the European Environment Agency

The EPA's regulatory functions cover water, wastewater, waste and industrial emissions, dumping at sea, volatile organic compounds (VOCs), sources of ionising radiation, genetically modified organisms (GMOs), dumping at sea and greenhouse gases. In order to carry out its functions, the agency relies on the co-operation with other institutions. The EPA has a dual role regarding its inspection and enforcement duties. The agency directly inspects facilities listed in Table 14.1 and it supervises (and provides advice to) the 31 local authorities who are in charge of enforcing a group of environmental regulations. Local authorities inspect and monitor air quality, noise, small-scale waste facilities, wastewater, and water quality in their jurisdictions.

The agency organises its functions in three broad categories – knowledge, regulation and advocacy Figure 14.1). These functions reflect the EPA's strategic goals for the period 2016-2020 and acknowledge the importance of an integral approach to environmental protection (Environmental Protection Agency, 2016[1]). The EPA obtains the financial resources to carry out its functions from two sources: the Irish government – including the Environmental Fund – that accounts for approximately 80% of the funds, and fees and income derived from the EPA's regulatory activities (e.g. licencing).

Figure 14.1. Main functions of the EPA



Source: Environmental Protection Agency (2016[1]), *Strategic Plan 2016-2020: Our Environment, Our Wellbeing*, https://www.epa.ie/pubs/reports/other/corporate/EPA_StrategicPlanWeb_2018.pdf (accessed 6 September 2019).

Environmental evidence and knowledge is a major focus of EPA. The agency monitors the quality of air and water, co-ordinates research activities, emits technical reports and publishes environmental data. The EPA uses data to improve its performance and to help stakeholders inform their decisions. In particular, the Office of Evidence and Assessment (OEA) provides relevant and accurate environmental data through two initiatives: the water management programme and the environmental evidence programme.

As part of its regulatory activities, the EPA carries out licensing, enforcement of regulations and provision of guidance. According to the Waste Management Act (1996) and the Environmental Protection Act (1992), the EPA is responsible for enforcing environmental licenses through inspections, audits and monitoring (see Table 14.1 for a list of licensed activities). The Office of Environmental Enforcement (OEE), within the EPA, has the task of enforcing and promoting compliance of environmental regulation. Currently, the EPA has five regional inspectorates, all of them supported by an enforcement team, laboratories and field staff.

Table 14.1. Activities licensed and regulated by the EPA

Activities
Large scale waste facilities (landfills, incinerators, waste transfer stations)
Large scale industrial activities (pharmaceutical, cement, manufacturing, power plants)
Intensive agriculture (pigs, poultry)
Contained use and controlled release of Genetically Modified Organisms
Sources of ionising radiation (x-ray and radiotherapy equipment, industrial sources)
Large petrol storage facilities
Waste water discharges
Dumping at sea activities
Volatile Organic Compounds (VOC)
Carbon dioxide emissions trading

Source: Environmental Protection Agency (2019[2]), *The Environmental Protection Agency: Who we are- What we do*, https://www.epa.ie/pubs/reports/other/corporate/WhoweAre_digital_Sept_2019.pdf (accessed 10 September 2019).

The third emphasis of the EPA is advocacy. The agency promotes awareness and good environmental practices through marketing campaigns, including television programmes and resources for schools. In addition, the EPA collaborates with other agencies to foster the inclusion of environmental priorities into sectoral policies.

Evidence-based enforcement

The EPA focuses on environmental pollution prevention. To do this, it follows an enforcement policy based on five principles: risk based, focusing resources and regulatory activities that pose a risk to human health and/or the environment; proportionality in the application of environmental law; consistency in the approach to the use of enforcement powers and in deciding the appropriate enforcement response. In addition, transparency by being clear and open about what is expected of the regulated community, and the polluter pays principle to ensure that polluters are held financially accountable (Environmental Protection Agency, 2019[3])

Regarding the selection of the inspected units, the EPA's approach is to target the sites where the risk of pollution and damage to the environment is higher. The former is done through the collection of data and information that allows the prioritisation of inspections, audits and monitoring activities. The agency produces inspection and enforcement plans following the requirements established by the EU and by other relevant national regulations (The European Parliament and the Council of the European Union, 2001[4]).

The EPA has developed inspection or enforcement plans that include a risk-based approach to enforcement activities based on the regulated sector. For example, the National Inspection Plan 2018-2021: Domestic Waste Water Treatment Systems (Environmental Protection Agency, 2018[5]) offers a comprehensive description of the number of inspections to be carried during the year and the criteria used to assess the periodicity and location of site visits to homes with a septic tank system.

Before the inspection

Selection of the inspected units

The EPA selects the inspection sites, the periodicity of the visits and the enforcement mechanism following a risk-based methodology and the legal requirements established in relevant legislation. As the inspection of all regulated entities is not possible, the agency prioritises the use of resources through several initiatives such as the Industrial Emissions Directive and the Remedial Action List.

- The Remedial Action List (RAL) was established in 2008 as a register of public water supplies with the most serious deficiencies and known to be most at risk in Ireland. It gathers data on water supplies at risk and is published every quarter. Since its creation, 92% of the sites have been removed from the list, as the necessary remedial actions have been completed. The dispositions and recommendations included in the RAL are binding.
- Industrial Emissions Directive (IED) is a legal instrument that regulates the release of pollutants from industrial installations across the European Union. Member states should carry out in site inspections of industrial facilities every one to three years following risk-based criteria (The European Parliament and the Council of the European Union, 2010[6]). The Annual Programme of Environmental Inspections is the EPA's inspection plan and ensures the coverage of all licensed installations through routine and non-routine inspections (Environmental Protection Agency, 2014[7]). According to the directive, the environmental inspection programme should consider the following elements:
  - General assessment of relevant significant environmental issues
  - Geographical area covered refers to all Irish counties
  - Register of the installations covered by the plan. The EPA's database of licensed installations is the main input for this point.
  - Procedures for drawing up programmes for routine are based on three criteria: risk analysis, environmental issues at all sites and that are not reflected in the risk analysis and additional sectoral requirements.
  - Procedures for non-routine inspections. Non-routine inspections take place in three different cases: occurrence of serious environmental complaints, incidents, accidents or non-compliances; identification of a significant case of non-compliance and investigation of complaints about licensed facilities.
  - Provisions on the co-operation between different inspection authorities
- Radiation: Inspections of licensees and registrants are determined by the sector, the practices that are carried out at the site and past performance.

In addition to using the methodologies presented above, the EPA also calculates risks using the Risk Based Methodology for Enforcement, which takes into account the following three elements:

- Complexity: Includes six categories, based on the type of activities carried out and the risk that they entail.
- Location: It is based on criteria such as distance to the nearest sensitive receptor, protected sites, groundwater type and vulnerability.

- Enforcement history: It refers the previous 12 months and considers both the non-compliances and the compliance investigations (see Box 14.1 for more information).

Scores achieved in these three categories are allocated into 12 different categories (A1, A2, A3, B1, B2, B3, C1, C2, C3, D1, D2, D3) that determine the enforcement efforts. For example, sites in the A categories are visited more frequently than sites in the B category and so on (Environmental Protection Agency, 2014[7]).

The EPA carries out planned inspections and non-routine environmental inspections, which are the result of specific situations such as complaints, major non-compliance issues or inaction of the local authorities. In order to promote stakeholder engagement, the agency has created a mobile application that allows citizens to submit their complaints to the EPA. The agency assesses the complaints and, when adequate, provides the local authorities with the opportunity to address the issue before getting involved. Additionally, the EPA has put in place a system of compliance promotion using a behavioural insights approach, see Box 14.1.

Box 14.1. Compliance promotion through behavioural change

National Priority Sites

The EPA uses the National Priority Sites System to signal the industrial and waste facilities that do not comply with environmental regulation. Currently, it follows a methodology that measures the performance of licensed sites based on four criteria – compliance investigations, complaints, incidents and non-compliance. Each licensee receives a final score that is the sum of the scores awarded for each individual criterion. If a site scores above the 30 points threshold (the higher the score, the poorer the performance) and has a compliance investigation score above 10 points, it is included in the NPS.

- Compliance investigations (CI): The EPA opens a compliance investigation when it recognises an issue that has the potential to generate environmental damage or identifies a situation that is causing a negative impact on the environment. Compliance investigations are classified according to the environmental risk and the stage of the investigation – open or close. The current methodology for NPS, establishes that CIs related to a nuisance issue can only be scored medium or high if a non-compliant issue has been recorded by the EPA during the previous 12 weeks and/or if a CI has not been addressed to the satisfaction of the EPA

Table 14.2. Compliance investigations

Compliance investigation rating		
	Open CI	**Closed CI**
High	20 points	4 points
Medium	10 points	2 points
Low	3 points	1 point

Note: Only the top three highest scoring Compliance Investigations are taken into account.
Source: Environmental Protection Agency (2014[8]), *Guidance on assessing and costing environmental liabilities*, https://www.epa.ie/pubs/advice/licensee/epa_oee%20guidance%20and%20assessing%20web.pdf (accessed 12 September 2019).

- Complaints: The EPA assesses all the complaints derived from the public, however not all of them derive in a compliance investigation. For the purpose of the NPS, only complaints leading to a medium or high CI are taken into account. In these cases, the methodology assigns one point per complaint and are capped at 20 points.

- Incidents: If there is a breach of a license condition, the EPA classifies the incident according to its impact – Catastrophic (30 points), Very serious (20 points), Serious (10 points), Limited (5 points), Minor (no score).
- Non-compliances: Licensed facilities are required to notify the EPA when license breaches take place. Non-compliance notifications are issued every time a breach occurs. The points assigned in cases of non-compliance depend on whether the licensee notifies the EPA or not. One point is assigned if the incident is notified and five in case it is not communicated to the EPA.

The EPA compiles the list of NPS sites every quarter based on data from the previous six months. As of June 2019, there were five NPS – less than 1% of the total licenced facilities in Ireland. The publication of the NPS has worked as a naming and shaming mechanism, resulting in many licensees improving their compliance.

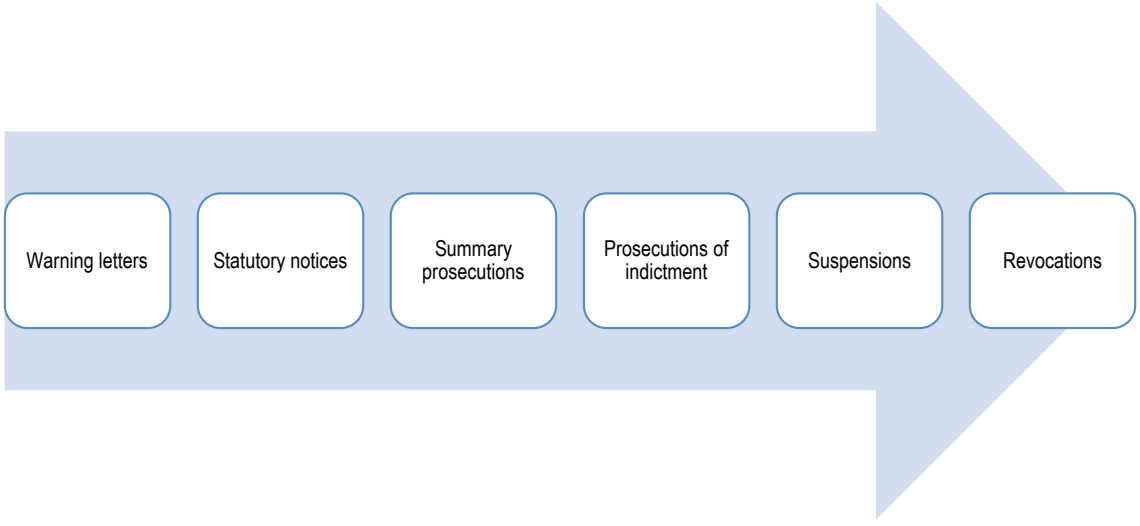
Source: Environmental Protection Agency (2014[8]), *Guidance on assessing and costing environmental liabilities*, https://www.epa.ie/pubs/advice/licensee/epa_oee%20guidance%20and%20assessing%20web.pdf (accessed 12 September 2019).

Responsive regulation

The EPA sanction scheme provides the agency with different enforcement methods, based on the severity of the infraction. This allows for a balanced and proportionate enforcement, particularly if risk criteria are used to target inspections. Figure 14.2 shows the mechanisms that the Office of Environmental Enforcement uses. These tools range from warning letters up to revocations (the hardest sanction).

The EPA follows the polluter pays principle, which states that the company or person that pollutes should pay for the damages. Given that remediation of environmental damages requires a significant amount of resources, the Environmental Protection Agency has mandated the creation of financial provisions – insurance, bond, guarantee, fund – to deal with environmental incidents and closure costs. The amount of the provision is based on the assessment and costing of environmental liabilities. As of 2019, the EPA had secured more than EUR 700 million in financial provisions for environmental liabilities (Environmental Protection Agency, 2020[9]) (Environmental Protection Agency, 2018[10]).

Figure 14.2. Enforcement actions used by EPA



Note: More severe actions to the right of the figure.
Source: Environmental Protection Agency (2019[2]), *The Environmental Protection Agency: Who we are- What we do*, https://www.epa.ie/pubs/reports/other/corporate/WhoweAre_digital_Sept_2019.pdf (accessed 10 September 2019).

Co-ordination with other agencies

The EPA has formal collaboration agreements with a broad number of government institutions, regulators and stakeholders. Currently, the agency has 21 Memoranda of Understanding (MoU) with 23 different entities. Furthermore, the EPA has co-operation arrangements with enforcement institutions such as the National Bureau of Criminal Investigation, the Criminal Assets Bureau and the Office of the Director of Corporate Enforcement. Coordination with these agencies reduces inconsistencies and promotes a better use of resources in the public administration (see Box 14.2 for an example of co-ordination with local authorities) (Environmental Protection Agency, 2006[11]).

One of the co-ordination fora in which the EPA participates is the Network for Ireland's Environmental Compliance (NIECE). The NIECE was established in 2004 with the objective of improving environmental protection in the country. It gathers relevant stakeholders for environmental enforcement – local authorities, the EPA, the County and City Managers Association, Inland Fisheries Ireland, the Health Service Executive, DCCAE, DHPLG, among others. NIECE's structure includes a steering committee (chaired by the EPA) that is in charge, among other things, of identifying the priority areas. The NIECE has defined three thematic areas of interest (waste, water and air/climate), each area has an assigned working group inside the network. Working groups integrate relevant stakeholders from different institutions and levels of government and work collaboratively to address specific environmental issues (Network for Ireland's Environmental Compliance & Enforcement, 2018[12]).

Box 14.2. Inspection of the domestic waste water treatment systems

According to the Water Services (Amendment) Act 2012, the EPA should prepare a national inspection plan of domestic wastewater treatment systems (DWWTS), or septic tank systems. Local authorities are in charge of the inspection of the DWWTS, while the EPA provides guidance, establishes the responsibilities and attributions of the relevant parties (homeowners, DHPLG, local authorities and EPA) and determines the minimum number of inspections that local authorities should conduct per year.

Using the information available and a risk-based methodology, the EPA defines the minimum requirements that local authorities should fulfil. In 2016, approximately 489 669 households had a septic tank system in Ireland (Environmental Protection Agency, 2018[13]). According to the National Inspection Plan 2018-2021, local authorities should carry out at least 1 000 DWWTS inspections per year. The EPA audits local authorities

Each local authority is responsible for the selection of the sites and the allocation of resources for enforcement. Local authorities document the justification and methodology followed for the selection of priority inspection areas in the local site selection plan. On the other hand, the EPA audits local authorities and evaluates their compliance with the requirements established in the National Inspection Plan. If a local authority fails to perform its functions, the EPA may take enforcement action. Moreover, the EPA helps the 31 local authorities through workshops for the inspectors, letter templates, and guidance. Additionally, the agency publishes rankings and reports that describe the local authorities' performance concerning the requirements established in the National Inspection Plan (Environmental Protection Agency, 2018[13]).

Source: Environmental Protection Agency (2018[13]), *National Inspection Plan 2018-2021: Domestic Waste Water Treatment Systems*, http://www.epa.ie/pubs/reports/water/wastewater/NIP%202018%20to%202021_web.pdf (accessed 10 September 2019) and Environmental Protection Agency (2017[14]), *Focus on Local Authority, Environmental Enforcement 2014-2016 Performance Report*, https://www.epa.ie/pubs/reports/enforcement/performanceframework/Focus_on_Local_Authority_Environmental_Enforcement_2014-2016_Performance_Report.pdf (accessed 13 September 2019).

During the inspection

The EPA's inspection and enforcement system includes on-site inspections, audits, desk-based assessments and monitoring. Regarding on-site visits and audits, the EPA prepares guidance for inspectors, offers training and provides kits with useful information, both for representatives of the agency and for regulated subjects.

The inspection procedure and visit frequency depend on the nature of the regulated sector. For example, on-site visits to facilities with an industrial and waste license (1 472 sites in 2019) include sample collection, monitoring, incident investigations and complaints investigations. In 2019, an EPA inspector visited at least 74% of these locations (Environmental Protection Agency, 2019[15]).

The inspection process of licensees and registrants that are subject to Ionising Radiation Regulations is comprised of two elements: administrative details and audit of equipment/facilities. The former comprises a revision of the relevant documentation, testing results, and dosimetry, among others. The latter refers to an on-site visit that allows the inspector to examine visually the equipment and protective gear. The inspector may make measurements if she deems it appropriate.

Local authorities are required to send homeowners a pre-inspection letter for the inspection of domestic wastewater treatment systems. This document informs regulated subjects about the on-site visit. Local inspectors are responsible for checking the septic tank system and producing a report within 21 days. If the homeowner desires to have a re-inspection, there is a EUR 20 fee to be covered by the regulated subject. Depending on the household income, the government provides grants aimed at easing the cost of fixing the issues (Environmental Protection Agency, 2018[13]).

After the inspection

The EPA elaborates an inspection report after each visit. These documents are publicly available and consist of a template where inspectors can explain the compliance breaches (if any) found during the inspection visit. Regulated subjects are allowed to submit a response to the report prepared by the EPA (this document is also public). The EPA also uses the information and data gathered through the inspections as input for the design of inspection plans and strategies.

The EPA's enforcement policy promotes the *polluter pays principle*, which aims at holding those responsible for environmental damages accountable for their actions. To do so, the agency imposes sanctions and fines proportional to the harm from profiting of the damage. Although, in 2017, the EPA awarded sanctions for EUR 390 074 (Environmental Protection Agency, 2018[10]), legislative limits on fines are deemed too low by legal experts. The EPA publishes relevant data regarding the punitive action and prosecution process for each sanction that it imposes – dates in which main events took place, charges, name of the judge and the amount of the fine.

Feedback mechanisms

The EPA carries out efforts aimed at improving the quality of their services, reducing environmental damage and increasing efficiency in the use of resources. The agency's use of IT systems has created feedback loops where data collected through inspection procedures can be analysed and processed, thus informing the policy design.

A clear example of the former is the licensing process for Industrial Emissions Licensing (IEM), Integrated Pollution Control Licencing (IPC) and Waste Licencing applications. Currently, the application process is available online, which has promoted a better allocation of resources and has compelled the EPA to analyse the rationale behind the licencing procedure. This assessment was used to modify, and improve, the application template.

United Kingdom: Health and Safety Executive

In the United Kingdom, all employers must protect their workers from hurts and ills through work. Otherwise, a regulator such as the Health and Safety Executive (HSE) or any local authority can take actions against the employer under criminal law (Health and Safety at Work Act 1974 - HSWA).

Under the scope of the criminal law, when employers do not comply with the HSWA, they can get an improvement notice (see section 21 of HSWA), or they can be prosecuted. The authority in charge of enforcing HSWA depends on the industry. For instance, local authorities are responsible for retailing, wholesale distribution, warehousing, hotel and catering premises, offices, and consumer or leisure industries. In the remaining industries, the HSE is the oversight body.

Moreover, any affected person can submit a compensation claim under the civil law. In this case, an employer may have to pay the worker a compensation due to hurts or ills at work. In most cases, employers must have an employer's liability insurance – it is a criminal offense not to have it. If the claim is successful, a court may rule in favour of the victim and award money as compensation.

About the Health and Safety Executive

According to the HSWA, all businesses must have a health and safety policy explaining how the employer will manage hazards and stakeholders' roles – if the business has more than five employees, it has to write down the policy. Thus, HSE supports business compliance publishing a concise guideline on how to write the policy, which must have at least three parts: statement of intent, responsibilities and arrangements. HSE also publishes an example and a template of an ideal policy (Health and Safety Executive, 2019[16]), (Health and Safety Executive, 2019[17]).

HSE also promotes the compliance of employers' obligation to assess risks affecting themselves and other people. HSWA indicates that an employer must assess and control risks at work, identifying the potential sources of harm and actions to prevent it. The results of the assessment must be recorded if the business has more than five employees. HSE publishes a risk assessment guide with templates, examples and a toolbox for risks control (Health and Safety Executive, 2019[18]).

HSE's enforcement activities

According to HSE, it emphasises prevention but it will enforce the HSWA when it is deliberately ignored. HSE secures compliance through inspections, other regulatory contacts, investigations and formal enforcement work. Actually, for some activities involving significant risks, hazards or public interests, the HSE provides permissions in forms of consents, licences, letters of conclusion, or acceptance of safety cases or reports.

Table 14.3 presents the strategy of HSE to accomplish its mission. The document indicate that the inspection process is a relevant tool to achieve one of the main objectives of the institution: secure effective management and control of risks.

HSE however, recognises that it is impossible to inspect all of 2.5 million business in Great Britain and consequently, it targets sectors and activities with the most serious risks – Table 14.3 indicates as a priority, targeting inspections on specific issues and activities. Box 14.3 presents the HSE's strategy to target priorities.

The objectives and tasks of HSE require fit-for-purpose financial resources. In 2018/2019, HSE's budget was GBP 223 million. The funding scheme of HSE for this period included several sources: parliament (59% in 2018/19), regulatory fees (33%) and commercial work (8%). Correspondingly, the operating expenditure was GBP 217.5 million – GBP 140 million were for staff salaries and GBP 78 million for other

operation costs as rentals, travel, accommodations, training, legal, shared services, technical support, scientific equipment, research and development, IT, etc.

HSE prioritises the use of financial resources according to the most serious risks, the industries with the greatest hazards and the sectors with the lower risk management records. According to HSE, inspections provide information to assess if the risk management is adequate, and if it finds any misconduct, investigations help to get the truth and increase the learning experiences. Furthermore, when the HSE assists employers with the setting of their health and safety obligations, the employer has to pay an intervention fee. In the period of 2018/2019, the income from this label was GBP 14 million.

Table 14.3. Health and Safety Executive's strategy

The prevention of death, injury and ill health to those at work and those affected by work activities			
↑			
Our objectives			
Lead and engage with others to improve workplace health and safety	Provide an effective regulatory framework	Secure effective management and control of risk	Reduce the likelihood of low-frequency, high-impact catastrophic incidents
↑			
Our priorities for 2019/20			
Continue to focus our activity on tackling ill health as part of the Health and Work Programme Promote proportionality in health and safety management Share the learning from our expert science and research with those who can influence workplace health and safety performance	Support the government's fundamental reform of the building safety system following the Grenfell Tower disaster Contribute to government-wide activities on the UK's departure from the EU	Target our inspections on specific issues and activities, including a sustained focus on work-related ill health Investigate to swiftly tackle and reduce risks, securing accountability for victims and their families Operate effective statutory schemes, ensuring the safe use of potentially harmful substances	Provide assurance that dutyholders are identifying and managing the major hazard risks they create Strengthen major hazard leadership and worker engagement Deliver robust and consistent regulation for decommissioning and dismantlement of offshore oil and gas infrastructure Secure improvements in the effective management of network assets including gas risers in high-rise homes Drive dutyholders to reduce the risk of offshore hydrocarbon releases Raise operators' focus on cyber security to ensure appropriate protection against major incidents
↑			
Enable improvement through efficient and effective delivery			
↑			
Our enablers			
Develop our strategy and put in place the building blocks to ensure we are fit for the future	Support our people to be the best they can	Secure a sustainable financial future for HSE	

Source: Health and Safety Executive (2018[19]), *Health and Safety Executive Annual Report and Accounts 2018/19*, Health and Safety Executive, http://www.hse.gov.uk/aboutus/reports/ara-2018-19.pdf (accessed 28 August 2019).

Box 14.3. HSE's strategy to target priorities

The HSE targets duty holders according to sectors with serious risks. The HSE has developed specific strategies for 19 categories of industry sectors (Health and Safety Executive, 2018[20]). The strategy includes a plan to cover, the health and safety performance, the top three priorities for five years and proposed actions. The priorities of each sectors are defined according to:

- The size of the industry and its demographics
- Death, ill and injury rates
- Potential risks

Other prioritisation's criteria is when information and intelligence indicates that health is a serious concern. The sources of information in this case are:

- Previous performance of duty holders
- Explicit concerns raised by workers or other stakeholders
- Investigations
- Reports of injuries, diseases and dangerous concerns – employees should report certain incidents at the workplace. See the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (HSE, 2013[21])).

Source: Health and Safety Executive (2018[20]), *Operational Guidance: Inspection Procedure*, http://www.hse.gov.uk/foi/internalops/og/ogprocedures/inspection/inspection-procedure.pdf (accessed 20 September 2019).

On average, the number of full-time equivalent staff in HSE during 2018-19 was 2 453 employees. As of March of 2019, 1 066 workers out of 2 426 were inspectors, visiting health, and safety staff – about 44% of the total headcount.

HSE's long term vision

The HSE publishes a business plan on a yearly basis. In such document, the regulator explicitly states the challenges ahead and its plans to address them. In the 2019/2020 business plan (see Box 14.4), HSE published data on illnesses and work related deaths, as well as the main regulatory actions to reduce such figures (Health and Safety Executive, n.d.[22]). For example, in the United Kingdom, over 2015-16, there were around 12 000 deaths per year from occupational lung disease, 1.4 millions of workers with work-related illnesses, 144 people killed at work, 30.7 millions of lost working days, amongst others. The actions of the HSE included 19 500 intelligence-led inspections, which ended in 91% of duty holders taking actions after the inspections over 2017-18. The HSE also recorded 6 000 investigations, 8 940 enforcement notices and 517 prosecution cases.

Box 14.4. The HSE's business plan of 2019/2020

The business plan for 2019/20 focuses on priorities to provide an effective regulatory framework, secure an effective management of risks, reduce the likelihood of low-frequency high-impact catastrophic incidents and promote improvement. Some of the priorities are the following:

- Support the government's reform of the building safety system.

- Contribute to government-wide activities on the UK's departure from the EU.
- Target inspections on specific issues and activities.
- Investigate to tackle and reduce risks, and securing accountability for victims and families.
- Operate effective statutory schemes and ensure the safe use of harmful substances.
- Assure that duty holders identify manage major hazards.
- Strengthen major hazard leadership and worker engagement.
- Deliver robust regulation of decommissioning and dismantlement of offshore oil and gas infrastructure.
- Improve the management of network assets including gas risers in high-rise home.
- Drive duty holders to reduce the risk of offshore hydrocarbon releases.

Source: Health and Safety Executive (n.d.[22]), *HSE Business Plan 2019/20*, http://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1920.pdf (accessed 23 September 2019).

Co-ordination and consolidation

The HSE works closely with other regulators and public agencies to ensure the most appropriate intervention – (Health and Safety Executive, 2018[19]). The objective is to lead and engage with others to improve workplace and health and safety. According to the HSE, it sets arrangements where laws overlap to promote co-operation, minimise duplication, co-ordinate joint regulatory activities, and share information and intelligence.

Local authorities focus on managing health and services in low-risk workplaces as offices, shops, warehouses and consumer services. The *Health and Safety (Enforcing Authority) Regulations 1998: A-Z guide to allocation* sets the limits in competences between the HSE and local authorities.

The HSE also controls major hazards in co-operation with the Environmental Agency, the Scottish Environmental protection Agency and the National Resources Wales. Besides, the HSE and the Department for Business, Energy and Industrial Strategy regulate oil and gas hazards jointly. The HSE also supports the Office for Nuclear Regulation, the Office of Road and Rail Regulation, the Driver and Vehicle Standards Agency, the Civil Aviation Authority and Maritime Coastguard Agency.

A complete list of agreements and memoranda of understanding is available in https://www.hse.gov.uk/aboutus/howwework/framework/f-2001-3.htm.

Information integration

HSE's policy is active on informing duty holders, workers and other stakeholders about the processes followed during inspections, complaints, expectations, duties, reports of incidents, objectives, and outcomes, amongst others. In http://www.hse.gov.uk/pubns/leaflets.htm, there are available pamphlets published by the HSE that are free of charge.

For example, the HSE publishes documents to inform the duty holders what to expect if an inspector calls. This document explains the objectives of the inspection, the information to be required, the information received after the visit, amongst others, (Health and Safety Executive, n.d.[23]). The document also provides information about disagreements with HSE's inspection decisions and the rights of duty holders on this matter.

Alternatively, HSE may endorse guidance publications made by other institutions when there is a joint participation, common topics, sectors, etc.

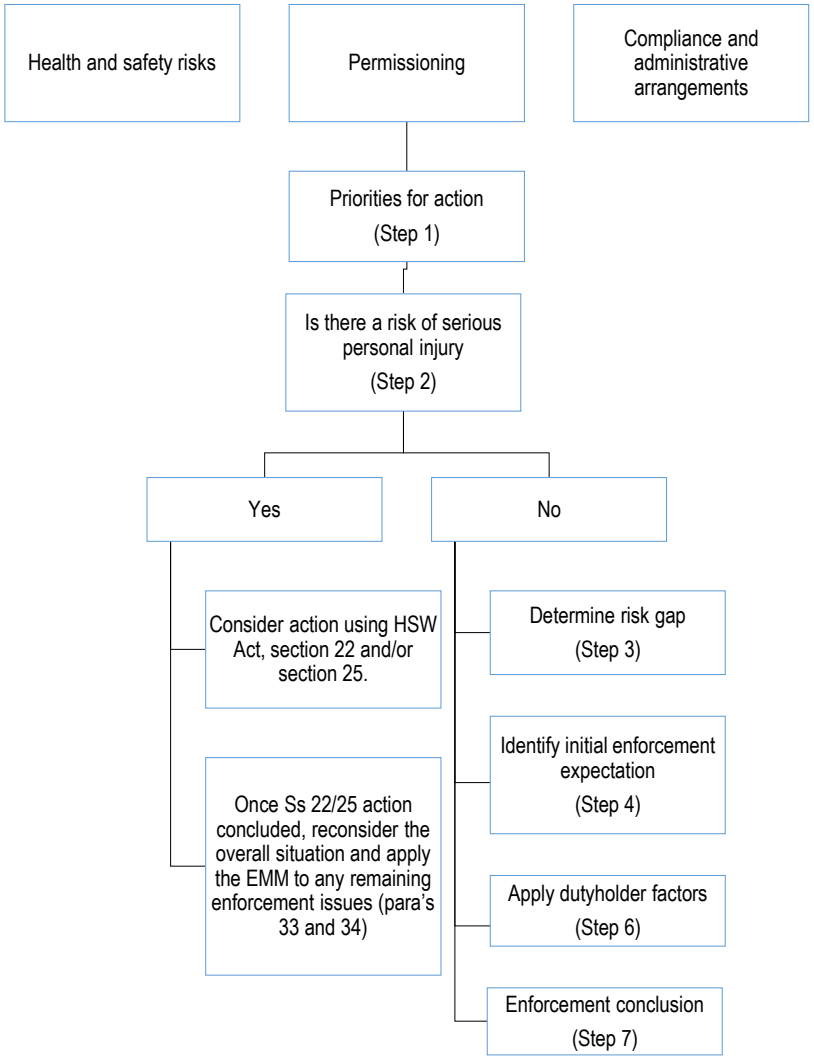
Before the inspection

Professionalism

The *Operational Guidance: Inspection Procedure* (Health and Safety Executive, 2018[20]) sets the foundations for inspections planning. It indicates the steps to carry out before any inspection event. Moreover, it suggests that inspectors align their duties with the Enforcement Management Model (EMM) (Health and Safety Executive, 2013[24]) and with the Enforcement Policy Statement (EPS) (Health and Safety Executive, 2019[16]).

The EMM is a system that supports inspectors in making enforcement decisions, according to the priorities stated in the HSE´s strategy and the specific programmes (see the step 1 of the Figure 14.3). However, the inspectors have discretion to define such priorities. In order to assess them, inspectors must collect information about hazards and control measures during regulatory contacts. Thus, after analysis they can make judgements about risks associated to activities.

Figure 14.3. Risk-based inspection process of the HSE



Note: This figure is an edited version, for brevity and clarity.
Source: Health and Safety Executive (2013[24]), *Enforcement Management Model*, HSE, http://www.hse.gov.uk/enforce/emm.pdf (accessed 18 September 2019).

Risk focus and proportionality

The EPS indicates that the HSE adopts a proportionate approach to enforce the laws across different industries and sectors. It establishes that the HSE applies enforcement actions that are proportionate to the health and safety risks and potential harms due to breaches of the law and seriousness of the risks. The principle of proportionality takes into account both, duties which are specific and absolute, but also reasonably practicable actions, which requires the exercise of judgement (Health and Safety Executive, 2019[16]).

Box 14.5. Activities before inspection visits

The Operational Guidance: Inspection Procedure suggest the following activities before the inspector conducts a visit

1. Selection of duty holders, which inspectors should target according to:
   a. The alignment with divisional working plans
   b. Sectors of higher risks or activities where local knowledge suggests that it is a priority for inspection or when there is an investigation on course
2. Gather information to achieve objectives and priorities. The collection of information should rely on:
   a. Records of previous interventions, enforcements and ratings
   b. Site-specific information, work activities and process risk
   c. Local arrangements with employees or safety representatives
   d. Liaison with other regulators
3. Identify clear objectives and outcomes of the inspection (aligned with divisional working and sector plans and the operational guidance). Besides, the objectives must be related to the most relevant hazards known or potentially to be present. Finally, the objectives should focus on the management of health and safety to achieve compliance.
4. Afterwards, a method of inspection should be selected according to the size and structure of the organisation, the level of risks associated to the working activities and the organisational complexity. It also has to take into account the most efficient path to achieve the objectives of the inspection.
5. Finally, the inspector should prepare the inspection taking into consideration:
   a. The address of significant risks and underlying management systems
   b. The resources, knowledge, skills or specialist inputs required for the inspection
   c. The timing of the visit or consider an appointment
   d. If there is are complex inspections that require more than one day inspection
   e. Making provision for personal health and safety

Source: Health and Safety Executive (2018[20]), *Operational Guidance: Inspection Procedure*, http://www.hse.gov.uk/foi/internalops/og/ogprocedures/inspection/inspection-procedure.pdf (accessed 20 September 2019).

On the other hand, the Operational Guidance: Inspection Procedure indicates the fulfilment of five steps before any inspection event. The principles of risk focus and proportionality are present in several of the activities suggested – see Box 14.5.

During the inspection

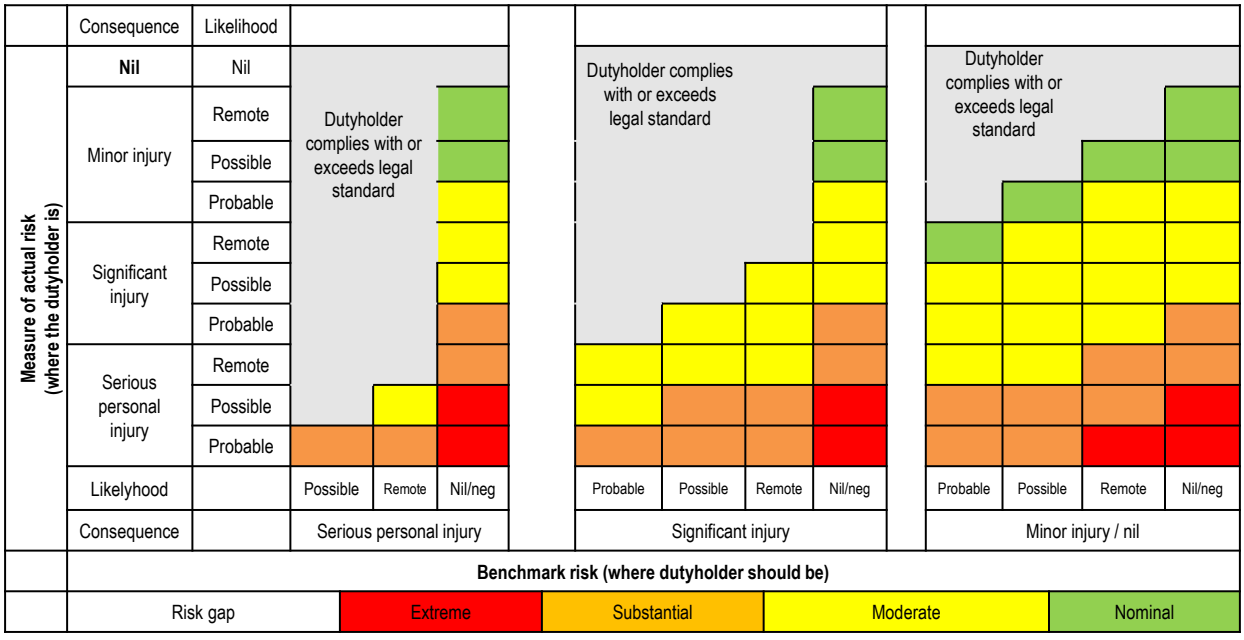
Risk focus and proportionality

According to the EMM, inspectors always have to understand and assess the actual risk that a person might be injured (step 2 of Figure 14.3), taking into account the consequences, the likelihood of occurrence and the extent, in order to prohibit the activity or make safer the origin of risks. Therefore, inspectors should identify risk gaps of the activities (step 3 of Figure 14.3).

The gap analysis is a fundamental concept of the inspection process at HSE. For instance, inspectors have to make an initial assessment of hazards based on the information collected during regulatory contacts and determine the actual risk. Then, they have to compare the risk with the levels defined in the guidelines and decide the benchmark risk. The benchmark is the remaining risk after the duty holder deployed the standards required by law.

The build-up of the risk table is a useful tool to identify priorities. This table matches the consequence and likelihood of the actual risk with the consequence and likelihood of the benchmark risk. Figure 14.4 presents an example of a risk table and the critical areas.

Figure 14.4. Risk tables



Note: This table is an edited version, for brevity and clarity.
Source: Health and Safety Executive (2013[24]), *Enforcement Management Model*, HSE, http://www.hse.gov.uk/enforce/emm.pdf (accessed 18 September 2019).

Clear and fair process

HSE promotes standard practices and transparent processes for inspection activities. For instance, the Operational Guidance: Inspection Procedure (OGIP) incorporates four recommendations to conduct during the HSE's inspection activities (Health and Safety Executive, 2018[20]).

The first recommendation is starting the process explaining the reason of the visit, the role of the inspector and how the official visit will be conducted – on this matter, the inspector should agree on who is the best suited person to assist to the inspection. The OGIP suggests an early contact whenever possible to explain

the reason of the visit, to find out the involvement of the employees in the management of safety and health, to provide a space to raise health and safety concerns in private and discuss about the information provided at the end of the inspection.

The inspector should encourage the duty holder on taking notes, engage in the inspection process and discuss the main hazards on site and the actions to control them. Besides, the parties may discuss about the policy and the findings. Finally, the inspector should provide information about the *fee for intervention policy*.

The *fee for intervention policy* is a cost recovery device used by the HSE for carrying out regulatory functions if duty holders are on material breach of the health and safety law (Health and Safety Executive, 2012[25]). In order to promote transparency, the HSE publishes a guide to make duty holders understand what is the *fee for intervention* and how it fits the enforcement policy (Health and Safety Executive, 2012[26]). Additionally, the HSE publishes a leaflet about the query and dispute process of the fee for intervention (Health and Safety Executive, n.d.[27]).

Afterwards, the inspector should assess specific risk control systems and the adequacy for health and safety management arrangements.

The OGIP indicates that inspections have to consider the inspector's own safety and health. The inspector should implement the inspection plan (which can be adapted if necessary) identifying and prioritising a sample of control-risks systems to assess how the duty holder is managing the health and safety. The number of systems to assess will depend on the nature or site of the business, the complexity or scale of the risks and the time to assess the duty holder.

Furthermore, inspectors should follow up on the concerns raised by employees or safety representatives during inspections, identify the strength and weaknesses in the risk control systems and report good practices. The OGIP also indicates that inspectors have to review the progress of the inspections against the level of compliance, the discovery of breaches and the effectiveness of the safety arrangements.

Ending the process in time, the inspector should finish with an appropriate explanation if there is evidence that inspected units manage risks adequately.

At the end of the process, the inspector should assess the findings and make regulatory decisions.

Responsive regulation

Inspectors should take actions in relation to risks and determine the level of enforcement using the principles of the EMM and the EPS. Moreover, the inspector must be sure that the information collected is enough to support the proposed arrangements. Besides, the inspector should decide if any specialist in needed or extend the inspection beyond a single visit. The types of the HSE's enforcement include:

- providing information and advice
- serving notices on duty holders
- withdrawing approvals
- varying licences, conditions or exemptions
- issuing simple cautions
- prosecution

HSE however, after an enforcement action, gives duty holders advice about their right to challenge or appeal any decision.

The inspector should communicate the outcome and conclude the visit, demonstrating failings, setting expectations for improvement and explaining the immediate actions to implement.

After the inspection

Information integration

After the inspection, the inspector should report and record the findings, follow up, closing out and evaluate the process.

1. The inspector must complete the reports using a do it inspection-recording tool, ensuring that all information required by the operational guidance is included. Afterwards, the inspector should assign a performance rating to each risk control system and prepare written correspondence and notices, which will be sent within 10 working days.
2. The follow up is specific for every issue raised during the inspection process. It should consider further activities, including visits, specialists' support to confirm that inspected units took remedial actions, and all issues were adequately solved. In addition, the inspector should consider potential notices, material breaches, etc. During the follow up process and the closing out, the inspector must communicate with other regulators and the sector about any significant issues found – novel solutions or relevant challenges to enforcement benchmarks.
3. Finally, the evaluation should consider if inspections achieved its objectives.

Lithuania: State Food and Veterinary Service

Background

The State Food and Veterinary Service (SFVS) is the regulatory agency of Lithuania in charge of implementing and designing food sanitation and animal health policy. While this is not a standardised institutional setting, it does allow SFVS to follow the governance cycle discussed in Chapter 1. The SFVS main legal framework is the Statute of the State Food and Veterinary, which defines the responsibilities of the SFVS (SFVS, 2000[28]) Table 14.4 outlines SFVS main responsibilities, including licensing, defining quality requirements, conducting inspections. Most of these tasks revolve around different sectors within the food and animal industries. However, SFVS also has a commitment to work with a focus on consumers rights.

The statute also defines legal structures relevant to the agency's operation. This includes financial matters, which mostly comes from the national government's budget and the European Union. Additionally, the statute outlines specific activities that SFVS has to undertake, beyond the broad mission of the agency. This is relevant as the SFVS defines two-year plans on yearly basis that must match the activities defined in this statue.

In 2017, the SFVS had an approved budget of 28.5 million EUR (including provisions from the European Union) with total expenses amounting to 26.8 million EUR. While the SFVS has technical independence, the Head of the SFVs, the Chief Veterinary Officer (CVO), is accountable to the Minister of Agriculture. The Minister of Agriculture appoints the CVO to lead the SFVS in four-year periods. The agency has four deputy directors heading the organisational departments directly accountable to the CVO. The SFVS totals 1 675 employees, including 309 that work for the National Food and Veterinary Risk Assessment Institute.

Table 14.4. Policy Responsibilities of SFVS

Safeguard interests of consumers and protect infringed rights	Food sanitation policy	Animal health policy	Additional tasks
Investigate complaints from consumers and stakeholders	Manage hygiene and control requirements for safety, quality, handling and placing of food	License to engage in veterinary practice	Performing smell control in residential houses and public building
Register, analyse and monitor consumer complaints	Introducing systems for analysis and management of risk factors in food handling practices	Permission to conduct laboratory trials on animals	Implement and maintain information systems and databases
Inform consumers and businesses about SFVS' tasks	Establish mandatory requirements to mark animal products	Certificates for animal transporters	Submit proposal to other ministries, regarding topical problems on food and veterinary research
Offer consultations and guidance to regulated entities	Establish procedures to control food, materials, and articles in contact with food and drinking water	Certificates for road vehicles intended for transport of animals	Maintain contacts with relevant institutions of other countries and international organisations
	Approval of food handling businesses	Approval of control programmes of contagious animal diseases	Collaborate with mass media, and research institutions
	Establish requirements for import, export and transit of non-animal food, animal products and materials in contact with food	Establish mandatory requirements for the protection of animals' welfare	Represent the country in pertinent EU commissions
		Establish mandatory requirements for trade in animals	
		Licence to engage in veterinary pharmaceutical activity	
		Carry out scientific evaluation of risks related to feeds, feed additives and veterinary appliances	

Note: This table is an edited version, for brevity and clarity.
Source: SFVS (2000[28]), *Statute of the State Food and Veterinary Service [Valstybinės Maisto Ir Veterinarijos Tarnybos Nuostatai]*, https://vmvt.lt/sites/default/files/statute_sfvs_2011.doc?language=en

Before the inspection

Risk focus and proportionality

In order to define the periodicity of inspections, the SFVS has a methodology to categorise business units by risk. The methodology, available online, allocates risk in different industries by looking at the specific products being produced, managed and transported. In the case of food products, SFVS has a different consideration for food business operators, for caterers and for traders.

Table 14.5 gathers the risk criteria and the frequency of inspections for each risk category. Products with the lowest risk are those with minimal or no likelihood of people getting a disease as well as products having physical/chemical properties that do not allow microorganisms to reproduce. The SFVS inspects business units that meet these criteria every six years. Conversely, the agency inspects once a year those with the highest risk associated.

Table 14.5. SFVS Risk Matrix for Food Safety

	Very low risk	Low risk	Medium risk	High risk
Criterion 1	There is minimal or no likelihood that people will become ill from food when handling food.	There is little likelihood of contamination, microbial growth and toxin and mycotoxin levels in food management.	While food is likely to cause contamination, food properties do not facilitate the growth of microorganisms and the growth of toxins and mycotoxins, and the application of heat treatment or other more efficient food processing processes can reduce microorganisms to an acceptable level.	There is a high risk of contamination, multiplication of microorganisms and increased levels of toxins and mycotoxins in the final product or food processing (e.g. long food production, supply chain).
Criterion 2	Physical-chemical properties of the product do not allow microorganisms to multiply or increase toxins and mycotoxins	The physical and chemical properties of the product do not allow microorganisms to multiply or increase levels of toxins and mycotoxins.	The physical and chemical properties of the product do not favour the growth of microorganisms or the increase of toxins and mycotoxins.	The product is inherently risky (readily multiplies microorganisms, increases toxins and mycotoxins), is intended for direct consumption, is a perishable food or is intended for infants and young children.
Frequency of inspection	Once every 6 years	Once every 3 years	Once every 2 years	Once every year

Source: SFVS (2019[29]), *Breakdown of Food Management Sub - items into Risk Groups [Maisto Tvarkymo Subejktų Suskirstymas Į Rizikos Grupes]*, http://vmvt.lt/opendata/mtsr/index.php (accessed 24 January 2020).

Forward planning

Every year the SFVS publishes a two-year *Strategic Action Plan* that outlines specific actions to undertake in order to achieve the stated policy goals. The plan has five chapters the mission; operational priorities; strategic objectives and programme; human resources and management expenditure, and operational efficiency. The plan outlines its 2019-2021 mission: Implement the procedures for placing on food safety and quality, labelling, animal health and welfare, labelling and registration to protect and defend consumer rights in the provision of food and food-related services areas (SFVS, 2019[30]). Table 14.6 lists the directives of both operational priorities and strategic objectives. Regarding operational efficiency, SFVS focus on conciliating personnel functions and asset management.

Table 14.6. SFVS's Strategic Action Plan 2019-2021

Operational priorities	Strategic objectives
Control the implementation of biosecurity and veterinary requirements to prevent the transmission and spread of infectious animal diseases	Maintaining a high level of animal welfare and health, while avoiding contagious animal diseases
Development of export markets for food and animal food products	Ensuring and maintaining a high level of food safety and quality, consumer rights to food and food advocacy in food-related services
Safety and quality control systems for food and food contact materials	Development of international co-operation in the fields of food and veterinary control
Increasing the effectiveness of controls on food supplements and their labelling	Improving the efficiency and transparency of the SFVS's management process.
Improving the efficiency and transparency of service, management processes and quality systems. Improving consumer confidence	

Source: SFVS (2019[30]), *Strategic Action Plan 2019-2021 [2019–2021 Strateginis Veiklos Planas]*, https://vmvt.lt/sites/default/files/zum_patvirtintas_2019-2021_vmvt_strateginis_veiklos_planas.pdf?language=lt

A key aspect is financial transparency. In this report, the SFVS states the expenses in the past year by specific goal purposes. SFVS also presents the expected expenses for the next two years.

These plans go beyond stating policy actions and their rationale. For example, the 2019-2021 plan states the following priority: carry out and co-ordinate controls on food supplements and their labelling. To explain the motivation of this policy action, the agency points to the rising consumer complaints on labelling. This example highlights two important features: forward planning and responsive regulation. The regulatory agency shows openness to the consumers, as it continuously receive comments, and adopts them to design policy going forward.

During the inspection

Clear and fair process: inspection acts

The SFVS publishes inspection acts for every inspection carried out. This transparency practice promotes good policymaking as it lets the industry prepares its quality practices beforehand, and it avoids potential authority abuses. As the acts are public, any business unit is able to complain if an inspector is asking for any additional information or requirements.

As an example, SFVS' *Retail Trade Inspection Act* is available in its website. The document incorporates identification information of the inspecting officer, the purpose of the inspection, consumer complaints (if any) and date of the inspections. The act consists of 44 question divided in four sections: general requirements, requirements for handling of food contact materials, liquor handing requirements, and products with protected indications.

After the inspection

Information integration: risk-related databases

The SFVS has a list of food business operations, categorised by risk groups (the same risk groups from the matrix presented beforehand). The SFVS match information from the inspections and from their own record. The database has updated information of the companies' licenses, so that the public can research whether companies are in good legal standing. This database (SFVS, 2019[31]), available for the public, contains the following information:

- Name of the company;
- Commercial activities;
- Range of products approved for the business operator;
- Address;
- Authority who issued license or permits;
- Date of issue of certificate;
- Food Management Certificate number;
- Risk group (very low, low, medium, high).

Annual evaluation

The SFVS prepares and publishes an annual activity report, available online for the public to download. As part of the report, the SFVS holds a self-evaluation with criteria that measure the progress of strategic goals of the agency (see Box 14.6). The report couples each criteria with several indicators to measure the agency's performance.

The goals are consistent with the OECD best practice principles in inspections in two ways. The SFVS's self-evaluation addresses policy objectives, such as "Control of the implementation of biosecurity and veterinary requirements in order to prevent the spread of contagious animal diseases". In addition, it addresses its own operational performance, as goal 6 states: "Open and effective public governance, with increased public confidence and reducing the burden on small agricultural operators."

While the SFVS achieved most of the expected targets in 2018, it was also transparent with those not met. Several goals contained underperforming indicators, and for all of them, the SFVS explained the reason. In some cases, the SFVS was clear on how institutional or technological changes modified its role on inspections. Overall, this practice renders SFVS as a good example of accountability to the public.

Box 14.6. SFVS annual evaluation indicators 2018

1. **Goal:** Strengthen prevention and control of antimicrobial resistance in the veterinary and food sectors.
    a. **Indicators:** 10% reduction in antibiotic use in food and veterinary use; selected samples for antimicrobial resistance of zoonotic and symbiotic bacteria materials tracking number (575 pieces).
2. **Goal:** Development of export markets for animal food products
    a. **Indicators:** Number of harmonised animal health certificates for animal food exports in 2018: 4 units; Countries with which veterinary sanitary negotiations started and have requirements for animal food (28).
3. **Goal:** Control of the implementation of biosecurity and veterinary requirements in order to prevent the spread of contagious animal diseases.
    a. **Indicators:** Analysed samples selected for state surveillance of infectious animal diseases programme: 297 894 units. Commercial pig farms with fully implemented biosecurity requirements: 100%. Selected samples for antimicrobial resistance of zoonotic and symbiotic bacteria materials tracking number: 575 pieces.
4. **Goal:** A plan of measures to combat food counterfeiting, illegal food processing, consumers cheating and food safety offenses.
    a. **Indicators:** Detection of food samples in food processing companies for possible tampering number: 129 units. Evaluation of distance selling of food products: 838 units. Meetings organised by Internet Service Providers and Portal Managers (0 out of 3). Regular inspections of markets and temporary markets for illegal activities or number of detection of food counterfeiting: 115 units. Control of incoming food at wholesale companies (cold stores) ensuring the traceability of the product stores: 162 units.
5. **Goal:** Food and alcoholic beverages registered in Protected Destination of Origin, the Register of Protected Geographical Indications, and the Register of Traditional Specialties Guaranteed market control.
    a. **Indicators:** Conformity samples of food products selected by food business operators to Protected Origin local destination, and quality of traditional specialties guaranteed number of requirements: 50 units. Done food and spirits registered 919 units.
6. **Goal:** Open and effective public governance, with increased public confidence and reducing the burden on small agricultural operators.

a. **Indicators:** Independent Consumer Satisfaction Index: 6.4 (expected 7). Users of electronic public and administrative services: 43% (expected 20%). Number of electronic services provided to business entities and residents: 85 392 (200 units expected). Eighty two percent of control questionnaires reviewed and updated (80% planned). Responding appropriately and timely to consumer inquiries: 65% (expected 90%).

Source: SFVS (2018[32]), *State Food and Veterinary Service Activity Report 2018 [2018 2018 Metų Veiklos Ataskaita]*, https://vmvt.lt/sites/default/files/veiklos_ataskaita.2018m.pdf.

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Regulatory Enforcement and Inspections in the Environmental Sector of Peru

To meet their policy objectives, regulations must be accompanied by a carefully designed and well-implemented enforcement strategy, including inspections. This report provides an assessment of the enforcement and inspections strategy in the environmental sector in Peru along with recommendations to strengthen this strategy. The report evaluates the policies and legal framework of the Environmental Evaluation and Enforcement Agency of Peru, as well as its practices and the resources employed in enforcement and inspections activities. It also offers policy options to improve performance. The benchmark for the comparative analysis is the *OECD Regulatory Enforcement and Inspections Toolkit*. Using a checklist of 12 criteria, this Toolkit provides a simple tool for assessing the inspection and enforcement system in a given jurisdiction, institution or structure.

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