

1 Background and context

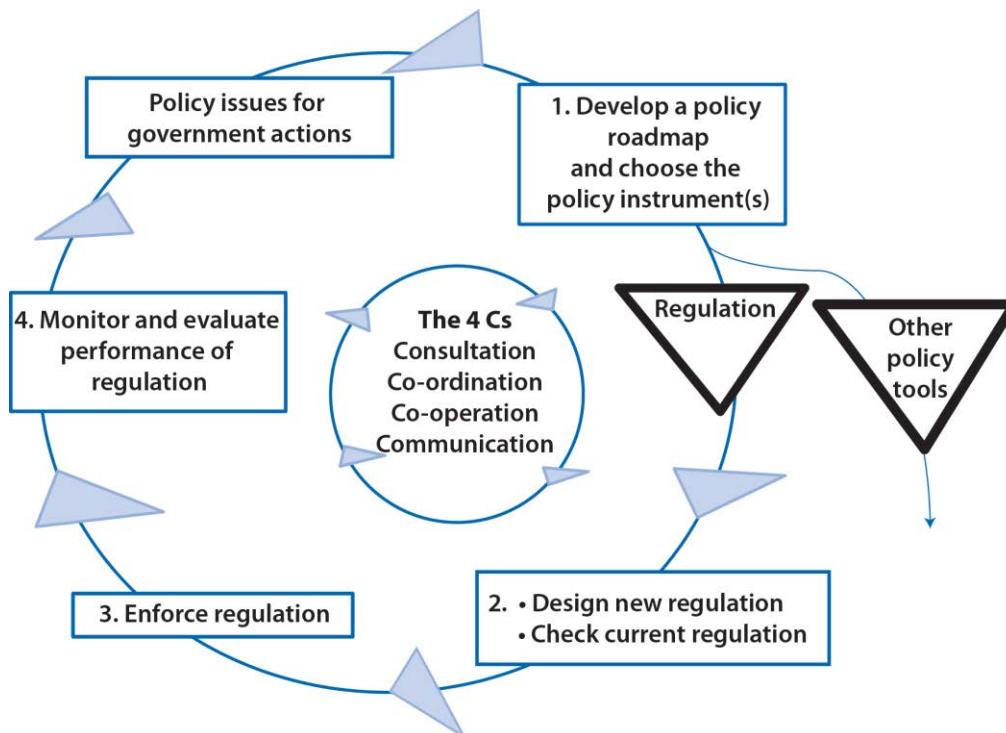
This chapter highlights the relevance for governments to ensure the effectiveness of enforcement and inspection activities to help achieve policy objectives. It then presents the environmental regulatory system and its management in Peru, provides a description of the Environmental Evaluation and Enforcement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

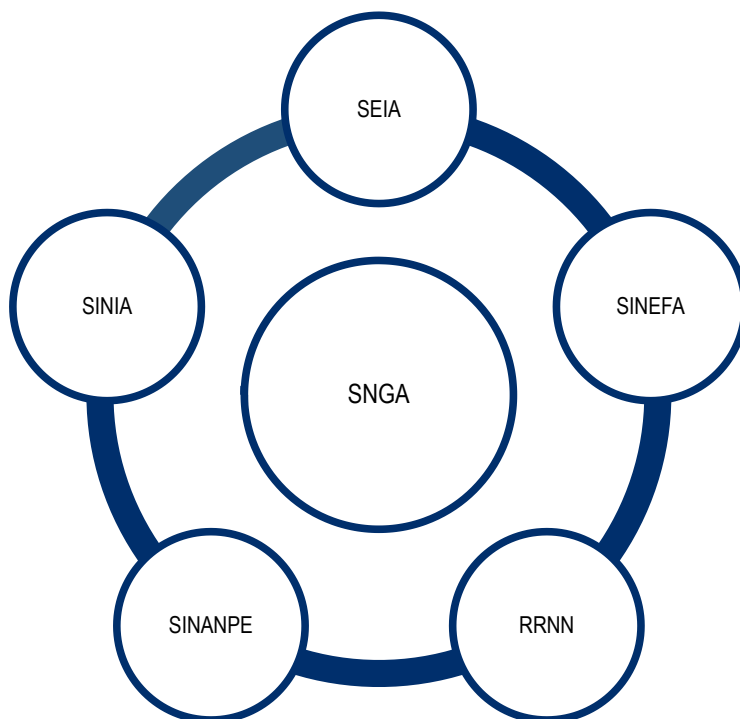
Source: OEFA (2017^[5]), *Institutional Memory OEFA 2017*, http://www.oefa.gob.pe/?wpfb_dl=34477 (accessed 14 January 2020).

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 EFAs¹ 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:

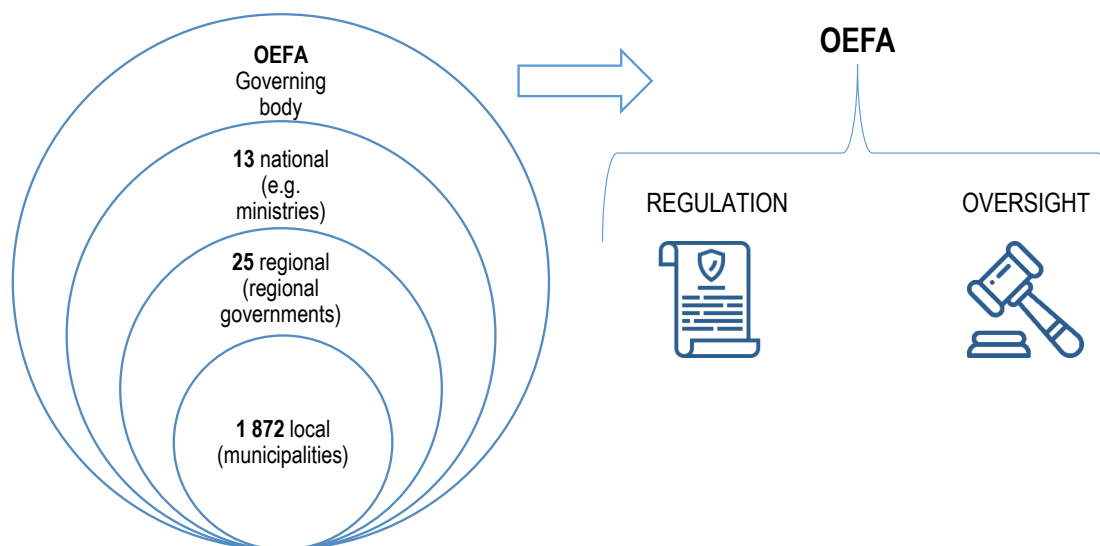
- Mining (medium and large establishments only)
- Energy (electricity and hydrocarbons)
- Fishing (medium and large companies of industrial fishing and aquaculture)
- Manufacturing industry and internal trade
- Moratorium on the entry and production of living modified organisms (LMOs)
- Solid waste infrastructure
- 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/oeфа> (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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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.



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