

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 legislation¹ 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 Governments² 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 than 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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<https://www.oefa.gob.pe/integridad-oefa> (accessed on 15 October 2019).

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>.

³ Available at: <https://www.oefa.gob.pe/avisos/reglamento-del-procedimiento-administrativo-sancionador-del-organismo-de-evaluacion-y-fiscalizacion-ambiental-oefa>.

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.



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