



AGENCY FOR ENVIRONMENTAL  
ASSESSMENT AND ENFORCEMENT

# Contribution by Regulation



Agency for Environmental  
Assessment and Enforcement

# Acronyms

**APR:**

Contribution by Regulation

**IGV:**

General Sales Tax

**IPM:**

Municipality Promotion Tax

**IR:**

Income Tax

**ISC:**

Selective Consumption Tax

**MINEM:**

Ministry of Energy and Mines

**OEFA:**

Agency for Environmental Assessment and Enforcement

**OSINERGMIN:**

Supervisory Body for Investment in Energy and Mining

**OSIPTEL:**

Supervisory Body for Private Investment in Telecommunications

**OSITRAN:**

Supervisory Body for Investment in Public Transportation Infrastructure

**SUNASS:**

National Supervisory Body for Sanitation Services





# Contribution by Regulation

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# What does **Contribution by Regulation (APR)** mean?

The APR is a contribution created by Article No. 10 of the **Law No. 27332**, Framework Law on Regulatory Agencies for Private Investment in Public Services, which has as main purpose to finance the following public functions:

- Supervisory function
- Regulatory function
- Normative function
- Controlling and penalty function
- Dispute resolution function
- Claim resolution function



The **Law No. 27332** orders that the regulatory bodies shall collect an APR without exceeding the 1% (one per cent) of the value of the annual billing of the companies and entities under its scope of jurisdiction deducted from the IGV and the IPM. The APR aliquot is set by Supreme Decree.

As in other contributions, the APR has the objective of creating:



# What does **regulation** mean?

It is the sustained and focused intention of modifying the behavior of other people with the purpose of obtaining defined results. This can include mechanisms for establishing standards, compilation of information and/or modification of behaviors.

**Julia Black**

Cf. *Critical reflections on regulation*, CARR Discussion Paper N° 4, London.  
London School of Economics and Political Science. p. 20.

# Public regulation function

Martin Lodge and Kai Wegrich, professors of London School of Economics, consider that there are three elements that determine the regulatory function: 1) establishment of standards, 2) modification of behaviors and 3) compilation of information in order to verify the compliance with the issued regulations<sup>1</sup>.

**Every institution having said elements complies with the public regulation function.** The OEFA has the three aforementioned elements.

## Establishment of standards

The OEFA has, among others, the **normative function**; that is to say, it has the power for issuing regulations of general aspect under the scope of its jurisdiction.

## Modification of behaviors

The OEFA has the power for **imposing penalties**, taking preventive, precautionary and corrective measures, as well as granting the corresponding incentives.

## Compilation of information

The OEFA, in compliance with its **supervisory function**, can carry out actions of follow-up and verification for the compliance with the obligations established in the environmental regulation.

<sup>1</sup> Cf. LODGE, M. and Kai Wegrich. *Managing Regulation. Regulatory Analysis, Politics and Policy*. Palgrave Macmillan. pp. 13 - 14

# Which are the kinds of regulation?

The regulatory function of the State has two dimensions as follows:



## Economic regulation 1

This approach comes from the premise indicating that the market efficiently designates the resources. On a competitive market, it is not necessary to have any kind of intervention due to the fact that if the offer and demand changes, a new balance will be obtained through the functioning of the own market. Nonetheless, on a market where there is little or any competition exists, it is necessary to have an intervention from the State in order to pretend its existence and foment it to safeguard the general welfare. In this sense, the arguments supporting the economic regulation are mainly based on the existence of a “natural monopoly”.



## Social regulation 2

The regulation, in order to be efficient, has to be oriented to improving the welfare of the society. Therefore, there is not only an economic regulation, but also a social regulation. The latter is focused on regulating the aspects related to health, security, environment and others. This was created due to the presence of the following market flaws: externalities, asymmetry of information, public goods, etc.



# The social regulation regarding environmental matters

In the environmental sector, **the social regulation** takes place because the ecosystems, air, water resources, forests and other environmental components are goods that have to be protected.

**The objective of the social regulation is to force the producer to assume the total costs of its production (including the pollution costs)** instead of pass them on the society. In such manner, this kind of regulation is oriented to protect the environment in order to guarantee the welfare of present and future generations.

The social regulation can be carried out through inspections, verifications, imposition of penalties and corrective measures, that is to say, through environmental enforcement actions<sup>2</sup>.



<sup>2</sup> Cf. Huapaya Tapia, Ramón. Administración Pública, Derecho Administrativo y Regulación. Estudios y cuestiones. Second edition. Lima: Ara Editores, 2011, pp. 794-795.

# The OEFA and its function of social regulation

The **OEFA** supervises and controls that the companies comply with their environmental obligations. If the OEFA verifies that the companies do not comply with its environmental obligations, it imposes penalties and corrective measures (remediation) with purpose of discourage this behavior and, in that sense, protect the environment.

On the other hand, it can grant incentives to promote a clean production and the implementation of measures or processes focused on preventing or reducing, in a greater scale, the negative impacts on the environment.

Therefore, **the OEFA complies with the function of environmental social regulation** since it controls the proper exploitation and use of the natural resources and guarantees that the negative impacts caused on the environment by these activities are minimum. In conclusion, the essence of the function of environmental social regulation is to guarantee that the investment happens but in a responsible and sustainable manner.



# The APR: finance mechanism of the economic and social regulation

The APR is a finance mechanism of the regulatory activity of the State without regarding the kind of regulation being applied (economic or social). The reason of its application is the benefit that the controlled companies obtain from the activities of the corresponding public entity (low costs of transaction, availability of information, coordination in the establishment of standards, among others).

At first, the APR was created to finance regulatory agencies such as OSIPTEL, OSINERGMING, OSITRAN and SUNASS. These agencies, usually known as economic regulatory agencies, also execute functions of social regulation and; therefore, benefit from the APR derivative from such function.



# Economic and social regulatory agencies financed by **contributions**

## Examples:

### Supervisory Body for Investment in Energy and Mining (OSINERGMIN)

The OSINERGMIN applies the economic regulation in the segments of the hydrocarbons subsectors where the natural monopolies exists and applies the **social regulation** to control the quality and quantity of fuel in service stations, plants and refineries. This regulatory body collects the APR of the companies on the hydrocarbons subsectors under the scope of its jurisdiction without regarding the kind of regulation to be applied.

### Ministry of Energy and Mining (MINEM)

The MINEM applies the **social regulation** and receives a **contribution** from the companies in order to finance its functions. Indeed, under its condition of sectorial normative body for the companies in the hydrocarbons subsector, the MINEM also carries out the social regulation and, as such, in compliance with the regulation in force, it also receives contributions from the controlled companies.

## Is the OEFA entitled to receive APR?

**Yes.** The OEFA is entitled to receive the APR in order to solve the expenses required for the execution of its public environmental social regulation function.

Above all things, we shall take into account that the APR finances the function of environmental control that was previously executed by the OSINERGMIN and is currently executed by the OEFA.



# What is the **legal basis** supporting the **OEFA** to be considered as a tax **of the APR**?

- On 2000, pursuant to Law No. 27332, the APR was created and all its essential elements were established:

1

## **Fact generating the tax obligation**

The public function of the economic and social regulation of the entity receiving the taxes.

2

## **Subjects**

The tax collectors are the public entities that carry out the public function of the economic and social regulation. The main tax debtors are the companies to be controlled.

3

## **Taxable basis**

The annual billing to supervised companies is deducted from the IGV and IPM.

4

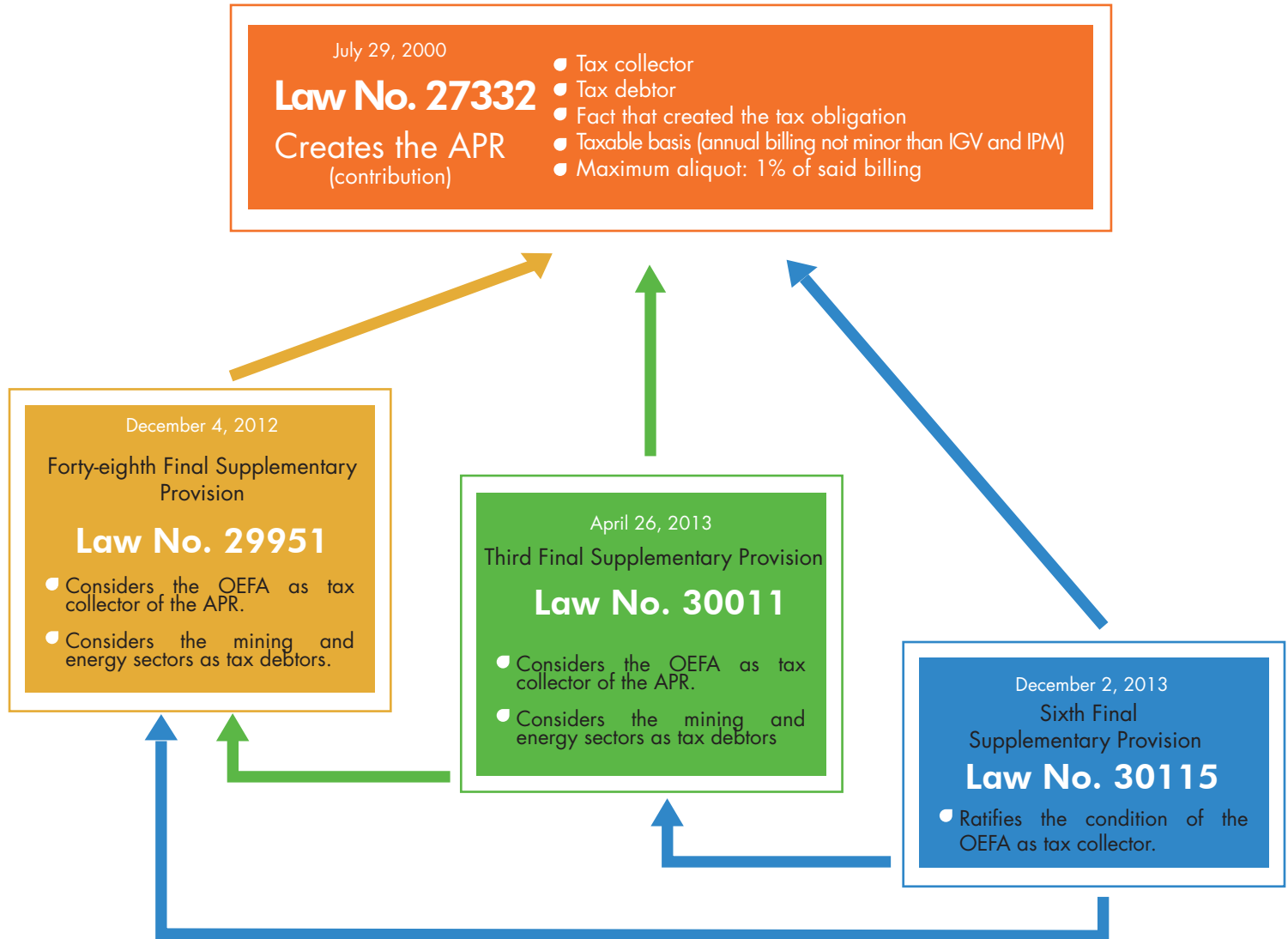
## **Maximum aliquot**

Obtained from 1% (one per cent) of the taxable basis in order to avoid the confiscation.

## Legal Basis

- At first, the OSINERG was in charge of controlling only the energy sector. However, by virtue of Law No. 28964, it receives the power for supervising the mining sector and its name changes to OSINERGMIN.
- On 2008, by virtue of Legislative Decree No. 1013, the OEFA was created and, two years later; it received the environmental enforcement functions of the OSINERGMIN.
- On 2012, as a consequence of the transfer of these functions, by virtue of the Forty-eighth Final Supplementary Provision of the Law No. 29951, Law on Public Sector Budget for the Tax Year 2013, it is established that the environmental enforcement functions of the OEFA carried out to the mining and energy sectors are financed by the APR, which was created by the Law No. 27332. In this manner, the OEFA is considered as a new tax collector.
- The condition of the OEFA as a new tax collector of the APR was ratified by the Third Final Supplementary Provision of the Law No. 30011, rule that amends the Law No. 29325, Law on the National Environmental Assessment and Enforcement System, and by the Sixth Final Supplementary Provision of the Law No. 30115, Law on Economic Stability of the Public Sector Budget for the Tax Year 2014.







# What are the **benefits generated** by the **APR**?

As evidenced in Order No. 416-1-2009, the Tax Tribunal has ordered as follows: “the contribution is a related tribute because its generation is associated to a state activity (public performance or work), that does not only produce general benefits for the entire population, but also creates specific benefits for certain people within said population”.

The APR is a contribution that creates the following benefits for the society and the companies subject to supervision:

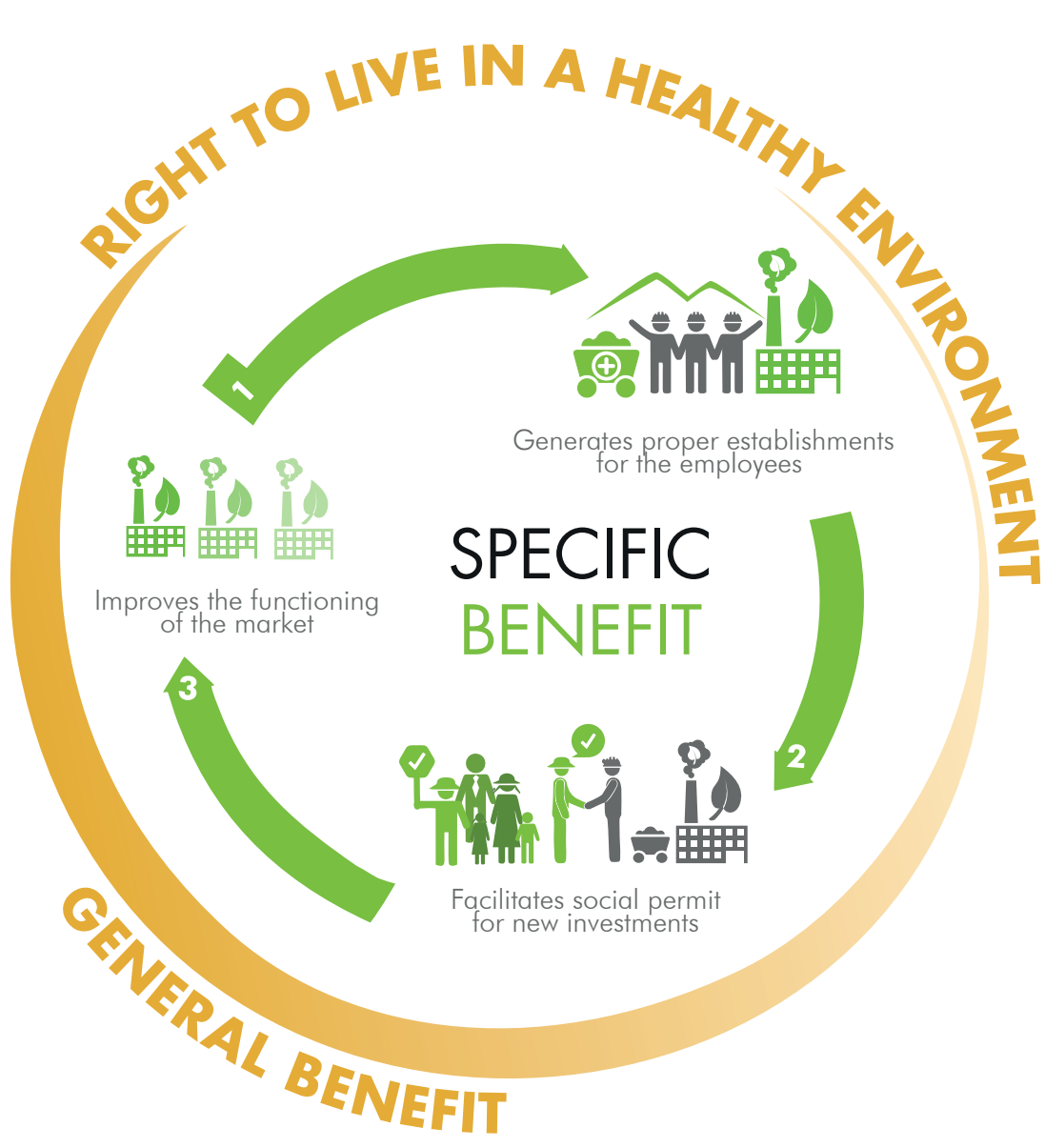
## General benefits for the society

- **Makes sure** that the society lives in a healthy and balanced environment.

## Specific benefits for the companies

- **Enables** that the populations surrounding the companies have a better acceptance to them which reduces social disputes and **promotes the social permit for new investments.**
- **Encourages** the companies to have proper establishments for their employees in order to prevent them from suffering the consequences of a possible contamination.





# How to **calculate the aliquot** of **APR received by** the OEFA?

## ON THE BILLING VALUE OF CONTROLLED COMPANIES

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The incomes (annual billing) are a great development indicator of the economic activities of a company due to the fact that they measure, in a reasonable manner, the production made.

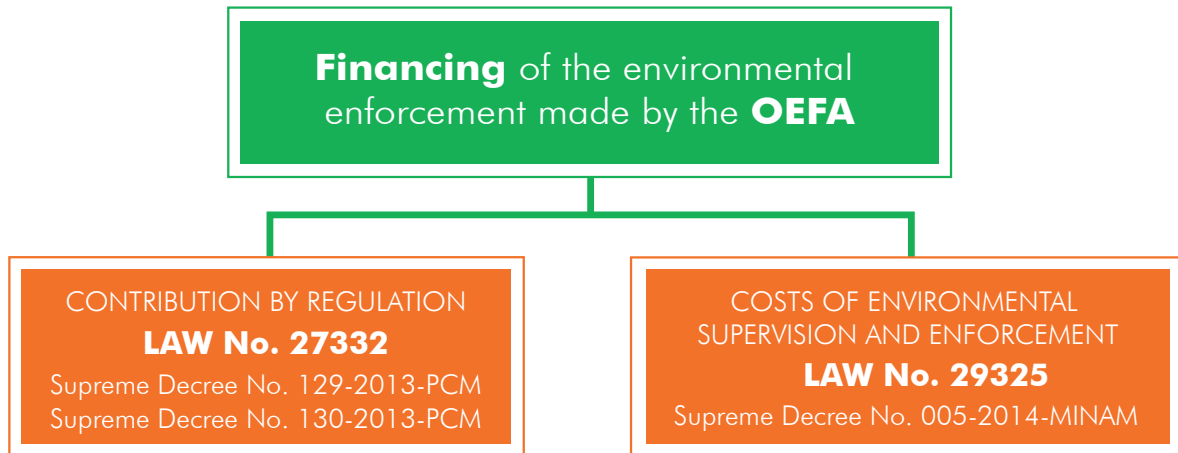
The more production a company makes, the more impact it can cause to the environment. Therefore, it is important to take into account said criterion (annual billing) in order to calculate the exact APR financing the enforcement activities destined to verify that said companies comply with its environmental obligations (that is to say that they do not damage the environment).

Considering that the possible **negative externalities** (negative impact on the environment), caused as a result of developing a particular activity, are closely related to the **level of production** obtained by the offender; therefore, it can be concluded that **the incomes** (annual billing) are a reasonable measurement to determinate the APR.

Finally, the payable amount for a contribution must be indicated since **it is not able to be calculated by a specific service** (personalized service) provided by the taxpayer due to the fact that characteristic only belongs to a fee and not to a contribution.

# Are the **mining** companies the only ones financing the enforcement made by **the OEFA**?

**No.** According to the principle of internalization of costs, all the companies of the OEFA shall assume the expenses generated by the enforcement of their activity. **The mining and energy sectors pay the APR, while the other sectors have to pay the costs of the environmental supervision and enforcement.**



# The APR is exclusively designated to finance **the environmental enforcement?**

The APR received by OEFA is exclusively designated to finance the environmental enforcement of the mining and energy activities, under the scope of jurisdiction of the OEFA. This permits to execute said function in an independent, impartial, agile and efficient manner.

The Law No. 30115 orders that the amount received by the APR shall finance the activities of institutional support related to the environmental enforcement carried out by the OEFA in the mining and energy sectors.



# Is there any different between a fee, a tax and the **APR**?

**Yes.** The APR is clearly different from a fee and a tax due to the fact that it is a contribution. In order to the better understanding of this difference, it is necessary to know the following definitions:

## TRIBUTE

It is a payment that the State demands from its citizens, as required by law, in order to cover the expenses generated for complying with its functions.

The tributes can be classified as follows:

### TAX

It is the tribute which compliance does not create a direct compensation in favor of the taxpayer from the State (for example: IGV, ISC, among others).

### CONTRIBUTION

It is the tribute which obligation is generated because of benefits that derivate from the execution of public works or activities from the State (for example: contribution to Peruvian Public Health Insurance System (ESSALUD, by its initial in Spanish), to the National Service of Training for the Building Industry (SENCICO, by its initial in Spanish), among others).



**Contribution by Regulation**

### FEE

It is the tribute which obligation is generated for the State effectively provides a personalized public service to the taxpayer.

The fees are the following:

- Charges: are the fees paid for the provision or maintenance of a public service.
- Tariff: are the fees paid for the provision of a public administrative service or for the use or exploitation of public property.
- Licenses: are the fees required for the obtaining specific authorizations for the execution of activities of a particular benefit subject to control or enforcement.

## Is the tariff for the mining enforcement **similar to the APR?**

**No.** The tariff for the mining enforcement financed the environmental **supervision** (in field and at office). It included the professional fees involved in the supervision, travel allowances, laboratory test costs and others necessary only for carrying out the act of supervision. It did not include the costs for the assessment in the influence zone of the mining unit, the preparation of the accusative technical report, the process of penalty administrative procedure, among others.

Nowadays, the mining, electrical and hydrocarbons companies pay the APR which is a tribute with a contribution aspect. The APR is paid due to the benefits the taxpayers obtain for the public works or activities made by the State. This tribute is focused in financing the function of the State of environmental enforcement which involves a macro process comprehending the **evaluation, supervision and enforcement in a strict manner** (penalty procedures).

Therefore, it is not reasonable to compare the payment of the tariff of the mining enforcement with the APR since each of them has **a different legal nature and involves different costs.**

# What would happen if the OEFA did not receive the APR?

## ● The compliance with its functions would debilitate

The APR received by the OEF allows that the said public entity carries out with a greater efficiency its function of environmental enforcement, as well as strengthens it as the guarantor of the compliance with the environmental obligations in the country.

The APR is very important so the technical, administrative and financial capacity of the OEFA does not get weak.

## ● The compliance with the environmental rules and fundamental rights would be violated

The possibility of reaching a balance between the economic freedom and the environmental protection would be limited which would negatively affect the entire society.

The capability of the OEFA to properly protect the environment and the health of people would be reduced.

The Peruvian Ombudsman's<sup>3</sup> Office sustains that a weak environmental management is a source of mistrust from the population towards the State which causes social-environmental conflicts. An efficient environmental enforcement facilitates the social permit for new investments.

## ● The functioning of the market would be negatively impacted

The mining and energy activities cause impacts to the environment which require to be internalized in the production costs. The companies that do not comply with this concept are improperly reducing their costs.

Through the environmental enforcement, the OEFA ensures the compliance with the environmental obligations, discouraging the execution of conducts that affect the environment. In such manner, the environmental enforcement contributes to the optimum functioning of the market since it prevents that the companies complying with their environmental obligations are in a position of disadvantage in comparison to others that do not comply with the said obligations.

<sup>3</sup> THE PERUVIAN OMBUDSMAN'S OFFICE. Informe Extraordinario: Los conflictos socioambientales por actividades extractivas en el Perú. Lima: Peruvian Ombudsman's Office, 2007, p. 18



## What does the Peruvian Ombudsman's Office think about the APR received by the OEFA?

Pursuant to Official Letter No. 393-2014/DP, dated August 29, 2014, the Peruvian Ombudsman's Office addressed to the Head's Office of the Council of Ministries to provide its opinion regarding the APR received by the OEFA. In said official letter, it stated the following:

"(...) it is indispensable – among other aspects – to strengthen the supervisory entities by providing them with technical capacity, political autonomy and budget sustainability. In this manner, it can be ensured that the important functions under its jurisdiction are carried out in a rigorous and impartial manner, as well as within a reasonable period which will consequently allow the economic development of the country, the strengthening of the State and the respect of the right to have a healthy environment".

Within this context, the functioning of the Agency for Environmental Assessment and Enforcement (OEFA) is very important since the same is the entity responsible for the environmental supervision and enforcement, among others, of the energy mining activities. (...)

(...) our institution observes with concern the possibility that, from now on, the OEFA does not have the resources enough to carry out its functions of environmental supervision and enforcement as it does now.

This will not only weaken the environmental institutionalism, but also will affect the labor of vigilance over the care of the environment carried out by the State, which has the objective of ensuring the development of economic activities and promoting the private investment that the country requires to develop in harmony with the right that all the Peruvian have to live in a healthy environment.

In such manner, it is really important to ensure that the respective authorities with regard to the environment have the resources to permit a proper compliance of its functions, and with a more important necessity, those that are responsible for ensuring the compliance of the environmental demands, determining responsibilities, as well as demanding the adaptation of measurements destined to revert or reduce, if possible, the damaging effect of the offensive conducts such as the environmental contamination. (...)"



**AGENCY OF ENVIRONMENTAL ASSESSMENT  
AND ENFORCEMENT - OEFA**

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Printing: 1 000

Made in the Legal Deposit in the Peruvian  
National Library No. 2014-12055

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EN71-3	Safety of toys, migration of certain elements

## Credits:

### CONTRIBUTION BY REGULATION OF THE AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT

First edition: August 2014

**Agency for Environmental  
Assessment and Enforcement - OEFA**

Printed by: por Billy Víctor

Odiaga franco

Taxpayer Registration No.:

10082705355

Av. Arequipa 4558 Miraflores - Lima  
August 2014

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- Team of the General Coordination of Publications
- Team of the Communications and Citizen Service Bureau
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