A new approach to environmental enforcement

OEFA
AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT

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Address: Av. República de Panamá 3542, Lima 27, Perú
Telephone: (51-1) (01) 713 - 1553
webmaster@oefa.gob.pe
www.oefa.gob.pe

The articles included in this book are pedagogical and do not necessarily reflect the official position of the administrative authority with jurisdiction in environmental enforcement.

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PRESENTATION

A New Approach to Environmental Enforcement

Hugo R. Gomez Apac
President of the Board of Directors

This book is made up of a number of academic articles developed by officials and civil servants from the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish), which explain the contents of a significant number of legal instruments[1] developed during the last year expressing the new approach of that enforcement, which is committed to efficiency, transparency, justice, probity and responsibility, ethical values that guide the action of the modern administrative bodies.

1 As legal instruments, we refer to:

(i) Law No. 30011, which amended the Law No. 29325, Law on National Environmental Assessment and Enforcement System, published on April 26, 2013;

(ii) Regulations of direct effects to the companies, as the Regulation for Administrative Penalty Proceedings, Regulations for direct supervision, Regulations for registry of environmental offenders, Regulations for voluntary remedial action of minor findings, Regulations for the report of environmental emergencies, special Regulation of direct supervision for conclusion of activities, Rules for regulating the jurisdiction of Environmental Enforcement Entities in cases of mining claim agreements, Regulations for installment and/or postponement in the payment of fines, Regulations for the notification of administrative acts by e-mail, the Directive promoting greater transparency regarding the information managed by OEFA, the Directive to identify environmental liabilities in the hydrocarbon sub-sector, and the regulations which approved the classification of offenses and the scale of penalties related to:

(a) Effectiveness of environmental enforcement,
(b) Non-compliance of maximum permissible limits, and
(c) Non-compliance of obligations contained in the Environmental Management Instruments and the development of activities in forbidden areas.

The environmental enforcement put in place by OEFA aims to balance the interaction stresses between the development of economic activities, especially the natural resources extraction and the right of every citizen to live in a healthy environment. Consequently, the new approach to environmental enforcement is focused on the search for an appropriate balance between investment promotion and environmental protection. It's not required an environmental enforcement which means a cost overrun, or which discourages investment or affects the economic competitiveness. Nor a lax, faint or insignificant enforcement, that encourages the non-compliance of environmental obligations. What is looked for is an efficient, effective and reasonable enforcement, promoter of environmental remediation, genuinely dissuasive, but far from arbitrariness and non-confiscation.

While, on the one hand, in the search for that balance, the dissuasive power of OEFA has been strengthened through the increase of maximum fines up to 30,000 UIT[2] and has been established the coercive execution proceedings for collection of fines can only be suspended if the company obligated to pay, obtains a precautionary measure from the judiciary, previous offer of injunction bond which consists in a real or personal guarantee (letter of guarantee)[3]; on the other hand, it has been

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(iii) Internal regulations as the internal Regulations of the Tribunal of Environmental Enforcement and the Regulations for the regime to hire third evaluators, supervisors and controlling authorities of OEFA;

(iv) Regulation guides, as Methodology to calculate the fines and the application of aggravating and mitigating factors by using in adjustment of penalties, guidelines to apply corrective measures of environmental restoration and compensation, guidelines which establish criteria to classify as repeat offenders to the environmental offenders, and Methodology to classify the level of risks of environmental liabilities in the hydrocarbon sub-sector; and,

(v) General Rules for the power of OEFA to impose penalties which contain particular provisions of an administrative regulation as well as particular provisions of a regulation guide.

2 According to Item b of Number 136.2 of Article 136, Law No. 28611 - General Law on Environment, amended by Law No. 30011.

3. According to Article 20- A, of Law No. 29325 – Law on National Environmental Assessment and Enforcement System, introduced by Law No. 30011. It should be noted that by Supreme Decree No. 008-2013-MINAM, published on August 22, 2013, regulatory provisions were approved on scopes of said article.

regulated the voluntary remedial action of minor findings[4], so that before a minor non-compliance, firstly, OEFA gives to the company the opportunity to be remedied and only in case where non-compliance continues there will be a respective penalty procedure.

There is another balance in the field of dissemination of information, neither secrecy nor excessive advertising. It is necessary to harmonize the right of all citizens to know the actions that OEFA has been performing with the interest of entities to keep in reserve their involvement in punishment procedures during the period in which these are confidential. An appropriate interpretation of the Law on Transparency and Access to Public Information[5] allows the dissemination of public summaries of confidential decisions[6]. Furthermore, on the basis of what is established in the Law on National Environmental Assessment and Enforcement System[7], OEFA can disseminate technical and objective information generated by supervisory actions which is expressed through the communication of public reports in supervision reports.

There is also a balance in administrative regulations recently issued that classify offenses and establish penalties regarding the effectiveness of environmental enforcement[8], non-compliance of Maximum Permissible Limits[9], the breach of

4 It should be noted that voluntary remedial action is regulated in the following legal rules: (i) the Item b of Number 11.1 of Article 11 of Law No. 29325, amended by Law No. 30011; (ii) Articles 11 and 12 of Regulations for Direct Supervision of OEFA, approved by Decision of Board of Directors No. 007-2013-OEFA/CD published on February 28, 2013; and (iii) Regulations for voluntary remedial action of minor non-compliances, approved by Decision of Board of Directors No. 046-2013-OEFA/CD, published on November 28, 2013.

5 We refer to Article 3 and Number 3 of Article 17 of Single Organized Text of Law No. 27806 – Law on Transparency and Access to Public Information, approved by Supreme Decree No. 043-2003-PCM, in which it is considered that the right to access to public information may not be exercised regarding the information related to ongoing investigations regard to the power of the Public Administration to impose penalties.

6 According to the established directive which promotes greater transparency regarding the information administered by OEFA, approved by Decision of Board of Directors No. 015-2012-OEFA/CD, published on December 28, 2012.

7 Article 13-A of Law No. 29325, introduced by Law No. 30011

8 Approved by Decision of Board of Directors No. 042-2013-OEFA/CD, published on October 16, 2013.

9 Approved by Decision of Board of Directors No. 045-2013-OEFA/CD, published on November 13, 2013.

obligations contained in the Environmental Management Instruments and the development of activities in forbidden areas[10]. To achieve the principle of reasonableness, the respective scales of penalties are covered by gradualness on the basis of such criteria as the environmental risk of metals or substances involved (lead, mercury, arsenic, cyanide, etc.); the real damage to life or human health, flora or fauna; percentage of excess of maximum permissible limits; the lack of operating permits for natural resources exploitation; development of activities in forbidden areas to develop extractive activities, etc.

In addition to the foregoing and safeguarding the reasonableness and proportionality principles, the principle of non-confiscation has been incorporated, whereby the fine imposed shall not exceed ten percent of annual gross revenue received by the offender the year prior to the date when the offense[11] was committed.

The search for balance is a constant in the different OEFA actions. In setting out its vision, it ensures that the economic activities are developed with stability in the country, establishing people's right to a healthy environment. Its mission also

10 Approved by Decision of Board of Directors No. 049-2013-OEFA/CD, published on December 20, 2013.

11 General Rules on the power of OEFA to impose penalties, approved by Decision of Board of Directors No. 038-2013-OEFA/CD, published on September 18, 2013.-

"TENTH.- The amount of fines

10.1 Applying the principle of non-confiscation, the fine to be applied shall not exceed ten percent (10%) of annual gross revenue received by the offender the year prior to the date when the offense was committed.

10.2 In case the company is carrying out activities in less time than the established in the previous paragraph, the annual gross revenue will be calculated multiplying by twelve (12) the average of monthly gross revenue recorded from the starting date of such activities.

In case the company is not earning income, the estimated income planned to earn will be made.

10.3 The previous rule provided in Number 10.1 will not be applied in cases where the offender:
a) has carried out his/her activities in forbidden areas;
b) has not demonstrated his/her gross revenue or has not estimated expected revenues; or,
c) Is a repeat offender.

10.4 Imposition of administrative fines is independent of the compensation for damages which are determined in the jurisdictional scope."

is to accomplish and promote an effective environmental control, seeking harmony between the economic activities and environmental protection with sustainable development.

Under this new approach to environmental enforcement interested in the search for balances and the reasonable power of OEFA to impose penalties, it will be created more confidence in the people in respect of public function of environmental protection. This greater confidence will help to reduce social conflict and at the same time is going to promote investment in the country, for the benefit of all.

STRENGTHENING OF ENVIRONMENTAL ENFORCEMENT

HUGO R. GÓMEZ APAC
MILAGROS GRANADOS MANDUJANO

Summary

This article explores the new approach to environmental enforcement that the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) is consolidating. Said approach seeks to harmonize the free private initiative and free enterprise with environmental protection. In that regard, OEFA has implemented a variety of mechanisms in order to ensure the celerity of environmental enforcement and an effective environmental protection.

I. Introduction. II. New approach to environmental enforcement: search for balances. III. Greater transparency and dissemination of environmental enforcement actions. IV. Celerity, effectiveness and reasonableness of the environmental enforcement. V. Predictability and reasonableness regarding the imposition of fines and corrective measures. VI. Promote the citizen participation in the process of approval of rules at OEFA. VII. Conclusions.

I. INTRODUCTION

This article[1] aims to explain the measures taken since the end of 2012 and during 2013 in order to strengthen environmental enforcement in charge of the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish), public entity dependent on Ministry of the Environment, which exercises the administration of the National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish) and, at the same time, carries out environmental enforcement on the companies which develop economic activities in the following sectors: medium and large-scale mining, hydrocarbons, electricity, fishery (indus-

1 This document is an updated version of the article which was published in the *Revista de Economía y Derecho*, number 39. Lima: Universidad Peruana de Ciencias Aplicadas, 2013. pp. 43-64.

trial fishing processing and large scale aquaculture) and manufacturing industry (beer, paper, cement and tannery)[2].

Broadly, environmental enforcement includes the environmental quality assessment actions (monitoring), supervision of environmental obligations of the companies (those that develop economic activities) and, in cases where there are non-compliances to these obligations there will be processing of respective punishment procedures, imposing penalties and issuing precautionary and corrective measures.

OEFA was created in 2008 through the Second Final Supplementary Provision of Legislative Decree No. 1013[3], and with the intention of providing it a high degree of functional autonomy, that provision recognizes the nature of OEFA as public specialized[4] technical agency. Basically, this public entity has two general competencies. On the one hand, it supervises that the companies under its scope of jurisdiction meet environmental obligations resulting from the environmental regulation, from its environmental[5] management instruments and from the acts and administrative provisions[6] issued by OEFA. On the other hand, as governing body of SINEFA, it supervises that all entities at national level (ministries), regional (regional governments) or local (municipalities) with jurisdiction in the environmental enforcement fulfill this public function. OEFA is empowered to issue rules, directives, guidelines and compulsory implementation procedures by Environmental En-

2 OEFA is receiving progressively from Ministry of Production (PRODUCE, by its initials in Spanish) the jurisdiction in the environmental enforcement on several activities which include the manufacturing industry subsector. At the time that this document was drafted (December 2013), have already been transferred the mentioned powers in the areas: beer, paper, cement and tannery.

3 Legislative Decree which approves the Law on Creation, Organization and Functions of Ministry of Environment, published on May 14, 2008.

4 n accordance with the Article 33 of Law No. 29158 - Organic Law on the Executive Branch, the public agencies classified as “specialized technical” have a high degree of functional independence.

5 Such as Environmental Impact Assessment (EIA, by its initials in Spanish) (semi detailed or detailed), Environmental Compliance and Management Programs – PAMA, plans of cessation of operations, contingency plans, decontamination plans and environmental liabilities treatment, etc.

6 Such as preventive measures, specific orders, precautionary measures and corrective measures.

forcement Entities (EFA, by its initials in Spanish). Supervision to the companies is known as direct supervision, while supervision to EFA is understood as an additional supervision.

II. NEW APPROACH TO ENVIRONMENTAL ENFORCEMENT: SEARCH FOR BALANCES

The Number 22 of Article 2 of Political Constitution of Peru recognizes the fundamental right of all citizens to live in a balanced environment and adequate for the development of life. The Articles 58 y 59 from the constitutional text recognize other fundamental rights, such as free private initiative and free enterprise, keys for economic development.

At OEFA, a new approach of environmental enforcement has been consolidating. This control is looking for a balance that can help to harmonize free private initiative and free enterprise with environmental protection, the right to develop economic activities with the right to live in a healthy environment, promotion of private investment with the ecosystems protection in order to that this balance and harmony lead all of us to sustainable[7] development.

Economic growth is sustainable if it gets welfare both now and in future. Only the exploitation (rational) of natural resources will allow maintaining a long-term economic development for the benefit of present and future[8] generations.

The achievement of sustainable development has been consolidated as a fundamental objective of environmental policy. With the aim of achieving that objective, in OEFA have been implemented measures aimed at strengthening environmental enforcement, which are the following.

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7 In this regard, the Article V of Preliminary Title of Law No. 28611 - General Law on Environment considers the principle of sustainability, wherefore "the environmental management and its components as well as the exercise and protection of the rights (…) is based on balanced integration of social, environmental and economic aspects of national development, as well as on meeting the needs of present and future generations".

8 The Global strategy for sustainable development is targeted at improving the quality of life of all the planet's citizens, which is reflected in continuous improvement of economic and social development through rational use of natural resources, that is to say, without increasing its use beyond the capability of nature to provide them. Cf. SUB DIRECCIÓN GENERAL DE ESTUDIOS DEL SECTOR EXTERIOR DE ESPAÑA. "Desarrollo Sostenible". *Boletín Económico de ICE*. España, número 2747, 2002, p. 10.

III. GREATER TRANSPARENCY AND DISSEMINATION OF ENVIRONMENTAL ENFORCEMENT ACTIONS

Access to environmental information is relevant for environmental protection, because is essential for an active and conscious participation of citizens in public decision-making processes that impact on the environment. Only if citizens are well informed may exercise the right to participate effectively. The fact of being better informed is a key element to exercise the actions of administrative or judicial protection of the environment. The environmental information also contributes to improve the transparency of the public authority actions and functions as mechanism to control them[9].

Considering the above, the new approach of environmental enforcement looks for a greater dissemination of information administered by OEFA, but with balance and deliberation, neither secrecy nor excessive advertising. It seeks a balance between the interests at stake, between the public interest — regarding the dissemination of information — and private interest protected by non-disclosure.

The Article 3 of Single Organized Text of Law No. 27806 - Transparency and Access to Public[10] Information Law establishes that all information in possession of the State is considered public, with the exceptions which are expressly provided in that Law. The Number 3 of its Article 17 precisely regulates one of the possible exceptions, establishing that the right to access to public information may not be exercised regarding the information related to ongoing investigations regard to the power of the Public Administration to impose penalties, in which case the exclusion to access ends when is consented the decision which close the procedure, or when more than six (6) months have passed since the beginning of administrative penalty procedure, without any final decision.

A restrictive interpretation of Number 3 of Article 17 of Single Organized Text of Transparency and Access to Public Information Law could induce us to consider, erroneously, that cannot be disclosed, disseminated or provided some information held by OEFA. That law classifies as confidential information all what is linked to punishment procedures, and what is carried out by OEFA, precisely, is the processing of punishment procedures; not only these procedures, but also preliminary

9 Cf. Casado, Lucía. *"El acceso a la información ambiental en España: luces y sombras". Derecho PUCP*. Lima, número 70, 2013, pp. 242-243.

10 Approved by Supreme Decree No. 043-2003-PCM, published on April 24, 2003.

investigations of these procedures, which are known as assessment and supervision activities, which entirely would classify as confidential, what would restrict the right of citizens to know the actions carried out to protect the environment.

Nevertheless, nor is the point to publish all the information linked to punishment procedures, because not only it would go against confidential nature of that information, but also could affect the image of investigated companies. Therefore, there is a need to find an appropriate balance between the right of citizens to know the OEFA activities and the right of investigated companies to keep under reserve the punishment procedures, of which they are part.

To achieve that balance, in December 2012 the "Directive which promotes greater transparency regard to information administered by Agency for Environmental Assessment and Enforcement – OEFA"[11] was published, which establishes that OEFA can publish public summaries of the confidential information. Thus, regarding the Direct Supervision Report[12], what is published is the Public Report of Direct Supervision Report, public document which contains technical and objective information resulting from taking of samples, analysis and monitoring as well as other relevant and objective facts related to supervision. This report doesn't contain any assessment regarding alleged administrative offenses. On the contrary, it should

11 Directive No. 001-2012-OEFA/CD, approved by decision of Board of Directors No. 015-2012-OEFA-CD, published on December 28, 2012.

12 Item g) of Article 5 of OEFA Regulations for Direct Supervision, approved by decision of Board of Directors No. 007-2013-OEFA/CD, published on February 28, 2013, which defines the Direct Supervision Report as document that contains the analysis of direct supervision actions, including classification and measurement of verified findings and evidences which support such analysis. The Number 10.1 of Article 10 of that Regulations establishes that Direct Supervision Report resulted from a field supervision, shall contain the following:

a) Objectives of supervision.
b) Direct supervision establishments.
c) Environmental verification matrix, which will contain the evidence of environmental accomplishments and field findings, and those that are in subsequent analysis made by Supervisor, as appropriate. To that end, must be attached the evidence proving the fact, as appropriate.
d) Proposal for recommendations to find alleged offenses of minor importance, as appropriate.
e) Monitoring of recommendations in detail, specific orders, corrective measures, preventive measures and previous precautionary measures, as appropriate.
f) Direct Supervision Record; and
g) Conclusions.

be clearly expressed that lab results contained there don't imply any preconception, prejudgment, not even evidences of offense.

Thus, for example, in a Public Report of Direct Supervision Report it can be mentioned the concentration level of mercury or lead found in the effluent thrown by a company to a water body (e.g. a river), but without indicating whether that fact is a breach of an environmental obligation. When is avoided the record of an evaluation or a judgment in legal form, even preliminary or of circumstantial evidence, the mentioned report no longer contains sensitive information that could be described as confidential, but rather technical and objective information susceptible of being disseminated to community.

The logic contained in that Directive has been included in the Law No. 30011[13], rule which amends and adds articles to the Law No. 29325 – Law on National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish) (**SINEFA Law**). The new Article 13-A of this law establishes that OEFA — and EFA — will make available and free access to the public the technical and objective information resulting from taking of samples, analysis and monitoring carried out in the exercises of its functions. It is expressly stated that such information is not a preconception regarding jurisdictions in the environmental enforcement, according to their own procedures.

Regarding punishment procedures and confidential penalty decisions, Number 7.2.1 of mentioned Directive points out that what is published are Public Summaries, which record the file number; name, business name of the investigated company; procedure status; supervised unit and supervision date. Also, the mention if sanction was applied or not and if it was formulated an administrative appeal or not, if applicable.

In this way, is guaranteed the right of citizens to access to environmental information possessed by the Entity. This is to ensure that citizens can participate effectively in public affairs related to environmental protection.

To conclude this part, it is pertinent to mention that in relation to punishment procedures, confidentiality is not taken into account if six months have passed since the beginning of procedure and if it has not issued final decision, understood as a decision to exhaust all available administrative remedies.

13 So-called law which amends Law No. 29325 – Law on National Environmental Assessment and Enforcement System, published on April 26, 2013.

IV. CELERITY, EFFECTIVENESS AND REASONABLENESS OF THE ENVIRONMENTAL ENFORCEMENT

We find other forms of balance which characterize this new approach of environmental enforcement on complementary application of the new OEFA Regulation for Administrative Penalty Proceedings[14] with the new OEFA Regulation for Direct Supervision[15]. The first, published in December 2012, and the second was published in February 2013.

For a rapid environmental enforcement and an effective environmental protection, such regulations look for: (i) a fast answer by administrative authority through the Technical Report, (ii) a convenient environmental protection through so-called "preventive measures" and (iii) strengthening of environmental enforcement with so-called "specific orders". Additionally, to avoid unnecessary overruns to the company and the State, the Regulation for Direct Supervision dismisses the processing of a punishment procedure when the company remedies minor non-compliances voluntarily and opportunely. The following explains each figure.

4.1 The specific orders

To guarantee the environmental enforcement efficacy it has been attributed to OEFA the power to issue orders with specific characteristics, measures intended to get that the company provides to the Direct Supervision Authority (OEFA Supervision Bureau) important information or documentation which enable an effective and convenient environmental enforcement. The aim of this kind of administrative measure is that the purpose of request is not limited to what the company already possesses, but rather includes information and documentation that must be developed and processed. Therefore, these orders have greater outreach compared to typical information injunctions. Thus, for example through a specific order, the Supervision Bureau could order to a mining company the development of a hydrogeological study of adjacent areas to its mining unit.

In that regard, the Regulation for Direct Supervision points out that the specific orders are provisions through which is ordered to companies to carry out certain

14 Approved by Decision of Board of Directors No. 012-2012-OEFA/CD, published on December 13, 2012.

15 Approved by Decision of Board of Directors No. 007-2013-OEFA/CD, published on February 28, 2013.

actions related to a finding, for the purpose of obtain greater elements of evidence about their compliance for environmental obligations[16]. Within the framework of supervision, the Direct Supervision Authority can issue specific orders so that the companies carry out audits, studies or generate information related to economic activities, which are matter of supervision.

It should be noted that the above provision has also been included in Law No. 30011, which incorporated the Article 16-A of SINEFA Law in order to establish that OEFA can issue specific orders, following the principles of reasonableness and proportionality. The breach of these orders means an administrative offense[17].

4.2 Preventive measures

To adequately protect the environment, it has been given to OEFA the power to issue preventive measures. These measures are issued applying the principle of prevention[18], whereby it is preferable to prevent a possible environmental damage than repair it, once carried out. Prevention has significant importance because the aggression to the environment is expressed in facts that cause a real and irreversible damage in the environment and a perceptible degradation of quality of life; therefore, its cessation cannot be put off[19].

In this regard, the Constitutional Court of Colombia holds that the sentence of preventive measures is based upon the necessity to react in a timely and efficient manner before the possibility of environmental risks. Similarly, it holds that such

16 Article 29 of OEFA Regulations for Direct Supervision.

17 In this same regard, the Article 17 of SINEFA Law, amended by Law No. 30011, establishes as administrative offense the breach of orders issued by the competent authorities of OEFA.

18 According to Constitutional Court, *"the principle of prevention is derived from the social aspect inherent in the right to a balanced and appropriate environment (...)*
In that regard, the duty of the State to prevent the risks suitably, as well as preventing the damages that can be caused to the environment as a result of human intervention is unavoidable, in particular, during the economic activity development. Moreover, the principle of prevention requires the State to implement actions and adopt technical measures aimed at assessing possible damages that can be caused to the environment". Cf. Judgment of February 19, 2009, ruling entered on the Docket No. 03343-2007-PA/TC, point of law 18.

19 Cf. GHERSI, Carlos, Graciela LOVECE, y Celia WEINGARTEN. *Daños al ecosistema y al medio ambiente.* Buenos Aires: Editorial Astrea, 2004, p. 24.

measure is carried out in fulfillment of provisions imposed to the State, in order to oblige it to protect natural diversity of the country, and guarantee to all people the enjoyment of a healthy environment[20].

The Regulations for Direct Supervision[21] stipulates that Supervision Bureau has the power to issue preventive measures in order to avoid a serious damage to the environment, natural resources, to people's health as well as to reduce the causes which generate degradation or environmental damage.

To issue a preventive measure must be taken into account the principles of reasonableness and proportionality[22], and its issuance must be based on risk assessments, impacts and the gravity that can represent such situation for the environment, natural resources and people's health[23]. Considering the principles above mentioned and the circumstances of the specific case can be arranged, among others, the following preventive measures[24].

(i) Temporary, partial or total closure of establishment where it is carried out the activity that puts at risk the environment or people's health.

(ii) Temporary, partial or total cessation of activities that put at risk the environment or people's health.

(iii) Temporary confiscation of objects, instruments, devices or substances used which put at risk the environment and people's health.

(iv) Destruction or similar action of materials or hazardous waste which put at risk the environment and people's health.

20 Cf. Judgment C-703/10 of 6 September 2010, recital 6.

21 Article 22 of OEFA Regulations for Direct Supervision.

22 Number 23.2 of Article 23 of OEFA Regulations for Direct Supervision.

23 Cf. NEGRETE, Rodrigo. "Environmental penalty system". En Universidad Externado de Colombia. *Lecturas sobre Derecho del Medio Ambiente*. Bogotá: 2005, p. 319.

24 Article 24 of OEFA Regulations for Direct Supervision.

Preventive measures are applied in situations where necessarily there isn't evidence of an administrative offense[25], reason why these measures are independent of the beginning of an administrative penalty procedure[26]. Thus, it may happen that a company which is fulfilling with the provisions of Environmental Impact Assessment, and nevertheless, is severely damaging the environment or affecting people's health. Before this situation, it can be issued as preventive measure the cessation of harmful activity. It is not surprising that occasionally some situations are presented, in which — despite the compliance of what is established in its Environmental Management Instrument — the activity of company is causing serious environmental damage or severely affecting people's health; because one thing is carry out a desk or documentary study (ex-ante) and quite another matter is the reality manifested over time (ex post).

To conclude, it should be noted that the power to issue preventive measures has been recognized in Law No. 30011, which has incorporated the Article 22-A of SINEFA Law, establishing that OEFA can issue preventive measures when there is evidence of imminent danger or risk of environmental damage. It is important to note that breach of preventive measures is an administrative offense[27].

4.3 Voluntary remedial action of minor findings

To avoid cost overruns to company and Public Administration, the processing of a punishment procedure is not considered when the company remedies minor non-compliances voluntarily and opportunely.

In this regard, Item b) of Number 11.1 of Article 11 from SINEFA[28] Law establishes that OEFA supervisory function aims to promote the voluntary remedial

25 Article 22 of OEFA Regulation for Direct Supervision.

26 As noted in doctrine, the authority inspector has the power to issue measures in order to face possible offenses or situations that — even though these are not considered as offenses — generate infringements to the environment and people's health. In response, Public Administration is empowered to adopt measures in order to face these circumstances. Cf. García, Agustín. *La potestad inspectora de las administraciones públicas*. Madrid: Marcial Pons, 2006, pp. 144-145.

27 Article 17 of SINEFA Law, incorporated by Law No. 30011.

28 According to text amended by Law No. 30011.

action of minor findings which doesn't imply the renunciation of the authority and his or her regulatory role. By contrast, the objective is have a legal instrument that allow a more flexible and reasonable intervention according to the seriousness of breaches in which the companies may incur.

In order to regulate the significance of the measure aforementioned has been issued the "Regulations for voluntary remedial action of minor non-compliances"[29]. This regulation points out that the lower impact findings are facts relating to alleged breaches of environmental obligations which don't cause potential or real damage to the environment or people's health; these findings can be rectified and don't affect the efficacy of Supervisory function executed directly by OEFA.

Similarly, the Regulation contains an indicative list of conducts classified as lower impact findings, among which there are obligations referred to information delivery, as well as conducts related to administration and management of solid waste and non-hazardous material. An example of this is when is not signaled the storage sites of such wastes or if the respective waste containers are not covered.

The company that carries out a conduct qualified as lower impact finding, can remedy it voluntarily, during or after the field supervision carried out by OEFA. In the event that compensation is carried out during the development of supervision, will not be issued a recommendation, nor will be developed the Technical Report. Otherwise, if compensation is not carried out during field supervision, the Direct Supervision Authority will be able to issue a recommendation to the company granting it a reasonable deadline in order to compensate that breach, according to established at Regulations for Direct Supervision[30]. In both cases, if the company properly compensates the detected finding, the Direct Supervision Authority will issue a letter to the company on the conformity of the compensation made.

Similarly, the company can compensate lower impact findings that have not been detected by Direct Supervision Authority. In this case, such conduct will be taken into account for provision of incentives.

29 Approved by Decision of Board of Directors No. 046-2013-OEFA/CD, published on November 28, 2013.

30 Number 12.2 of Article 12 by OEFA Regulations for Direct Supervision.

The rules aforementioned are not applicable in the following assumptions: (i) if the conduct which is classified as lower impact finding interferes with supervisory function executed directly by OEFA; (ii) when the company previously has had a conduct similar to the lower impact finding detected earlier; or (iii) when conduct refers to Environmental Emergency Reports.

It is important to mention that voluntary remedial action generates benefits to the company as well as for Public Administration. Indeed, for the company, it is more convenient to compensate the lower impact finding instead of assume legal costs in an administrative penalty procedure. Likewise, for Public Administration is more efficient if — to safeguard the public interest — the entity compensates such breach instead of be subjected of an administrative penalty procedure.

4.4 Technical Report

In accordance with the provisions in the Regulations for direct supervision[31], through Technical Report (ITA, by its initials in Spanish) the Supervision Bureau proposes to the Instructor Authority (Sub-department for Instruction of the Bureau of Enforcement, Penalty and Application of Incentives at OEFA) the alleged existence of administrative offenses and attaches the evidences which support its conclusions. ITA is the result of field supervision, which is carried out by Supervision Bureau in the areas influenced by the dynamism of the economic activity developed by the company. ITA contains the following[32]:

(i) Exposure of actions and omissions which are circumstantial evidences of the existence of punishable administrative offenses; identifying alleged perpetrators; evidences; rules or commitments supposedly broken or breached and other environmental obligations to be controlled.

(ii) Identification of imposed preventive measures, if applicable, and

(iii) Request to appear in person to the administrative penalty procedure, where applicable.

31 Number 15.1 of Article 15 of OEFA Regulation for Direct Supervision and Number 7.1 of Article 7 of OEFA Regulation for Administrative Penalty Proceedings.

32 Number 15.2 of Article 15 of OEFA Regulation for Direct Supervision and Article 8 of OEFA Regulation for Administrative Penalty Proceedings.

For its part, the Regulation for Administrative Penalty Proceedings provides that charge is formed by Technical Report and imputations that Instructor Authority could add. Similarly, the charges included at Technical Report as well as the others added by that Instructor Authority, if applicable, must be recorded at charge decision. With the notification of charge decision, the administrative penalty procedure[33] is started.

As can be seen, when field supervision is finished, the Supervision Bureau technicians proceed to quickly identify everything that can be described as circumstantial evidence of alleged administrative offense (minor non-compliance is not included) and thus ITA is developed.

Because this document identifies alleged people responsible, evidences and environmental obligations allegedly breached, the content of ITA is part of charge decision, whereby the Bureau of Enforcement, Penalty and Implementation of Incentives initiates the respective punishment procedure.

ITA allows the shortest possible time between field supervision and the beginning of punishment procedure. For the company, the defense is easier if the facts alleged occurred two or three months ago, and not two or three years ago. This celerity is possible due to that ITA can be developed even before the conclusion of Supervision Report[34].

According to regulation issued by OEFA, the Bureau of Enforcement, Penalty and Application of Incentives does not have to study, analyze and process

33 Article 9 of the OEFA Regulation for Administrative Penalty Proceedings.

34 Indeed, Number 15.3 of Article 15 of the OEFA Regulations for Direct Supervision establishes that issue a Technical Report does not necessarily require the initial issue of Supervision Report.

The fact that the Supervision Report requires more time for its development is due to having higher complexity and content. In that report not only appears what has been mentioned regard to ITA, but also the supervision objectives; the parent of environmental verification (where appear all the supervised aspects, those which are circumstantial evidence of administrative offense as well as the compliance of obligations to be controlled); the proposal for recommendations to find less important alleged offenses; the detail for follow-up of recommendations, specific orders, corrective measures, preventive measures and previous precautionary measures, as appropriate; among others.

an extensive Supervision Report, but rather it is in charge of ITA, which is a shorter document, whose content is included into Charge without further formalities.

V. PREDICTABILITY AND REASONABLENESS REGARDING THE IMPOSITION OF FINES AND CORRECTIVE MEASURES

If within the framework of an administrative penalty procedure, the Bureau of Enforcement, Penalty and Application of Incentives verifies an administrative offense, this Bureau will impose the corresponding penalty and will issue the relevant corrective measure. The aim of the penalty is to punish or repress the implementation of wrongful conduct[35] [36]; it seeks to dissuade the offender to commit the same offense in the future (special prevention); and to the rest of entities to don't fall into similar conduct (general prevention). In general terms, the penalty seeks to discourage the imminent danger in the environment as well as its concrete impact[37]. On the other hand, the corrective measure aims to restore things to their original state before the offense; that is to say, repair, restore, or reinstate the damages caused by the offending conduct to the environment or people's health[38].

35 In this sense, the case law states that repressive or retributive function is what distinguishes the administrative penalty from other administrative decisions which restrict individual rights (as corrective measures). Cf. Judgment of the Constitutional Court of Spain 276/2000 of November 16th. In Nieto, Alejandro. *Administrative Penalty Law*. Fourth edition, Madrid: Editorial Tecnos, 2005, p. 197.

36 For its part, the doctrine refers to that punitive character is a necessary and sufficient condition for detect the existence of a penalty. At the same time, there are criteria to differentiate the penalties from other administrative measures. Cf. Rebollo, Manuel. "*El concepto de sanción administrativa*". En García, María del Pilar y Óscar Darío Amaya (compilers), *Derecho Sancionatorio Ambiental*. Bogotá: Universidad Externado de Colombia, 2013, p. 125.

37 Cf. Gómez, Hugo, Isla, Susan y Mejía, Gianfranco. "*Apuntes sobre la Graduación de Sanciones por Infracciones a las Normas de Protección al Consumidor*". Derecho & Sociedad. Lima: 2010, number 34, p. 136.

38 In this regard, can be reviewed: Conesa, Vicente, *Guía Metodológica para la Evaluación del Impacto Ambiental*. Madrid: Mundi-Prensa, 2010, pp. 295-312.

With the aim of having predictable and reasonable corrective measures and the delivery of penalties, in March 2013 were published the "Methodology to calculate the fines and the application of aggravating and mitigating factors to use in adjustment of penalties"[39] (hereinafter, the **Methodology**) and the "Guidelines for the application of expected corrective measures in Item d) of Number 22.2 of Article 22 of the Law No. 29325"[40] (hereinafter, the **Guidelines**). These legal instruments complement each other and have five central objectives: (i) generate a greater predictability regarding the action of the decision divisions of OEFA; (ii) reduce their discretional nature; (iii) guarantee a better exercise of companies' rights of defense; (IV) apply the principle of reasonableness, avoiding the generation of overruns to the companies; and (v) promote the environmental remediation. Let's see each one.

5.1 Greater predictability

The aforementioned Methodology contains the formulas and value tables that must be used to calculate fines, which have been decided taking into account the principle of proportionality[41]. In this way, using the Methodology, the companies know beforehand which will be the reasoning used by the administrative authority to calculate the fine, as well as the criteria which will be described as aggravating or attenuating, and the importance of each one of them.

By way of example, the Methodology notes that to calculate the fine, it is taken into account the assessment of environmental damage (specific), the illicit

39 Approved by Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD, published on March 12, 2013.

40 Approved by Decision of Board of Directors No. 010-2013-OEFA/CD, published on March 23, 2013.

41 The doctrine points out that in the Administrative Penalty Law, the principle of proportionality requires the existence of a balance between the means used and the aim pursued; a correspondence between the gravity of a conduct and its punitive consequence. Cf. De Fuentes, Joaquín et ál. *Manual de Derecho Administrativo Sancionador*. Navarra: Editorial Aranzadi, 2005, p. 245.

profits[42] and probability of detection[43]. Similarly, are considered as aggravating factors: the impact on natural resources, protected natural areas and buffer zones; the impact to indigenous and rural communities; the effect on people's health; the economic damage; the repeated offense[44]; the premeditation, among others; and as mitigating factors: voluntary remedial action of the offending conduct, the adoption of remediation measures, etc.

The Methodology mentions in what percentage the fine will increase or decrease based upon the implementation of aggravating or mitigating factors. It is known beforehand what the weight is in percentage terms of aggravating and mitigating factors.

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42 The illicit profits consist in the real or potential benefit generated by the commission of an administrative offense. In other words, it is the benefit obtained or what the offender expects to obtain without complying with obligations to be controlled. In economic terms, it is understood that the offender is in a better situation (it has been obtained a benefit) by infringing the legal system. For this reason, the illicit profits which are considered to calculate the fines must necessarily include all concepts that can represent a benefit or advantage for the offender (e.g. savings obtained or illicit incomes); otherwise, the offender always would have reasons to engage in the classified conduct. Cf. Explanatory Manual of the Methodology to calculate the fines and the application of aggravating and mitigating factors to use in adjustment of penalties, paragraphs 18 to 20 (approved by Article 3 of the Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD).

43 The probability of detection is the possibility — measured in percentage terms — that the commission of an offense is detected by administrative authority. The necessity to relate the benefit illicitly obtained — as a result of the offense — with the probability to detect the conduct meet the objective of eliminating a possible opportunistic behavior by the offenders. In this regard, when is more likely to detect a breach, the associated penalties will not be increased; by contrast, when there is a low probability of detection, the penalties will increase. Cf. Explanatory Manual of the Methodology to calculate the fines and the application of aggravating and mitigating factors to use in adjustment of penalties, paragraphs 21-23.

44 The doctrine points out that the reason to consider the repeated offense is in the greater reproach for those who already know from their own experience the sense of legal prohibitions, as well as in situations of special prevention, because the person has showed dangerous tendency to violate the legal system. Cf. Sánchez Terán, Juan Manuel. *Los criterios de graduación de las sanciones administrativas en el orden social*.
Valladolid: Lex Nova, 2007, pp. 323-324.

Furthermore, it should be noted that OEFA has issued "Guidelines which establish criteria to classify as repeat offenders to the environmental offenders under the responsibility of OEFA", which were approved by Decision of Presidency of Board of Directors N° 020-2013-OEFA/PCD, published on 22 February 2013. In that document is established that the repeated offense is configured if there is an allowed penalty or, if it is exhausted all available administrative remedies by the same type of offense punishable in the last four (4) years.

Considering the above, we can affirm that Methodology is designed so that the company can know — before to commit an offense — the approximate amount of fine in case of an offense.

5.2 Reduction of administrative discretion

The use of Methodology reduces the discretion of administrative authority by considering objectives criteria to determine the value of each one of factors (aggravating and mitigating) which will be used to calculate the fine. While these criteria cannot be calculated with mathematical precision — what is impossible — then, at least with a reasonable approximation which is enough for Administrative Penalty Law.

Thus, it is explained how will be calculated the illicit profits which includes illicit incomes,[45] and costs avoided[46]. In reference to probability of detection, the Methodology reduces to five the probability levels (100%, 75%, 50%, 25% and 10%)[47], and mention the criteria[48] which will allow to the authority choose the probability level, when deemed necessary.

As regards aggravating factors, the Methodology points out that, for example, the aggravating factor relating to economic damage will be calculated taking into account the incidence of poverty of affected community. For this purpose, it is es-

45 These are "illegal economic incomes related to the breach of environmental regulation". Cf. Explanatory Manual of the Methodology to calculate the fines and the application of aggravating and mitigating factors to use in adjustment of penalties, paragraph 20.

46 This is "savings obtained by breaching the environmental obligations to be controlled, by not carrying out or postpone investments or expenditures to prevent the occurrence of environmental damages during the period of breach for environmental regulation". Ibid.

47 "An offense will be difficult to detect if, e.g., only one in ten of them is reported to the authority. In this case, the probability of detection is 10%. A greater probability will be 25% (one in four offenses would be detected by authority). If one in two cases is detected, the probability of detection raises to 75%. The offenses of high detection will be 75% (three in four offenses would be detected). Finally, if all offenses would be detected, then we have a 100% probability of detection". Ibid. paragraph 24.

48 Among the criteria mentioned we have the following: if the company reported the administrative offense; if there is population located near the place of offense; if the offense was detected in a special or regular supervision; if the activity carried out is illegal (i.e., without administrative authorization); and if the company submitted false and incomplete information or quite simply, did not submit the information to which it is obliged, in order not to be detected by the authority. Ibid. paragraph 26.

tablished a scale, which has been developed following the principle of proportionality and in accordance with the information provided by the National Institute of Statistics and Information Technology (INEI, by its initials in Spanish). The scale imposes greater severity, proportional to the incidence of poverty of population in the area of offense. In this way, it is noted that the aggravating factor will have a weight of +4% if the impact happens in an area with incidence of poverty to 19, 6%; however, it will have a weight of +20% if happens in an area with incidence of poverty greater than 78, 2%.

5.3 Optimization in exercising the right of defense

The right of defense is guaranteed in the best way due to that, when is known beforehand the Methodology to calculate the fines, the companies during the presentation of their deposition or administrative appeals (reconsideration or appeal), will not only be able to question the alleged existence of the administrative offense, but they may also provide evidences or pleas in respect of adjustment criteria, for the purpose of paying the lowest fine, if applicable. Therefore, in its respective deposition or administrative appeals, the company will be able to argue that environmental impact is reversible in the short term; that a protected natural area has not been damaged; that indigenous and rural communities have not been affected; that people's health have not been harmed, etc.

As an example, the Methodology considers as aggravating factor the "severity of damage", establishing that one of the criteria to determine the value of that factor is the reversibility or irreversibility of environmental damage. In this sense, once proven a real or specific damage for the environment, it has been established that the aforementioned aggravating factor will have a weight of +18% if the damage is reversible naturally in the short term; a weight of +36% if is recoverable by man in the short term; a weight of +54% if is recoverable by man in the medium term; and a weight of +72% if is recoverable in the long term or if is irrecoverable.

Well, it can happen that, in a specific case, the administrative authority has considered that real damage is recoverable in the medium term, so, the fine increased by 54%. Nevertheless, the company in its appeal brief could argue that not correspond them a so heavy fine, because the damage was recoverable naturally in the short term, so that it had to use the value of +18, resulting in a smaller fine.

5.4 Reduction in cost overruns for the companies

The Methodology and Guidelines are complementary to avoid cost overruns for the companies. In the first place, to calculate the fine will be used the real damage only if there is information which allows its valuation. In the event of there is

this information and, therefore, the approximate value of the real damage is included in the equation which is used to calculate the fine, the damage will not be used, whether it is potential or real as aggravating factor. This avoids a double imposition on the company.

Additionally, in the event of it is used the real damage in the formula of the fine and, there is decision to dictate a corrective measure of restoration or environmental compensation; it will not be used the total amount of real damage in the formula of the fine, but only a quarter, i.e., 25%. The logic underlying is that the other three quarters, i.e., the remaining 75% will be covered by the company by taking on the cost of corrective measure. As is clear, at all times it is avoided to generate overruns for the companies.

5.5 Promotion of environmental remediation

The environmental remediation is promoted due to the fact that this circumstance impacts on the reduction of the fine and the cost of corrective measure regarding environmental restoration. This means that, if the company, after commit the offense (e.g. spills or dumping on surfaces or water bodies) goes on to implement remedial actions (e.g. cleaning up what is contaminated) which reduce damage sustained; such action will be taken into account to calculate the fine and the necessary corrective measure. Indeed, firstly, will be included a reduced amount for damage concept when calculating the fine; secondly, such remediation will be considered as a mitigating factor; and thirdly; what is remedied will decrease the cost which would be assumed by the company, if there was a corrective measure of environmental restoration, because would be less the damage to repair.

VI. PROMOTE THE CITIZEN PARTICIPATION IN THE PROCESS OF APPROVAL OF RULES AT OEFA

In accordance with the provisions in the Article 21 of Regulations on Transparency, Access to Environmental Public Information and Citizen Participation and Consultation in environmental issues[49], citizen participation in environmental matters is the process through which the citizens participate responsibly, in good faith and with transparency and truthfulness, individually or collectively, in the definition and policy implementation related to environment and its components.

49 Approved by Supreme Decree No. 002-2009-MINAM, published on January 17, 2009.

The Articles 35 and 39 of the aforementioned Regulation consider as a mechanism for citizen participation, the publication of draft rules. Particularly, these stipulate that draft norms which regulate general environmental issues or have environmental effects must be brought to the attention of public to receive opinions and suggestions of interested parties. The publication notice of the project should be published at Official Gazette *El Peruano* and the entire body of the project at transparency portal of entity, for a minimum period of (10) business days.

In compliance with the aforementioned rules, OEFA is publishing the draft rules which regulate their activities of environmental enforcement. Even more, even if the aforementioned rules do not require it, OEFA carries out meetings with the commentators, and furthermore, develops and publishes a matrix of comments, in which give details the reasons why were accepted or rejected the suggestions received. Consequently, the process of approval of rules at OEFA begins with the publication of regulatory proposal; afterwards is carried out a meeting with people which sent their comments and at the end, it is published the rule approved and the matrix of comments. In this way, it is guaranteed that the companies and citizens in general have an effective participation in environmental management, i.e., that their opinions are considered as part of approval of regulatory proposals, which have a positive impact on efficacy of policies for environmental enforcement, adopted by OEFA.

As established in "Convention on Access to information, public participation in decision making and the access to justice in environmental matters", approved by the European Community[50] *"(...) a greater public participation in decision making allows to take better decisions and apply them more effectively; helps to increase public awareness regard to environmental problems; gives to public the possibility to express their concerns and take them into account through public authorities*".

During the process of developing of environmental rules it is important take into account not only the opinions of companies monitored by environmental enforcement, but also of non-governmental organizations and civil socie-

50 The Convention on Access to information, public participation in decision making and the access to justice in environmental matters (known as "Convenio Aarhus") was approved by the Council of the European Union on February 17, 2005.

ty groups who defend the environment (native communities, rural, indigenous peoples), for the purpose of carry out an appropriate weighting between the interests involved[51].

VII. CONCLUSIONS

The effectiveness of environmental enforcement requires a suitable legal framework which facilitates control of activities carried out by particulars and at the same time guarantee the exercise of their economic freedoms. Under this logic, at OEFA a new approach to environmental enforcement is being consolidating which seeks to harmonize free private initiative and free enterprise with environmental protection.

To get that balance, OEFA has implemented a set of mechanisms aimed to guarantee the environmental enforcement celerity and an effective environmental protection. Among these measures we have the Technical Report, preventive measures and specific orders. Additionally, to avoid unnecessary overruns to company and the State, it is excluded the processing of a punishment procedure when the company remedies minor non-compliances voluntarily and opportunely.

Furthermore, has been implemented mechanisms aimed to strengthen transparency, the access to information and citizen participation in environmental enforcement. In this way, all citizens can access to Public Report of Direct Supervision Report and Public Summaries of punishment procedures. Additionally, it is promoted the citizen participation in the process of approval of rules related to environmental enforcement.

The new approach of environmental enforcement does not seek to be an obstacle for private investment. Quite the opposite, is in favor of investment, but in a responsible manner, with the aim of that exploitation of natural resources guarantees greater well-being for present and future generations. This is the concept of sustainable development that characterizes the new approach of environmental enforcement, a control for change.

51 Cf. Lozano, Blanca. *Derecho Ambiental Administrativo*. Décima Edición. Madrid: Editorial Dykinson, 2009, p. 252.

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CONSTITUTIONALITY OF PROVISIONS AIMED AT STRENGTHENING ENVIRONMENTAL ENFORCEMENT CONTAINED IN THE LAW No. 30011

MILAGROS GRANADOS MANDUJANO
FRANCISCO VILLA SOTOMAYOR

Summary

This article analyzes the constitutionality of the Law No. 30011, which implements a series of measures to strengthen environmental enforcement. Between these measures, OEFA has the power to classify offenses and establish the scale of penalties, by regulation. Additionally, the increase of maximum fine has been provided, taking into account the seriousness of offending conduct and economic capacity of the companies controlled by OEFA.

I. Introduction. II. Power of classification attributed to OEFA. III. Increase in the maximum amount of fines. IV. Special regime for the execution of administrative acts. V. Conclusions.

I. INTRODUCTION

Number 22 of Article 2 of Political Constitution of Peru recognizes the right of people to enjoy a balanced and adequate environment for the development of life. With the objective of guaranteeing the protection and sustainable use of the environment, a series of rules have been issued, which establish limits or prohibitions to the use of certain natural resources or the carrying out of activities particularly harmful for the environment.

Nevertheless, to achieve a high level of environmental protection it is absolutely essential develop an appropriate legislation favorable for control and surveillance in compliance with the legal regulation. The emission of rules with commendable legal technique is not helpful if there are not adequate legal instruments to achieve their effective compliance.

For this purpose, the Law No. 30011 has been issued, through which a series of amendments at legal system have been carried out for the purposes to strengthen the environmental enforcement. Among these, it has been amended the Law No. 28611 - General Law on Environment, by increasing the maximum fine that can be

imposed by the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish).

Furthermore, Law No. 30011 has amended the Law No. 29325 – Law on National Environmental Assessment and Enforcement System, by conceding to OEFA the power to classify offenses and establish the corresponding scale of penalties. Additionally, has been established a special scheme for the implementation of administrative acts issued by this Entity. These amendments have been questioned by certain sector of the companies in the last months.

In this context, the purpose of this article is to explain the underlying reason behind the above mentioned amendments, as well as to state the constitutionality and necessity of such measures.

II. POWER OF CLASSIFICATION ATTRIBUTED TO OEFA

In this section, with the objective of demonstrating the constitutionality of the power to classify attributed to OEFA, below are developed the areas of legal reservation in the administrative scope and the requirements of classification, by regulation.

2.1 Legal reservation in the administrative scope

Through legal reservation it is asserted that regulations of certain matters be carried out by legislative procedure, i.e. through a public discussion, with participation of opposition and accessible knowledge to citizens, making it possible to reach greater democratic legitimacy[1].

One of the subject matters to legal reservation is the regulations of any order that limits freedom of citizens, among these, the establishment of offenses and disciplinary penalties. In this way, it is intended to "secure that regulation in the areas of freedom corresponding to citizens depends exclusively on the willingness of their representatives"[2].

1 Cf. Nieto, Alejandro. *Derecho Administrativo Sancionador*. Quinta edición. Madrid: Editorial Tecnos, 2012, p. 219.

2 Cf. Constitutional Court of Spain, STC 83/1984 dated on July 24, 1984, cited by Nieto, Óp. Cit., p. 218.

In this regard, the Number 24 of Article 2 of the Political Constitution of Peru states that in accordance with the **principle of legality** "*No one shall be prosecuted or convicted for any act or omission that, at the time of its commission, was not previously prescribed in the law expressly and unequivocally as a punishable offense, or did not constitute an offense penalized by law*".

It is important to point out that the principle of legality has various manifestations or specifications. One of these manifestations is the **principle of classification**, through which are imposed limits to legislator, in order that the prohibitions which generate the imposition of a disciplinary penalty are written with an adequate level of accuracy enabling to all citizen understand clearly what is being prohibited in a particular legal provision[3].

As pointed out in the Constitutional Court "it must not be confused the principle of legality with the principle of classification. The first (…) is met when is accomplished with the forecast of offenses and penalties in the law. However, the second defines the conduct which is considered by law as misconduct. Said accuracy of what is considered unlawful from an administrative point of view, (…) is not subject to an absolute legal reservation, but rather that can be complemented through the respective regulations[4].

In effect, and according with the doctrine, legal reservation can function in two different ways in the administrative scope: through the first — or in the strict sense — the Law regulates by itself all matter reserved. This is the variety conceptually more logical, but hardly is used due to the difficulty and rigidity which suppose the exclusive regulation in the law. Because of this, there is also a second usual variant: in these cases, the law (which is always inexcusable) does not regulate exhaustively the matter, but rather is limited to what is essential and, for the rest, is referred to the regulation, which is invited (or ordered) to cooperate at normative task[5]. In these cases, it is clear that the more detailed is the Law, less scope will have for regulatory development; the opposite will occur if the Law is concise[6].

3 Cf. Constitutional Court of Peru, Judgment dated on August 24, 2010, recorded in the Docket No. 00197-2010-PA/TC, legal basis 6.

4 Cf. Constitutional Court of Peru, Judgment dated on August 24, 2010, recorded in the Docket No. 00197-2010-PA/TC, legal basis 5.

5 Cf. Nieto, Alejandro. Op. Cit., p. 223.

6 Ibid. p. 233.

In this regard, the Number 4 of Article 230 of Law No. 27444 - Law on the General Administrative Procedure (LPAG, by its initials in Spanish) states the following:

> "Article 230°. - Principles of administrative penalty power
> The power to impose penalties of all entities is additionally governed by the following especial principles:
> (…)
> 4. ***Classification***. - *Only the offenses expressly* ***provided by a legally binding rule****, according to their nature, are considered as administratively punishable conducts, without any further interpretation. The* ***regulatory provisions of development may specify or adjust*** *those focused on identifying punishable conducts to those stipulated under law,* ***except in cases which the law allows the classification by regulation****".*
> *(...)".*
>
> (emphasis added)

As reflected in the rule cited, the legal reservation is not absolute in the administrative scope. The precision of what is considered as offense can be carried out in Law or Regulation. In the first scenario, it is established an **exhaustive classification**, so, only are considered punishable conducts administratively those offenses expressly provided in legally binding rules. In the second scenario, the law requests the Regulation its collaboration in the classification of offenses and penalties. Sometimes, the **regulatory collaboration** will be limited to specify the offending conduct (e.g. determine an undefined legal concept) or adjust the penalty imposed. In other circumstances, will be made an authentic **classification by regulation**, i.e., the Regulations will develop the unlawful conduct, taking into account the established parameters by Law.

2.2 Scopes of classification by regulation

As noted at previous section, the law itself can convene the participation or support from Public Administration to finish the work of classification.

In these cases, the "Regulations develops a classification by reference to law. This is a sort of delegation of tasks that legislator carries out in the Administration, considering that are presented technical or very dynamic aspects that have no justification to keep within legal reservation"[7].

7 Novena edición. Lima: Gaceta Jurídica, 2011, p. 712.

The participation of a regulatory rule in the process for classification of administrative illicit is justified in factual arguments, such as technical complexity of some topics, the necessity to address the dynamism of an activity, the unfeasibility to apply the casuistry in a legally binding rule, among others[8].

In this regard, the comparative case law holds that regulatory power is based on speeding-up of means, experience, habituality, speed and continuity of work of the Public Administration, as seen in the following citation:

> *"(...) while Parliaments act with solemnity, slowness and intermittences, with little aptitude from legislatures to reach as a whole the knowledge of details and technical rules, which have to regulate with subtlety the many issues that daily have to be faced by Administration. By contrast, the Administration has in its favor the* ***speeding-up of means, with experience, habituality, speed and continuity****, which explain the existent disproportion in all countries, between the volumes of legislative and regulatory work"*[9].
>
> (emphasis added)

According to the doctrine[10], classification by regulation is subject to very strict conditions:

- The regulatory classification needs express authorization of law.
- The reference to law must establish **parameters (instructions and limits)** within which the Regulations should be developed.
- The Regulations can only regulate what has been entrusted by law and within instructions and established limits.

In relation to parameters, the Constitutional Court of Spain establishes that regulatory classification only is constitutionally lawful "*when is sufficiently* ***settled*** *in the law — which acts as coverage —* ***the key elements of unlawful conduct, and nature and limits of the sanctions*** *imposed"*[11].

8 Ibid. P. 713.

9 Concatenated judgments dated on March 10 and 20, 1985; and January 28 and February 12, 1986, cited by Nieto, Alejandro, Op. Cit., p. 263.

10 Cf. Nieto, Alejandro. Op. Cit., pp. 229 and 269.

11 Cf. STC 3/1988, legal basis 9, cited by Nieto, Alejandro, Op. Cit., p. 223. STC 101/1988 dated on June 8 (RTC 1988, 101), legal basis 3, cited by Gomez, Manuel and Iñigo Sanz. Derecho Administrativo Sancionador: *Parte General. Teoría General y Práctica del Derecho Penal Administrativo*. Segunda edición. Lima: Editorial Aranzadi S.A., 2010, p. 164.

In this same regard, the Constitutional Court of Peru states that the establishment of offenses and penalties through regulations is perfectly possible and constitutionally legitimate, as long as these regulations **do not distort the purpose and rationale of law** which is intended to regulate, in strict compliance with the principles of reasonableness and proportionality[12].

Therefore, the principle of legal reservation would be infringed if the legislator is limited to open the road to the regulatory regulation without add any details[13]. In these cases, would be produced what the Constitutional Court of Spain calls "delegalization of matter reserved", i.e., total abdication on the part of the legislator concerning his or her power to classify offenses and disciplinary penalties. This would be unacceptable because by doing so, it becomes possible an independent regulation and not clearly subject to the law, which would imply the degradation of the essential guarantee that involves the principle of legal reservation (ensure that regulation of areas of freedom corresponding to citizens depends exclusively on the will of their representatives)[14].

Likewise, the doctrine states that the reference to law will be considered unconstitutional if it implies the "*authorization or the reference to regulations for the existence ex novo of obligations or prohibitions whose violation leads to a punishable offense*"[15].

For the reasons set out above, the classification by regulation is justified in technical complexity and dynamism of the matter to be regulated, as well as in the experience and celerity of the Public Administration. For the valid result of this mechanism is required: (i) that must be established expressly by a legally binding rule, (ii) that the reference to law contains the key elements of the unlawful conduct and nature and limits of the sanctions that can be imposed; and, (iii) that the regulations do not distort the purpose and rationale of law, i.e., that regulates only what is entrusted within the established parameters.

12 Cf. Judgment dated on March 29, 2007, recorded in the Docket No. 05262-2006-PA/TC, legal basis 6.

13 Cf. Nieto, Alejandro. Op. Cit., p. 229.

14 Cf. STC 83/1984 of 24 July, cited by Nieto, Alejandro. Op. cit., p. 230. STC 101/1988 dated on June 8 (RTC 1988,101), legal basis 3, cited by GOMEZ, Manuel and Iñigo Sanz. Op. Cit., p. 134.

15 Cf. Nieto, Alejandro. Op. Cit., p. 244.

2.3 Constitutionality of regulatory delegation established by Law No. 30011

As stated above, through Law No. 30011 the Articles 11 y 17 of Law No. 29325 have been amended, delegating to OEFA the work of classifying offenses and approving the respective scale of penalties, as shown in the following citations:

> *"Article 11º. - General functions*
> (…)
> ***11.2*** *OEFA, in its capacity as governing body of the National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish), carries out the following functions:*
>
> ***a) Regulatory function****: (...) in exercise of the regulatory function, OEFA has the power, among others aspects, to* ***classify administrative offenses and approve the respective scale of penalties, as well as the classification criteria*** *of these penalties and the scopes of preventative, precautionary and corrective measures to be issued by the respective competent authorities.*
> *(...)".*
>
> [emphasis added]
>
> ***"Article 17. - Administrative offenses and the power to impose penalties***
> *(...)*
> By decision of the OEFA Board of Directors the conducts are classified and the applicable scale of penalties is approved. The classification of offenses and general and cross-cutting penalties will be in supplementary application to the classification of offenses and penalties used by EFA."

The regulatory delegation is justified in technical complexity and dynamism of the matter regulated, as well as in the experience and expertise of OEFA. In effect, according to Maraví Sumar, OEFA — being a specialized technical agency, responsible of environmental enforcement, and also, a governing body of SINEFA — is the public entity with a greater capacity to classify punishable conducts based on their knowledge and experience in this area[16].

Regarding the validity of regulatory delegation, it should be noted that through a change to Article 17 of Law No. 29325, made by Law No. 30011, has been com-

16 Cf. Maraví, Milagros. Report presented to OEFA on June 4, 2013. Paragraph 4.13.

plied with the **first requirement** of validity. i.e., there is an ***express authorization of law*** to classify offenses and penalties through a Regulation.

In relation to the ***second requirement*** of validity, it is worth to mention that in the Articles 17 and 19 of Law No. 29325 and, in the Article 136 of Law No. 28611 (amended by Law No. 30011) the ***instructions and limits*** have been provided, within which the regulation should be developed.

First, in the Article 17 of Law No. 29325, amended by Law No. 30011 (law of reference) the ***key elements of unlawful conduct*** have been considered, being established the following:

> "Article 17. - Administrative offenses and the power to impose penalties
> *Within the scope of jurisdiction of The Agency for Environmental Assessment and Enforcement (OEFA),* ***administrative offenses are the following conducts****:*
>
> *a) Non-compliance of obligations contained in the* ***environmental regulation****.*
> *b) Non-compliance of obligations in charge of the companies, established in the* ***environmental management instruments*** *specified in the environmental regulation in force.*
> *c) Non-compliance of environmental commitments taken on the* ***mining claim agreements****.*
> *d) Non-compliance of precautionary, preventive or corrective measures as well as the provisions or orders* ***issued by competent authorities of OEFA****.*
> e) Others within the scope of its jurisdiction.
>
> *(...)".*
>
> [emphasis added]

In this way, OEFA only will be able to classify as offenses the actions or subsumable omissions in the parameters previously established, i.e., the non-compliance of obligations provided by law[17], environmental management instruments, mining

17 In particular, the comparative case law points out that it is not infringed the *lex certa* requirement, if "the reference that the precept which classifies the offenses make to other rules that impose **duties or specific obligations** of inevitable compliance, so that its violation be assumed as defining element of the punishable offense, as long as it is expected with sufficient degree of certainty, the punitive consequence as a result of the non-compliance or violation". Cf. Constitutional Court of Spain (STC, by its initials in Spanish) 219/1989 on December 21, legal basis 5, cited by Gomez, Manuel and Iñigo Sanz. Op. Cit., p. 164.

claim agreements or the administrative measures issued by OEFA will be considered only as administrative offenses.

As may be seen, the classification of offenses made by OEFA shall not imply the creation of new obligations for companies. By contrast, the work of classification of OEFA shall be limited to compile and consolidate all obligations already planned (in legal system, in environmental management instruments, etc.) and to adjust the penalty that can be imposed due to their non-compliance.

The above has been expressly recorded in the Article 4º of General Rules on the Power of OEFA to Impose Penalties, approved by Decision of the Board of Directors No. 038-2013-OEFA/CD, which states as follows:

> "Four. - Regarding the content of factual assumption of type of offense
> *4.1 Those conducts of action or omission that mean or express the non-compliance of environmental obligations to be controlled, including those related to environmental enforcement, are classified as factual assumption of administrative offenses.*
>
> *4.2 Without prejudice to classify as administrative offense the non-compliance of precautionary, preventive and corrective measures, as well as the provisions and orders issued by competent authorities of OEFA,* ***through classification of offenses carried out by the Board of Directors of OEFA, it will not be possible to create new environmental obligations for the companies****."*
>
> [emphasis added]

In the same vein, Maraví Sumar holds that *"the classification to be carried out by OEFA must be issued in harmony with the essential content about what is considered incorrect in the aforementioned law [Ley No. 30011]. Thus, OEFA will not classify punishable conducts beyond the general causes mentioned [above] (...). The classification function of OEFA must be understood as the power to classify and regulate the specific content of the offenses mentioned, by defining and specifying the punishable conducts within legal framework established"*[18].

In this way, the law of reference has established specific parameters to determine the conducts, whose non-compliance can be punishable.

18 Cf. Maraví, Milagros. Report presented on June 4, 2013, paragraph 3.12.

Secondly, in the Article 136 of Law No. 28611, amended by Law No. 30011, it is envisaged **the nature and maximum limits of penalties** that can be considered in the regulatory classification, for example:

> ***"Article 136. - Regarding penalties and corrective measures***
> *(...)*
> **136.2** *The following are coercive penalties:*
> a. Warning.
> b. A fine not exceeding 30,000 Peruvian Tax Units (UIT, by its initials in Spanish) in force until the date on which the payment is enforced.
>
> (…)".

As we can see in said rule, in the regulatory classification carried out by OEFA it can only be considered as penalty: warning or fine. Regarding the fine, the maximum amount that can be imposed rises to 30,000 Peruvian Tax Units (UIT). In this way, the law of reference has established clear limits for the exercise of Regulatory power of OEFA.

In accordance with the doctrine and the detailed case law in in the previous section 2.2, the regulatory delegation provided for by Law No. 30011 would be fully valid by complying with the two requirements referred to above (express authorization of law and the establishment of parameters in the law of reference). Nevertheless, to guarantee that regulatory classification can be even more reasonable, the law of reference has considered criteria to establish the scale of penalties. In this sense, the Article 19 of Law No. 29325, amended by Law No. 30011, states the following:

> **"Article 19. - Classification and criteria to classify penalties**
>
> ***19.1*** *Offenses and penalties are classified as minor, serious and major. Its determination must be based on t**he impact to health and environment, in its potentiality or certainty about damage, in the spreading of their effects and in other criteria** that can be defined according to current regulations.*
>
> ***19.2*** *The OEFA Board of Directors approves the scale of penalties where the penalties applicable for each type of offense are established, on the basis of the already established in the Article 136 of Law 28611, General Law on Environment."*
>
> [emphasis added]

As stated by Maravi Sumar "*the approval of the scale of fines, which is finally the adjustment of classified offenses, has legal backing and is consistent with the principle of classification*"[19]. In fact, the law of reference has been very precise by establishing the nature and limits of the offense, as well as the criteria for its adjustment. Therefore, regulatory delegation is fully constitutional.

For all these reasons, the regulatory delegation laid down in the Law No. 30011 fulfills the two requirements of validity. Firstly, it has an express authorization of law provided for in Article 17 of Law No. 29325. Secondly, the law of reference complies with clarify the criteria that must be taken into account to establish the offenses and adjust the penalties. In this way, the regulatory delegation granted to OEFA has observed the principles of legality and classification, so that it is fully constitutional.

Additionally, it should be noted that the Regulatory Agencies also have the power to classify offenses and establish the scale of penalties, pursuant to the same parameters established to OEFA. In effect, in accordance with the Article 3 of Law 27332 - Framework Law for the Regulatory Agencies of Private Investment in Public Services, these entities — in exercise of their regulatory functions — can classify offenses for **non-compliance of obligations established by legal rules, technical rules and those resulting from conciliation agreements, as well as for the non-compliance of regulatory provisions, and regulations issued by themselves**. Such rule has full legal validity.

III. INCREASE IN THE MAXIMUM AMOUNT OF FINES

Pursuant to Law No. 30111, Item b) of Number 136.2 of Article 136 of Law No. 28611 (General Law on Environment) has been amended; therefore, the amount of the maximum fine has increased from 10,000 to 30,000 Peruvian Tax Units.

With the purpose of demonstrating that said increase is merely constitutional, the approaches of the proportionality principle are explained below.

19 Ibid. paragraph 3.14.

3.1. Application of the Proportionality Principle when Imposing Penalties

The Constitutional Court holds that the proportionality principle is recognized in Article 200 of the Political Constitution of Peru[20] and it is used to analyze the validity of any act that limits or restricts people's rights, as penalties[21].

In Administrative Penalty Law, the proportionality principle requires a balance between the means used and the aim, correspondence between the seriousness of an infringement behavior and the punitive consequence[22]. As a consequence, the legislator must be cautious when categorizing infringement behaviors and imposing them a penalty, which will necessarily be adjusted to the seriousness or the impact of the infringement[23].

In this sense, Number 1.4 of Article IV of the Preliminary Title of Law No. 27444 establishes that the decisions of the administrative authority that impose penalties must maintain the adequate proportion between the means that will be used and the public use that has to guard in order to respond to what is extremely necessary for the fulfillment of its purpose.

On the other hand, Number 3 of Article 230 of Law No. 27444 establishes that in the application of the proportionality principle, administrative authorities must foresee that the commission of a punishable conduct is not more beneficial for the offender than complying the infringed norms or assuming the penalty.

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20 **Political Constitution of Peru**
"Article 200.- *Constitutional guarantees are:*
The execution of the actions of habeas corpus and amparo is not suspended during the validity of the exception regimes that are referred in article 137 of the Constitution.
When actions of this nature are interposed regarding restricted or suspended right, ***the jurisdictional agency in charge examines the reasonability and proportionality of the restrictive act****. The judge is not in charge of questioning the declaration of the emergency state or site."*

[emphasis added]

21 Cf. Judgment of January 3rd, 2004, Docket No. 010-2002-AI/TC, Legal Basis 195.

22 Cf. De Fuentes, Joaquín et al. Manual de Derecho Administrativo Sancionador. Navarra: Editorial Aranzadi, 2005, p. 245.

23 Ibid.

For all these reasons, the application of the proportionality principle, the legislator must ensure that the penalty established is proportional to the seriousness of the punishing conduct. Furthermore, it must be foreseen that it is serious enough as to avoid the offender from obtaining a benefit from that illicit act. However, at the same time, it must not be too onerous for the offender, which would cause an undesirable over disincentive, due to the fact that it can lead to efficiently low development of economic activities.

3.2. Constitutionality of the Increase in the Maximum Amount of Fines

In application to the proportionality principle to establish the amount for the penalty, the following criteria must be considered: **the seriousness of the punishing conduct and the financial capacity of the offender**.

Regarding the first criterion, Item a) of Number 3 of Article 230 of Law 27444 – Law for the General Administrative Procedure - states that the penalties to be imposed must be proportional to the infringement qualified as penalty, first analyzing the seriousness of the damage to the public interest and/or protected legal right.

In this line, it must be considered that the conducts classified as environmental infringements may generate significant impacts in the protected legal goods (*v. gr.* the environment, natural resources, people's health, among others). The environmental damage of those conducts can be valued in tens of millions Nuevos Soles.

For example, the oil ship "Prestige" had an accident on November 13th, 2002 in the north east of Galicia, with a load of 77,000 metric tons of oil. The spill's black tide caused the biggest environmental catastrophes in history due to quantity of pollutant liberated and the extension of the affected area (area from the north of Portugal to the Landes of France).

The investigations indicated that the environmental damage was esteemed in 574.72 million Euros, approximately 2,870 Nuevos Soles[24].

Another important case occurred in Alaska (United States) on March 24th, 1989. The oil ship Exxon Valdez crashed with a coral reef and spilled almost 10.8 million gallons of crude oil. That spill expanded over 2,000 kilometers of coastal

24 Cf. Loureiro M. et al. Economic valuation of environmental damages due to the Prestige Oil Spill in Spain. Springer Science+Bussines Media B.V., 2009, pp. 537-553.

area. The damage to the environment was esteemed in 2.8 billion American dollars, approximately 3,951 million Nuevos Soles[25].

Thus, if the seriousness of the environmental punishing conducts and the impacts that can cause to the protected legal goods are considered, the fine established by the legislators (30,000 Peruvian Tax Units) is very reasonable. Evidently, a fine with that amount would only be applied in those cases when the offender has made a serious infringement, that conduct has caused severe damages to the environment or the health or life of people and to those who are present in more significant aggravating factors (v. gr. reoccurrence, intentionality, impact in protected natural areas, affected indigenous peoples, among other).

Regarding the second criterion, it must be pointed out that the penalties must be proportional to the income of the offender (financial capacity). In this sense, the penalty must not be too onerous but serious enough as to effectively cause disincentive in the danger of the guarded legal goods.

In this line, to set the maximum fine to be imposed, the income of the companies must be considered (especially companies with bigger income) to establish a dissuasive enough percentage for the offenders. Otherwise, the offenders would not have any incentive to comply with the environmental legislation.

According to the publication "Perú: The Top 10,000 Companies", in 2011 the maximum income of a company, which was supervised by OEFA, ascended to 13,576,653,000 Nuevos Soles. For the twenty first companies, the maximum fine ascending to 10,000 Peruvian Tax Units only represented 1.7% of their income, as the following chart indicates:

25 Cf. Carson, Richard, Mitchell, Robert, Hanemann, Michael, Kopp, Raymond, Preseer, Stanley y Ruud, Paul. "Contingent Valuation and Lost Passive Use: Damages from the Exxon Valdez Oil Spill". Environmental and Resource Economics, Netherlands: Kluwer Academic Publishers, 2003, pp. 257-286.

PERCENTAGE OF THE FINE REGARDING THE INCOME OF THE FIRST TWENTY COMPANIES IN THE SECTORS SUPERVISED BY OEFA DURING 2011

(In Nuevos Soles)

Percentage of the Income

Corporate Name	Incomes in 2011	Maximum Fine (10,000 Peruvian Tax Units - 2011)	Percentage of the Income
Petróleos del Perú - PETROPERÚ S.A.	13,576,653,000	36,000,000	0.3%
Refinería La Pampilla S.A.A.	11,951,401,000	36,000,000	0.3%
Southern Peru Copper Corporation Suc. del Perú	8,743,971,500	36,000,000	0.4%
Sociedad Minera Cerro Verde S.A.A.	6,930,137,500	36,000,000	0.5%
Minera Barrick Misquichilca S.A.	4,021,151,750	36,000,000	0.9%
Perú LNG S.R.L.	3,537,943,094	36,000,000	1.0%
Cía. de Minas Buenaventura S.A.A.	3,281,258,792	36,000,000	1.1%
Shougang Hierro Perú S.A.A.	3,065,579,000	36,000,000	1.2%
MINSUR S.A.	2,256,179,000	36,000,000	1.6%
Empresa de Distribución Eléctrica de Lima Norte S.A.A.	1,879,762,000	36,000,000	1.9%
Volcán Cía. Minera S.A.A.	1,855,062,000	36,000,000	1.9%
Luz del Sur S.A.A.	1,813,673,000	36,000,000	2.0%
Xstrata Tintaya S.A.	1,776,152,000	36,000,000	2.0%
Gold Fields La Cima S.A.A.	1,571,266,000	36,000,000	2.3%
Cía. Minera Milpo S.A.A.	1,362,036,500	36,000,000	2.6%
Pluspetrol Lote 56 S.A.	1,279,049,750	36,000,000	2.8%
Savia Perú S.A.	1,270,642,000	36,000,000	2.8%
EDEGEL S.A.A.	1,224,652,000	36,000,000	2.9%
Pluspetrol Camisea S.A.	1,220,903,750	36,000,000	2.9%
ENERSUR S.A.	1,145,949,750	36,000,000	3.1%
Average			**1.7%**

Source: "Perú: The Top 10000 Companies", 2012 Edition, pp. 374 – 385
Own elaboration

However, the current maximum amount of the fine ascending 30,000 Peruvian Tax Units represents 5.2% of the income average of the first twenty companies, as can be seen in the following chart:

FINE PERCENTAGE REGARDING THE INCOME OF THE FIRST 20 COMPANIES IN THE SECTORS SUPERVISED BY OEFA DURING 2011 (In Nuevos Soles)

Corporate Name	Incomes in 2011	Maximum Fine (30,000 Peruvian Tax Units - 2011)	Percentage of the Income
Petróleos del Perú - PETOPERÚ S.A.	13,576,653,000	108,000,000	0.8%
Refinería La Pampilla S.A.A.	11,951,401,000	108,000,000	0.9%
Southern Peru Copper Corporation Suc. del Perú	8,743,971,500	108,000,000	1.2%
Sociedad Minera Cerro Verde S.A.A.	6,930,137,500	108,000,000	1.6%
Minera Barrick Misquichilca S.A.	4,021,151,750	108,000,000	2.7%
Perú LNG S.R.L.	3,537,943,094	108,000,000	3.1%
Cía. de Minas Buenaventura S.A.A.	3,281,258,792	108,000,000	3.3%
Shougang Hierro Perú S.A.A.	3,065,579,000	108,000,000	3.5%
MINSUR S.A.	2,256,179,000	108,000,000	4.8%
Empresa de Distribución Eléctrica de Lima Norte S.A.A.	1,879,762,000	108,000,000	5.7%
Volcán Cía. Minera S.A.A.	1,855,062,000	108,000,000	5.8%
Luz del Sur S.A.A.	1,813,673,000	108,000,000	6.0%
Xstrata Tintaya S.A.	1,776,152,000	108,000,000	6.1%
Gold Fields La Cima S.A.A.	1,571,266,000	108,000,000	6.9%
Cía. Minera Milpo S.A.A.	1,362,036,500	108,000,000	7.9%
Pluspetrol Lote 56 S.A.	1,279,049,750	108,000,000	8.4%
Savia Perú S.A.	1,270,642,000	108,000,000	8.5%
EDEGEL S.A.A.	1,224,652,000	108,000,000	8.8%
Pluspetrol Camisea S.A.	1,220,903,750	108,000,000	8.8%
ENERSUR S.A.	1,145,949,750	108,000,000	9,4%
Average			**5.2%**

Source: "Perú: The Top 10,000 Companies", 2012 Edition, pp. 374 – 385
Own elaboration

As can be seen, the increase of the maximum fine was necessary, only in this way the penalty became dissuasive for this group of companies with bigger incomes. In fact, it is evident that the previous maximum fine was not dissuasive, as it only ascended in average to the 1.7% of the incomes of these companies, thus for them realizing the punishing conduct could be profitable. In this context, the increase of the maximum fine has allowed the compliance of the retributive and preventive purpose of the penalties.

It follows from the above that the maximum fine established by Law No. 30011 is neither excessive nor confiscatory if the financial capacity of the companies with bigger incomes controlled by the OEFA are considered.

It must be clear that, to impose the maximum fine, the seriousness of the punishing conduct and the financial capacity of the company are considered, in application of the proportionality and not confiscatory principles. In this way, Public Administration would only impose the maximum penalty to a company with significant income with the most serious infringement of the most significant aggravating factors.

Even so, it must considered in the "General Rules for the Execution of the Power to Impose Penalties of OEFA", approved by the Decision of the Board of Directors No. 038-2013-OEFA/CD published on September 18th, 2013, it was establishes that the penalty to be imposed will not surpass the 10% of the annual gross income of the offender, as it indicates in the following citation:

> ***"Ten.- Fine amount***
>
> 10.1 In application of the no confiscatory principle, the fine to be applied must not surpass the ten percent (10%) of the annual gross income of the offender from the preceding year to the year when the infringement occurred.
>
> 10.2 In case the company is realizing activities in a shorter period than established in the paragraph above, the annual gross income multiplied by twelve (12) will be estimated the average of the monthly gross income registered from the beginning date of those activities.
>
> In case the company is not receiving more income, an estimation of the income that it is going to earn will be effectuated.
>
> 10.3 The rule provided in the preceding Number 10.1 will not be applied in those cases when the offender:

a) Carried out activities in prohibited areas or sites;
b) Has not accredited the gross income or has not made the estimation of the income that it is going to earn; or,
c) Is a repeat offender."

(…)".

It must be noted that this provision was also contemplated in the recent classifications approved by OEFA. Which means, in the "Classification of Infringements and Scale of Penalties Linked to the Efficiency of Environmental Enforcement", approved by the Decision of the Board of Directors No. 042-2013-OEFA/CD, published on October 16th, 2013 in the "Classification of Infringements and Scale of Penalties Linked to the Unfulfillment of Permissible Maximum Limits", approved by the Decision of the Board of Directors No. 045-2013-OEFA/CD published on November 13th, 2013; and in the "Classification of Infringements and Scale of Penalties Linked to Environmental Management Instruments and the Realization of Activities in Prohibited Areas", approved by the Decision of the Board of Directors No. 049-2013-OEFA/CD, published on December 20th, 2013.

The not confiscatory principle, in terms implemented by OEFA, will avoid that medium-sized or small-sized companies are affected by the execution of its power to impose penalties, because in any case the fine to be imposed surpasses 10% of the income earned by the offender the preceding year to when the infringement occurred.

Additionally, it accounts with a Methodology for the Calculation of Base Fines and the Application so the Aggravating and Mitigating Factors to Use in the Penalty Classification", approved by the Decision of the Board of Directors No. 035-2013-OEFA/PCD, published on March 12th, 2013. In the aforementioned methodology, objective criteria was considered to classify the penalty to be imposed. In this way, the dictation of the penalties are reasonable and predictable.

For all these reasons, the increase in the maximum fine established by Law No. 30011 is justified in the seriousness of the punishing conduct and in the financial capacity of the companies controlled by OEFA. The maximum fine will only be imposed to those companies that receive significant income and that make the most serious infringement with the most severe aggravating factors.

In this sense, it can be assumed that the maximum fine is proportional and not confiscatory. Even so, according to the "General Rules for the Execution of the Power to Impose Penalties of OEFA", a penalty bigger than 10% of the gross inco-

me earned by the offender will not be imposed. Also, there is a "Methodology for the Calculation of Base

Fines and the Application so the Aggravating and Mitigating Factors to Use in the Penalty Classification" through which the penalties become reasonable and predictable.

Finally, it must be noted that in the national legal system fines with maximum fine that are greater were foreseen in Law No. 30011. In fact, the Decision of the Board of Directors OSINERGMIN No. 271-2012-OS/CD[26], through which the "Classification of Infringements and Scale of Fines and Penalties of Hydrocarbons" established that the maximum fine can reach 44,000 Peruvian Tax Units, as can be seen in the following chart:

	INFRINGEMENT (Supposed Punishing Fact)	MONETARY PENALTY
1	Not having a Risk Study, having it incomplete, out of date or not reformulated, not presenting it or presenting it after the deadline.	Up to 44,000 Peruvian Tax Units
2	Unfulfilling the obligations contained in the Risk Studies	Up to 44,000 Peruvian Tax Units

As can be seen, the maximum fine imposed by OSINERGMIN is significantly superior to the one established by OEFA. However, that rule is still in force, because it is proportional to the financial capacity of the companies.

IV. SPECIAL REGIME FOR THE EXECUTION OF ADMINISTRATIVE ACTS

As indicated previously, a Special Regime for the Execution of the Administrative Acts Issued by OEFA was established through Law No. 30011.

With the purpose of demonstrating the need and constitutionality of that regime, the scopes of the preventive guarding right and counter preventive and injunction.

26 Published on the official gazette El Peruano on January 23rd, 2013.

4.1 The Right to Precautionary Protection in the Administrative Contentious

The Constitutional Court holds that the precautionary protection constitutes an implicit demonstration of the right to the due process set forth in Number 3 of Article 139 of the Political Constitution of Peru. In this sense, it states that *"there would not be due process, Constitutional State of Law and democracy if after a case is resolved by the judicial authority, it is impossible to comply with its decision*[27]*"*.

Precautionary protection has as constitutional functions the provisory assuring of the effects of the definite jurisdictional decision and the neutralization of the unamendable prejudices to the effective jurisdictional tutelage[28].

Preventive measures are only granted if the main intention seems to be protected by the Right (*fumus boni iuris*), and through an ideal providence (*adaptation*) to avoid the hazard that a delay in the process can be (*periculum in mora*[29]).

In the administrative contentious processes, the concession of a preventive measure implies diminishing the importance of the privilege of execution and enforceability of the administrative acts, which is its presumption of validity[30], and with that, the possible affectation of the legal goods through the protection of those acts.

For that reason, the Constitutional Court referred that the legislator when **establishing the preventive procedure** *"cannot create directions and requirements that may affect other constitutional good, on the contrary, it must establish mechanism that allow an* ***effective execution of not only the preventive measure*** *and, consequently, an effective performance of that process,* ***but also the execution of fundamental rights*** *that prevail over the procedure ones*[31]*"*.

Furthermore, the supreme constitutional authority indicates that the judge must proceed with absolute prudence when granting or maintaining a preventive measu-

27 Cf. Judgment of November 27th, 2005, Docket No. 0023-2005-PI/TC, Legal Basis 49.

28 Cf. Judgment of August 10th, 2012, Docket No. 00295-2011-Q/TC, Vote by the magistrates Mesía Ramírez y Eto Cruz, Legal Basis 7.

29 Cf. Judgment of November 27th, 2005, Docket No. 0023-2005-PI/TC, Legal Basis 50.

30 Cf. De la Sierra, Susana. *Tutela cautelar Contencioso - Administrativa y Derecho Europea*. Navarra: Thomson Aranzadi, 2004, p. 126.

31 Cf. Judgment of November 27th, 2005, Docket No. 0023-2005-PI/TC, Legal Basis 44.

re. He must grant it compensating and balancing the interests that may correspond to the party that requests a preventive measure and to the defendant. Although a preventive measure aims to protect the results of a process that began to elucidate if a plaintiff has or not a determined right, this measure cannot be granted sacrificing the protection of the constitutional rights and goods guarded public authorities (*v. gr.* children and teenager protection, public health, environmental protection, public security, education, home, sanitation, collective transport, circulation and transit, among others)[32].

4.2. Injunction Bond Scopes

Injunction Bond intends to balance the risk of adopting preventive measure for the interests at stake. In this way, the judge can dictate reasonable decision guaranteeing repair a *posteriori* of the interest affected by his decision. In this context, the judge is allowed to demand guaranties (injunction) that considered timely for that effect[33].

The doctrine has linked the demand of injunction with the application of the proportionality principle. In this sense, it is indicated that in the application of the proportionality principle, the judge when granting a preventive measure must deliberate the requirements for the execution of the administrative act and its suspension, assuming injunction as a modulation mechanism of the interest that lost in that deliberation[34].

As can be seen with the establishment of injunction, the legislator guarantees an appropriate balance between the interest of the plaintiff and the public interest guarded by Public Administration hence injunction must be established considered the importance of the affected public interest.

4.3. Constitutionality of the Special Regime for the Execution of Administrative Acts established by Law No. 30011

As indicated above, Article 20-A of Law No. 29325 was incorporated through Law No. 30011 establishing a Special Regime for the Execution of the Administrative Acts Issued by OEFA to guarantee environmental control efficiency.

32 Ibid.

33 Cf. De la Sierra, Susana. Op. Cit., p. 214.

34 Ibid, p. 217.

The aforementioned article of Law No. 29325 established greater requirements to request the suspension of the effects of the administrative decisions issued by OEFA, in comparison with the ordinary regime regulated by the Single Organized Text of Law No. 26979 – Law for the Coactive Execution Procedure.

In fact, according to the ordinary regime, the mere presentation of an administrative contentious complaint or a complaint of legal revision suspends the procedure of coactive execution. On the other hand, according to Article 20-A, to suspend the efficiency of an administrative act issues by the OEFA, it is required to necessarily obtain a preventive measure, prior offer of a personal or real injunction, as the following citation indicates:

> ***"Article 20-A.- Enforceability of OEFA's decisions***
> *(...)*
> *Without prejudice to the requirements and other regulations established in the Civil Procedure Code in preventive measure matters, when the company, in any type of legal procedure,* ***requires a preventive measure that aims to suspend or nullify the decisions*** *at first or second administrative instance referred to the imposition of administrative penalties, even those dictated within the coactive execution procedure or that aims to* ***limiting any of OEFA's faculties*** *foreseen in this Law and complementary regulations, the following rules are applied:*
>
> *a) Admitting a process for preventive measures requires that the companies comply presenting an injunction of personal or real nature.* ***The judge cannot accept the promissory oath as injunction bond in any case****.*
> (…)".
>
> [emphasis added]

The establishment of a special regime is justified in the importance of the fundamental rights (*v.gr.* right to an adequate and balance environment, right to health and life, among others) that intend to protect the timely execution of the administrative acts issued by OEFA.

To protect the validity of those legal goods, it was necessary that the suspension of the administrative acts issued by OEFA is only effectuated if the company obtains a preventive measure (and not just presenting the complaint). In other words, it is necessary that the suspension only proceeds in the cases when the judge considered that there is credible that the execution of the administrative act can generate a prejudice to the plaintiff and, considering the circumstances of the case, it is necessary and reasonable to impose a preventive measure.

Moreover, considering the importance of the legal goods at stake, it was necessary that the legislator demanded granting a preventive measure the presentation of an injunction of personal and real nature, it is evident that the simple promissory oath is not ideal to mend the damages –unamendable in some cases– that could generate the suspension of the administrative act.

Regarding that, it must be considered that there is a close link between the environmental interest and the right to health and life. When the environment is affected, it generates a negative impact to the welfare of the human being. The damages caused to the environment, the vital sphere of the individual, will be irreversible in most cases[35]. For that reason, the suspension of the administrative act aimed to guarantee the efficiency of the legal rights must be granted with prudence. In the case of the need to concede a preventive measure, the granting of an ideal injunction must be requested to assure the amendment of the damages, it can only be an injunction of real or personal nature.

As can be seen, the establishment of the Special Regime for the Execution of the Administrative Acts Issued by OEFA was necessary to guarantee the timely compliance of the decisions and, with that, an effective protection of the environment. Through this regime, the right of the companies with public interest guarded by OEFA is balanced adequately.

V. CONCLUSIONS

Pursuant to Law No. 30011 a series of measures to strengthen environmental control were implemented. First, OEFA granted the faculty of classifying infringements and establishing the penalty scale by a regulation. Regarding that, it must be indicated that the referred regulatory delegation complies two validity requirements. In effect, it has express legal authorization and, in the Law of Reference, the criteria that must be considered for establishing infringements and classifying penalties is complied. In this way, the regulatory delegation granted by OEFA considered legality and authenticity principles, which is fully constitutional.

Furthermore, it must be indicated that the increase of the maximum fine provisioned by Law 30011 is justified in the seriousness of the punishing conduct and in the financial capacity of the companies controlled by OEFA. Thus, that provision complies with the proportionality and not confiscatory principle.

35 Cf. De la Sierra, Susana. Op. Cit. p. 248.

Finally, regarding the Special Regime for the Execution of Administrative Acts, it must be indicated that it is based in the important of the legal goods protected by OEFA. In effect, considering that criterion, it was necessary that the legislator demanded the concession of a preventive measure, prior offer of an injunction bond of personal or real nature for the suspension of an administrative act. It is evident that the mere promissory oath is not ideal to compensate for the damages –irreversible in some cases– that may generate the suspension of the administrative act. Thus, said regime is fully constitutional when balancing adequately the right of the companies with the public interest guarded by OEFA.

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RIGHT TO ACCESS PUBLIC ENVIRONMENTAL INFORMATION

LUZ ORELLANA BAUTISTA

Summary

The author highlights the importance of the right to access information, holding that it is a fundamental right. She also states that the access to timely and true information about the environment guarantees having transparency in environmental management, taking well-informed decisions, having citizen participation as well as preventing of damages and impacts that may lead to severe and irreversible consequences if not identified timely.

I. Introduction. II. Access to Public Information as a Fundamental Right. III. Legal Framework of the Right to Access Public Information in Peru. IV. Access to Public Environmental Information and its Legal Development in Comparative Law. V. Advances in Public Environmental Information Access Matters in Peru. VI. OEFA as Promoter of Greater Transparency in Environmental Enforcement Activities. VII. Conclusions.

I. INTRODUCTION

Information is an essential component for society development because it provides elements so that people can be oriented responsibly and timely about their action. In the public sector, the right to access information that institutions of the State keep in its possession are one of good governance's pillars, as it makes citizens' informed participation possible and favors citizen control of governance.

It is for this reason that the right to access public information was upgraded to fundamental right in the main international instruments on human rights, hence being the Political Constitution of Peru, which defines it as every person's right to request and access information that is in the possession of public entities without expressing the cause. Thus, the only limitations regarding information access occur if it affects personal privacy and the one that is excluded deliberately by law or by national security reasons.

As to the environment, access to public information has special relevancy because it is essential to achieve more active and aware citizen participation in the decision-making processes of public decisions that have an impact on the environment. Also, offering tools to the citizen for active scrutiny by private or state entities, which are given permissions and/or concessions for exploiting natural resources lowering the discretional nature in the management of public goods.

Although this matter produced a series of legal instruments in our country aiming to promote civil society participation in environmental management and strengthen the citizens' ability to demand and obtain timely and reliable information that are in possession of the public institutions and/or authorities, this objective was not being complied effectively mainly because the existence of practices that were infringing systematically and unknowingly the right to access public information.

In this context, the Agency for Environmental Assessment and Enforcement (OEFA), as a governing body of the National System of Assessments and Environmental Inspection (SINEFA), has an active role in the promotion of greater transparency in the management of the information it has, either because it generated it or obtained it from third parties, defending clearly the information that is considered confidential, according to the principle of maximum publicity.

For this reason, the goal of the current work is presenting measures introduced by OEFA oriented to make that citizens are better informed, a condition that constitutes a key element for performing the actions in administrative or law tutelage in environmental matters.

II. ACCESS TO PUBLIC INFORMATION AS A FUNDAMENTAL RIGHT

The right to access public information is closely related to the principle of transparency of the management and the public nature of the State's activities[1]. In this context, this right makes informed population participation possible in public affairs and favors citizen control of the exercise of power and accountability by public officials, essential requirements to strengthen governability and democracy.

1 Castro, Karin. *Acceso a la Información Pública: Apuntes sobre su desarrollo en el Perú a la luz de la Jurisprudencia del Tribunal Constitucional. Cuaderno de Trabajo N° 6 del Departamento Académico de Derecho*. *Research Note No. 6 of the Academic Department of Law.* Lima: Pontificia Universidad Católica del Perú, September, 2008, p. 7.

At supranational level, this right has its correlation in law to freedom of expression collected from the main international instruments on human rights such as the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights (Article 19) and the American Convention on Human Rights (Article 13).

In Peru, the right to access public information has been recognized as a fundamental right in the Political Institution of Peru of 1993[2]. It defines it as the faculty of every person to request and access information in their possession without expressing the cause, mainly the state entities, except those whose public access is forbidden by the Constitution, in other words, information that affects personal privacy and the one that is expressly excluded by law or by national security reasons.

At the same time, this right can be protected through the *habeas data* process, stated in Number 1 of Article 61 of the Constitutional Procedural Code. It prescribes any person can request access to information in possession of any public entity through the *habeas data* process, which may be information that they:

> *"(...) generate, produce, process or possess, including the information that held in finished dockets or in progress, judgments, opinions, statistical data, technical reports and any other document that Public Administration has in their possession, in any form of expression either graphic, sound, visual, electromagnetic or held in any other type of tangible form".*

It is possible to identify as basic elements of the decisions that the Constitutional Court has been issuing on access to public information[3]: (a) the ownership of every person without any other additional requirement or subjective qualification; (b) the execution is not condition for the expression of the cause, motive, end or use

2 **Political Constitution of Peru**
*"**Article 2**.- Every person has the right to:*
(...)
5. Request the information required and receive it from any public entity without expressing the cause within the legally specified period and cost. Exceptions include the information that affect personal privacy and the ones that are expressly excluded by law or by national security reasons.
Banking secrecy and concerning taxes can be lifted at the request of the judge, the Attorney General or an investigative commission of the Congress in accordance with law and when they refer to the case under investigation.
(...)"

3 See the Judgment of the Constitutional Court issued in the Docket 01133-2012—PHD/TC of May 11th, 2012.

of the requested information; (c) the applicant can exclusively assume the cost of the reproduction of the information; and, (d) it is required to all public entities of all different levels of governance, the companies of the State and private companies that offer public services or execute administrative function in any form.

It must be stated that, being a fundamental right, any limitation access of the information of the public powers must be supported in the urgent need for protection of a constitutional legal right; otherwise, the limitation would be unconstitutional. In this matter, the Office of the Special Rapporteur for Freedom of Expression.of the Inter-American Court of Human Rights establishes that *"(...) applying the criterion of proportionality in the balance of the affected rights, the access to the information of public interest must be governed by the principle of presumption of disclosure, applying the same restrictions and only in exceptional cases"*.[4]

This principle is closely related to another governing principle on public information access, the maximum disclosure principle. It implies the duty of the State of ensuring the largest application possible of this right, which involves (a) the establishment of the right to access information as general rule, (b) the preeminence of the right to the information in case of norm conflict or lack of regulation, (c) the relevancy of having public records that treat public information systematically and permanently and (d) the duty of some public officials of acting in good faith.

III. LEGAL FRAMEWORK OF THE RIGHT TO ACCESS PUBLIC INFORMATION IN PERU

Prior to its express establishment as a fundamental right in the Political Constitution of Peru of 1993, the access to public information was regulated as a mechanism to facilitate the development of economic activities and the free private initiative through the Framework Law for the Development of Private Investment, approved by Legislative Order 757[5].

This rule included a chapter named "Transparency in the Processing of Administrative Procedures", which compiles the duty of the public entities of bringing the paperwork in their possession that is requested by them, except the information that may affect national security and international affairs, the one that has merely internal scope and circulation in public management, and the one corresponding to individuals that are confidential or that refer to commercial or technological secrecy.

4 Castro, Karin. Op. Cit., p. 7.

5 Published in the official gazette *El Peruano* on November 13th, 1991.

Subsequently and since its enshrining in the constitutional norm, the right to access public information has been regulated in a scattered manner, demonstrating the "secrecy culture" in public managements protected by a wide concept of national security that was managed in various norms and official documents, as revealed by The Peruvian Human Rights Ombudsman on two reports issued in 2000[6] and 2001[7-8].

Following the recommendations formulated in the first report, Valentin Paniagua Corazao's transitional government approved the Supreme Decree No. 018-2001-PCM[9], in which a special information access procedure was designed to be implemented in the Unique Text of Administrative Proceedings of the entities of the Public Sector.

However, it was with the entry into force of Law No. 27806 – Law on Transparency and Access to Public Information, modifies by Law No. 27927, as well as its Single Organized Text approved by Supreme Decree No. 043-2003-PCM that was consolidated in regulatory legal framework of the fundamental right to access information, as well as the promotion of transparency in actions of the State.

Thus, the aforementioned norm compiles the disclosure principle of the activities and provisions of public entities and expressly establishes the alleged excep-

6 Ombudsman Report No. 48 – *Situación de la libertad de expresión en el Perú*. September 1996 – September 2000. In: http://www.defensoria.gob.pe/informes-publicaciones.php. (Accessed on November 29th, 2013)

7 Ombudsman Report No. 60 – *El acceso a la información pública y la "cultura de secreto"*. September 2001. In http://www.defensoria.gob.pe/informes-publicaciones.php. (Accessed on November 29th, 2013)

8 In the aforementioned reports, the Peruvian Human Rights Ombudsman cites the document called "*Política de Defensa Nacional del Estado Peruano"*, elaborated by the Ministry of Defense, which considers a series of aspects that are not exhausted in the preserving of sovereignty, independency and integrity of the territory as part of the objectives of national defense, but also they include the preserving of democratic system and internal order, eradication of illicit trafficking of drugs, participation in the process of national development, strengthening of national identity, preserving of the environment, consolidation of national and regional integrity, eradication of poverty and common organized crime, among others. (MINISTRY OF DEFENSE. *Política de Defensa Nacional del Estado Peruano*, Lima, 1998, pp. 29-30.)

9 Published in the official gazette El Peruano on February 27th, 2001.

tions related to information expressly classified as secret, reserved or confidential. It should be noted that the aforementioned norm foresees that said alleged exceptions are the only ones that can limit the right to access public information, so they must be interpreted restrictively by being a limitation of a fundamental right.

In effect, although the right to access public information is not an absolute right but a limited one, it should be clearly enshrined by law and only collect those that restrict this right at a lower level. In addition, it should be compatible with the goal aimed and proportional to the interest that justifies it.

In the same vein, Articles 15, 16 and 17 of the Single Organized Text of the Law on Transparency and Access to Public Information establish that the alleged exception of execution of the right to access public information. Furthermore, Article 18 of the aforementioned norm establishes that the alleged exceptions foreseen are the only ones that can limit the right to access public information, so they must be interpreted restrictively by being the limitation of a fundamental law, précising that any law exception can be established by a norm of a lower status.

IV. ACCESS TO PUBLIC ENVIRONMENTAL INFORMATION AND ITS LEGAL DEVELOPMENT IN COMPARATIVE LAW

The timely access to precise and true environmental information guarantees transparency in environmental management, the process of taking well-informed decisions, as well as prevention of damages and impacts that may lead to severe and irreversible consequences.

Furthermore, the execution of the citizen participation right in environmental matters requires the existence of informed citizen with access to documents, decisions, studies and records in possession of the authorities that have competence in the enforcement and assessment of studies or declarations of environmental impact[10].

For that reason, the right to access environmental information constitutes one of the three pillars of every person's right to live in an adequate environment for their health and welfare, jointly with the right of public participation in environmental affairs and the access to justice and administrative tutelage in that matter.

10 Ramirez, Felipe. "Acceso a la Información Ambiental". *Revista Chilena de Derecho*. Vol. 38. No. 2, Santiago de Chile, August 2011, pp. 311-339.

The European Community in the Convention of Aarhus on information access, public participation in decision-making processes and access to justice in environmental matters was signed in June 1998 by the state members and is in force since October 30th, 2001. It collects this approach, starting from the idea that greater citizen implication and awareness on environmental problems conducts to a better protection of the environment[11].

In Spain, the right to access information, public participation and access to justice in environmental matters are regulated through Law 27/2006 of July 18th, 2006. This norm establishes environmental information that is considered public in a detailed manner, in which there is one related to the condition of the environmental elements; the factors that affect the environment; the adopted state measures (policies, norms, plans, programs, agreements and activities); the reports on execution of the environmental legislation; the economic analysis used in the decision-making process and the health and security conditions of the people affected.

It should be noted that this norm not only regulates the rights that belong to the citizen in the execution of a general right of environmental information access, bus also the duties and obligations of the Public Administration to guarantee and facilitate its effective execution, both from the general point of view and active and passive dissemination of environmental information.[12]

At the level of the Latin American countries, it can be noted that in the case of the United Mexican States and its General Law on Ecological Balance and Environment Protection that introduced a chapter about the "Right to Access Environmental Information" in 1996. Thus, the transparency duties are regulated by the environ-

11 The European Community committed to adopt the required measures to guarantee an efficient application of the Convention of Aarhus. In this matter, the first pillar cited in the Convention refers to public information access was applied at community level through the Directive 2003/4/CE relating to the public access to environmental information. The second pillar, relating to public participation in environmental procedures, was transposed through Directive 2003/35/CE. A proposal of the Directive published in October 2003 has the aim of transposing the third pillar, tending to guarantee public access to justice in environmental matters.

12 According to the aforementioned norm, passive dissemination means that it responds to the previous request by the citizens; while active dissemination is not necessarily the presentation of a request, but the Administration accomplishes it on its own accord. In that context, the more the information is disseminated proactively, the lesser the citizens will need to request information.

mental authority –which requires a National System of Environmental Information and Natural Resources, which aims to disseminate the existing records and database–; as well as the specific right of having access to the existing environmental information. The Federal Law on Transparency and Access to Public Governmental Information complements this norm, it eliminated various requirements such as the need to justify the motives for requesting information, as well as the change of the legal criterion due to the silence of the administrative authorities towards a request to access information, assuming the existence and awarding of the information charged to the subject obliged to pay its reproductions costs.

Likewise, the case of the Republic of Argentina can be found in Law 25,831 "Free Access to Public Environmental Information Regime", published in January 2004 and establishes the minimum estimates of environmental protection to guarantee the right of to access environmental information that is in possession of the State. This norm defines in a general matter what is meant by environmental information and establishes exceptions related to national defense, commercial or industrial secrecy, and personal information confidentiality, among others.

Finally, in the case of Chile, Law 19,300 "Environmental General Basics" establishes the main regulation on this matter, modified by Law 20,173 of 2007 and Law 20,417 of 2010. This norm recognizes the importance of information access in promoting citizen participation for making decisions in environmental matters and obliges the State to maintain National System of Environmental Information (SINIA) of public nature[13].

V. ADVANCES IN PUBLIC ENVIRONMENTAL INFORMATION ACCESS MATTERS IN PERU

The constitutional right to have a healthy and balanced environment is regulated with the Environment and Natural Resources Code approved by Legislative Decree No. 613[14]. Said rule already collected the public nature of some management instruments, such as the Environmental Impact Assessment, except the information whose disclosure may affect industrial or commercial property rights of confidential nature or personal security.

13 CORPORACION PARTICIPA et ál. *Situación del Acceso a la Información, la participación y la Justicia Ambiental en Chile*. March 2005. <www.accessinitiative.org>. (Accessed on November 13th, 2013).

14 Published in the official gazette El Peruano on August 8th, 1990.

Aiming to promote a greater access to environmental information, Law 26410 – National Environment Council Law[15] – was approved in December 1994, which gives that entity the responsibility of managing the National System of Environmental Information (SINIA) as a development and consolidation tool of the information generated by public and private sectors, so it can be registered, organized, updated and disclosed.

Subsequently, Law 28245 – Framework Law of the National Environmental Management System[16] approved in June 2004, which establishes the guarantee of the right to environmental information as one of the principles of that system. In this norm, it is already in sight the access to environmental information as one of the citizen participation mechanisms in environmental management as well as the right of every person to request and receive information about the condition and management of the environment and natural resources, as established in the Constitution and the Law on Transparency and Access to Public Information.

It is important to highlight that the Framework Law of the National Environmental Management System defines environmental information as any sort of written, visual or database information that is in possession of the authorities in water, air, soil, flora, fauna and natural resources matters in general, as well the activities or measures that affect them or may affect them. Furthermore, it establishes facilitating direct and personal access to environmental information that is required and that is in the field of their competence and/or processing as a duty of the public entities.

In the same line, Law 28611 – General Environmental Law[17] states in its Preliminary Title the right that every person has of accessing adequately and timely to public information about policies, norms, measures, works and activities that may affect the environment direct or indirectly without the need to invoke justification or interest that causes said requirement. It must be noted that this right is already seen in this norm, as well as the right of citizen participation in environmental management and the right to access environmental justice[18] as the pillars to guarantee

15 Published in the official gazette El Peruano on December 22nd, 1994.

16 Published in the official gazette El Peruano on June 8th, 2004.

17 Published in the official gazette El Peruano on October 15th, 2005.

18 **Law No. 28611 – General Environmental Law**
PRELIMINARY TITLE
RIGHTS AND PRINCIPLES

the irrevocable right of every person to live in a healthy, balanced and adequate environment for the full development of life.

In fact, the General Environmental Law contains a chapter regarding environmental information access and citizen participation, in which a series of duties is foreseen to the public entities with environmental competences and legal entities that offer public services in environmental information access matters[19].

"Article I.- Fundamental Right and Duty
Every person has the irrevocable right to live in a healthy, balanced and adequate environment for the full development of life, as well as the duty of contributing to an effective environmental management and protecting the environment and its components, particularly assuring people's health individually and collectively, the preservation of biological diversity, the sustainable use of natural resources and the sustainable development of the country".
"Article II.- Right to Access Information
Every person has the right to access adequate and timely public information on policies, norms, measures, works and activities that may affect the environment directly or indirectly without invoking justification or interest that causes said requirement.
According to law, every person is obliged to bring adequate and timely information required by the authorities for an effective environmental management".
"Article III.- The Right to Participate in Environmental Management
Every person has the right to participate responsibly in the decision-making processes, as well as in the definition and application of the policies and measures related to the environment and its components, that are adopted in each level of governance. The State arranges the decisions and actions of environmental management with civil society".
"Article IV.- The Right to Access Environmental Justice
Every person has the right to a rapid, simple and effective action from the administrative and jurisdictional entities in defense of the environment and its components, safeguarding the appropriate protection of the people's health both individually and collectively, the preservation of biological diversity, the sustainable use of natural resources, as well as the preservation of the cultural heritage linked to them.
Legal actions can be applied even in cases when the economic interest of the plaintiff is not affected. The moral interest legitimizes the action even when it is not related directly to the plaintiff or his family".

19 **Law No. 28611 – General Environmental Law**
CHAPTER 4
ACCESS TO ENVIRONMENTAL INFORMATION AND CITIZEN PARTICIPATION
"Article 41.- Environmental Information Access
According to the right of accessing adequately and timely to public information on environment, its components and its implications in health, every public and legal entity under the private regime that offer public services, facilitate the access without distinction whatsoever to said information to whoever requests it, exclusively subject to the provisions in the current legislation".

In May 2008, regarding the subscription and ratification of the Commercial Promotion Agreement Peru – United States (FTA) and its Protocol of Amendment, the Legislative Order No. 1013 – Law of Creation, Organization and Functions of the Ministry of Environment was approved as a governing body on environmental matters, in charge of the management of SINIA as a component of the National Environmental Management System with the National Environmental Assessment and Enforcement System and the National Service of Natural Protected Areas by the State.

Specifically, regarding the issue in hand, through Supreme Decree No. 002-2009-MINAM, the Regulation of Transparency of Public Environmental Information Access and Citizen Participation and Consultation in Environmental Affairs[20] that aims to establishing the provisions about the access to public information with environmental contest to facilitate citizen access, as well as regulating the mechanism and processes of citizen participation and consultation in these topics.

"Article 42.- Obligation to Inform

As stated above, public entities with environmental competences and legal entities that offer public services has the following obligations in environmental information access matters:

a) Establishing mechanism for generating, organizing and systematizing environmental information related to the sectors, areas and activities in charge.

b) Facilitating the direct access to environmental information as required and that is in the scope of its competence without prejudice of adopting the required measures for guarding the normal performance of its activities and that it is not in legal exceptions to information access.

c) Establishing criteria or measures to validate or assure the quality and suitability of the environmental information in their possession.

d) Disseminating free information about the activities of the State and specially the one related to its organization, functions, goals, competences, organization charts, dependencies, opening hours and administrative procedures at their charge, among others.

e) Eliminating the demands, improper fees charged and requirements that obstruct limit or hinder efficient access to environmental information.

f) Holding accountable about the information access requests received and the attention offered.

g) Handing over the environmental information that it generates to the Ministry of Environment-MINAM, by being necessary for environmental management. The Ministry will provide the information in the period that it determines under the responsibility of a maximum representative of the agency in charge of providing information. Without any prejudice, the unfulfillment by the public official or servant in charge of sending the aforementioned information will be considered as a serious infringement.

h) The Ministry of Environment will request the information to the entities that generate information to elaborate national reports about the condition of the environment. Said information must be delivered within the period determined by the Ministry, which may be extended by them, under the responsibility of the maximum representative of the agency in charge of providing information. Without any prejudice, the public official or servant in charge of delivering the aforementioned information will be considered as a serious infringement".

20 Published in the official gazette El Peruano on January 17th, 2009.

According to the Political Constitution of Peru and the Single Organized Test of the Law on Transparency and Information Access, this norm collects the right of every person to access information related to the environment, its components and implications in health of the MINAM, its related bodies and other entities and bodies that are part of the National Environmental Management System or perform environmental functions in all its levels (national, regional and local).

In this context, it is included the principle of the assumption of environmental information disclosure that is managed by the aforementioned entities due to the performance of their functions. In other words, it states that a public information means any information generated or obtained referring to the environment, its activities or measures that affect them or may affect them and that are in their possession or control by a National Environmental Management System entity.

It must be noted that although the aforementioned rule does not explicitly establish the environmental documentation that has public nature, neither the one that is included in the alleged exceptions[21], it does compiles a detailed account of the obligations that public entities have in environmental information access matters, as established by the General Law on Environment, as well as their duty of having environmental information dissemination tools.

Finally, in Law No. 30,011, rule that modifies and introduces articles to Law No. 29325, the Article 13-A is added, which establishes that OEFA and the Environmental Enforcement Entities (EFA) must make public and free access to the public to technical and objective information about sampling, analysis and monitoring made in execution of its functions, expressly stating that said information does not constitute advance of the trial regarding competences in environmental control matters applying to them.

VI. OEFA AS PROMOTER OF GREATER TRANSPARENCY IN ENVIRONMENTAL ENFORCEMENT ACTIVITIES

6.1. Background

Environmental information access is not only essential to achieve more active and aware participation of the citizens in the decision-making processes of public

21 In reference to the alleged exceptions, the norm refers generally to the Articles 15, 15-A, 15-B, 16 and 17 of the Single Organized Test of the Law on Transparency and Access to Public Information.

decisions that affect the environment, but also constitute a key element for the execution of the administrative or judicial protection actions on environmental matters[22]. In effect, environmental information provides the citizen with tools for the active scrutiny of the activities of public and private entities to which the State give permissions and/or concessions to use natural resources, reducing the discretional nature of eminently public management of goods.

Despite that and due to a literal interpretation of Number 3 of Article 17 of the Single Organized Test of the Law on Transparency and Access to Public Information[23], it was understood that the information managed by OEFA would be entirely qualified as it was confidential penalty procedures and preliminary investigations to those procedures (assessment and supervision activities). In this matter, the information requested by the citizens was denied, restricting the right of accessing information related to the actions executed by OEFA in order to protect the environment.

In effect, the number referred regulates one of the assumed exceptions and establishes that the right to access public information will not be executed regarding information linked to investigations in progress related to the execution of the penalty power of the Public Administration. In that framework, not only penalty procedures, but also investigations prior to those procedures (assessment and supervision procedures), would be entirely qualified as confidential.

In that regard, it should be considered that exceptions to information access are regulated in Articles 15, 16, 17 and 18 of the Single Organized Text of the Law on Transparency and Access to Public Information, have a special legal regime for its interpretation and application. In effect, those exceptions are regulated by the legality principle, in other words, they can only be foreseen in a law; they must be expressed and emphatic; and must be interpreted restrictively and never extensively

22 Gomez, Hugo and Milagros Granados. "The Strengthening of Environmental Control". Magazine of Economy and Law, Lima, number 39, 2013, p. 45.

23 **Supreme Decree No. 043-2003-PCM. Single Organized Text of Law No. 27,806 – Law on Transparency and Access to Public Information**
"Article 17.- Exceptions to the Execution of the Right: Confidential Information
The right to access public information will not be executed regarding as follows:
(...)
3. The information linked to the investigations in progress referred to the execution of the power to impose penalties of the Public Administration, where exclusion of the access finished when the decision puts an end to the procedure remains granted or when more than six (6) months pass sin the beginning of the administrative penalty procedure, without a final decision".

or analogically. Furthermore, as stated by the Constitutional Court, every norm or act that limits this right must be considered unconstitutional, except that the restriction agent demonstrates the existent of a pressing matter of public interest that would only be possibly protected in that form.

Notwithstanding the foregoing, it is not possible either to disclose all the information related to the penalty procedures, because that would go against the confidential nature of that information and might potentially affect the image of the companies under investigation. For that reason, there is a need to find an appropriate balance between the citizens' right of knowing about OEFA's activities and the right of the companies under investigation of keeping the sensitive information confidential.

For that reason, initially a practice was generated internally in OEFA that, being aware of the confidential nature of the information managed –in the sense that it may affect the image of the companies under investigation-, would guarantee the citizens' right of knowing the actions executed to protect the environment, especially when there is a growing demand of information from the population. In that sense, work began on summaries of the information contained in the Supervision Reports and of the information related to the penalty procedures, with the initial aim of attending the information requests that the citizens made on a daily basis.

For this practice to become institutionalized, the disclosure of OEFA's institutional website of a draft directive aimed to promote greater transparency regarding the information managed by the entity through Decision of the Directing Council Presidency No. 127-2012-OEFA/PCD of November 30th, 2012 was declared. This intends to receive the associated comments, suggestions and observations of the citizens in general for a period of ten working days, counting from the publication cited in the Decision in the official gazette *El Peruano*, according to Article 39 of the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Consultation in Environmental Affairs.

After the acquittal and analysis of each of the contributions received during the period of pre-disclosure of the draft regulation, through the Agreement No. 026-2012 adopted in Ordinary Session No. 024-2012 of December 21st, 2012, OEFA's Board of Directors approved Directive No. 001-2012-OEFA/CD, denominated "Directive that Promotes Greater Transparency Regarding Information managed by OEFA" ("Directive of Environmental Information Access"). This agreement was concluded through the Decision of the Board of Directors No. 015-2012-OEFA/CD of December 21st, 2012.

6.2. The Main Reforms Introduced by OEFA

The Directive of Environmental Information Access was created to promote greater transparency in the administration of information managed by OEFA in the execution of its assessment, supervision, enforcement and penalty functions. For that matter, different criteria is needed as a starting point to qualify the information contained in a determined document as public or confidential.

In this vein, it is foreseen as a general rule that the environmental information that OEFA possesses, produces or has available as a result of the execution of its environmental control functions has public nature, so every person has the right to that information according to the procedure of information access regulated by the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Consultation in Environmental Affairs**.**

Moreover, it is established as the only exception of public nature of that information the one considered as secret, reserved or confidential, as stated in the Single Organized Text of the Law on Transparency, Public Environmental Information Access and its Regulation. In other words, the information linked to the investigations in progress referring to the execution of the OEFA's power to impose penalties and the information declares as confidential upon request[24].

It must be noted that the Directive foresees that assumed exception must be interpreted restrictively as it is a limitation of a fundamental right, according the constitutional framework analyzed in preceding lines. In this sense, the Court of

24 **Directive No. 001-2012-OEFA/CD – Directive that Promotes Greater Transparency Regarding Information Managed by OEFA**
"VIII. COMPLEMENTARY PROVISIONS
8.1. DECLARATION OF CONFIDENTIALITY
It will be declares as confidential upon request, the information obtained in the execution of OEFA's functions, that refers to the alleged commercial, industrial, technological secrecy, banking, fiscal and stock exchange secrecy that are not available to other means of public information, as well as information that affects personal and family intimacy of the people involved in a procedure and information from third parties not included in the investigation procedure, whose disclosure without previous authorization would cause them serious economic and moral damages. The treatment of the confidential information will be regulated by Article 6 of the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Consultation in Environmental Affairs, approved by Supreme Decree No. 002-2009-MINAM.
The information linked to personal and family intimacy might be declared confidential.
(...)".

Justice of the European Union stated *"(...) article 14 [from Directive 91/414] must be interpreted in the sense that is only applicable in the measure that does not affect negatively the compliance of the obligations under [article 4.2] Directive 2003/CE as disposed in the (...)".*[25]

In effect, in Directive 2003/4/CE of the European Union that regulates the exceptions to the obligation of public authorities of providing environmental information upon request. It is also foreseen that the interest in the confidentiality protection of the information of commercial and industrial nature cannot justify the refusal to the requests related to information about the emissions in the environment.

Finally, in the same order of bringing predictability regarding information that must be qualified as public or confidential due to its nature, the Directive lists in detail the administrative acts and the documents that contain information managed by OEFA, expressly indicating its public or confidential nature. This, following the trend of current legislations of avoiding the use of general formula that give excessive discretional nature to public authorities and that, because of that reason, they put at risk the goal of the right to access public information.

6.2.1. Environmental Information Generated by OEFA

The environmental information generated by OEFA is elaborated by the entity's agencies in the execution of the environmental assessment, supervision and enforcement functions. It basically refers to the reports, records and decisions issued by the Bureaus of Assessment, Supervision, Enforcement, Penalty and Implementation of Incentives[26].

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25 CARDESA, Antonio. "Jurisprudencia Ambiental de la Unión Europea". *Revista Catalana de Dret Ambiental*, volume 2, number 1, 2011, p. 10.

26 **Directive No. 001-2012-OEFA/CD – Directive that Promotes Greater Transparency Regarding the Information Managed by OEFA:**
"VII. SPECIFIC PROVISIONS
7.1. INFORMATION MANAGED BY OEFA
7.1.1. Information generated by OEFA:
(...)
a) Environmental Assessment Activities
(i) Environmental Monitoring Report (...)
(ii) Environmental Assessment Report (...)
(b) Environmental Supervision Activities
(i) Direct Supervision Record (...)
(ii) Direct Supervision Report (...)

Although the general rule described lines above, which refers to environmental information, has public nature, it would exclusively apply in the case of information produces by the Assessment Bureau, which is the Environmental Monitoring and the Environmental Assessment Reports. This, due to the fact that both the Assessment Bureau and the Bureaus of Enforcement, Penalty and Implementation of Incentives generate information linked to the investigations in progress referred to the execution of the power of the OEFA to impose penalties. For this reason, this information would constitute the assumption of exception foreseen in the legal framework hence it would be classified as confidential.

Nevertheless, the Directive introduces a mechanism that, without affecting the confidentiality of the information, allows guaranteeing the effective execution of the citizens' fundamental right to access information in the case of the information produces by the Bureaus of Supervision, Penalty and Implementation of Incentives.

6.2.1.1. Information Related to Environmental Supervision Actions

Before the issuance of the Directive of Environmental Information Access, the Supervision Bureau in the execution of its direct supervision faculties issued the following documents: (i) Direct Supervision Record, (ii) Direct Supervision Report, (iii) Account of the Direct Supervision Report for the Supervised Companies, (iv) Technical Report and (v) Supported Technical Report, among others[27].

Those documents were classified as confidential despite containing technical and objective information resulting of the monitoring and verification activities of

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(*iii) P*ublic Account of the Supervision Report
(iv) Account of the Direct Supervision Report for the Supervised Companies (...)
(v) Technical Information (...)
(vi) Account of the Supervision of National, Regional or Local Environmental Control Entities (...)
(i) Supported Technical Report (...)
(ii) Decision of Adoption of Preventive Measures (...)
(ix) Decision that Declares a Specific Order (...)

c) Environmental Investigation and Penalty Procedures
The administrative acts and other procedures occurring in administrative penalty procedures at first or second instance. (...)".

27 The Supervision Bureau, in the execution of one of its direct and indirect supervision functions, also issues the following documents:
- Supervision Report of National, Regional or Local Environmental Control Entities;
- Decision of Adopting Preventive Measures; and
- Decision that Declares a Specific Order.

the compliance of enforceable environmental norms made by OEFA in execution of its supervision functions, which is particularly relevant for the settles of areas of influence and for citizens in general.

For that reason, the Directive includes under study, as part of the documents the Supervision Bureau must elaborate, the Public Account of the Direct Supervision Report, which must contain technical and objective information from the sampling, analyses and monitoring, as well as the relevant objective facts related to supervision. This account does not contain any qualification regarding possible alleged administrative infringements, expressly indicating that the laboratory results contained do not imply any prejudgment or advance of opinion, not even indications of infringement, so it does not affect the confidential nature of the Direct Supervision Report that does contain these conditions.

In that regard, a similar experience at the level of the European Community can be found in Article 14 of Directive 91/414/CEE, which establishes the procedure in which the State members have to protect the confidentiality of the information that constitutes industrial or commercial secrecy, and which was delivered to the framework of procedure of authorization of a phytosanitary product. That Directive states that this protection is not applied to "the summary of the test results to determine the efficiency of the product and its harmlessness for the human being, animals, vegetables and environment"[28].

Moreover, regarding the Direct Supervision Record, traditionally qualified as a document of confidential nature, the Directive restricts that qualification only if that record contains references of alleged administrative infringements. This way, the principle of publicity presumption in matters of public information access is materialized, as explained in the preceding paragraphs.

6.2.1.2. Information Related to Penalty Procedures

The information generated by OEFA, in the scope of environmental penalty and investigation procedures, refers to the administrative acts and other procedural actions occurred in penalty administrative procedures at first or second instance. This information has confidential nature by being within the assumed exception foreseen in the analyzed legal framework, in other words, it is information linked to investigations in progress referred to the execution of the OEFA's power to impose penalties.

28 Cardesa, Antonio. Op. Cit., p. 9.

Nevertheless, following the principle of publicity presumption, the Directive foresees that the Bureau of Enforcement, Penalty and Implementation of Incentives elaborates a **Public Summary of the Penalty Procedure**, which must record the file number; name, company or corporate name of the company under investigation; the status of the procedure; the supervised unit; the supervision date; and, if so, the reference of the penalty imposed to the infringement and the impugning way formulated.

Additionally, the Directive determines that the firm decision in the administrative channel has public nature, whether by being a decision at first instance that has remained granted or at second instance that the administrative channel exhausts, as well as all the decisions that were issued after six months of starting the penalty procedure if the final decision has not been issued yet, in other words, decision at second instance exhaustive by the administrative channel.

6.2.2 Environmental Information not Generated by OEFA

OEFA also manages information provided by public entities or by the companies, in the framework of the environmental assessment, supervision and enforcement activities[29]. In that regard, the Directive indicates that it has a public nature in relation with the information provided by public entities, by being environmental

29 **Directive No. 001-2012-OEFA/CD. Directive that Promotes Greater Transparency regarding the information managed by OEFA**
VII. SPECIFIC PROVISIONS
(…)
7.1 INFORMATION MANAGED BY OEFA
7.1.2. Information not Generated by OEFA: (…)

a) Environmental Management Instruments. *The Declarations on Environmental Impact (DIA), Semi Detailed Environmental Impact Studies (EIA-sd), Detailed Environmental Impact Studies (EIA-d), Environmental Management Plans (PMA), Environmental Management and Adaptation Programs (PAMA), Complementary Environmental Plans (PAC), Closure Plans or Abandonment Plans can be found herein.*

b) Information of Environmental Nature Provided by the Companies. *The following information can be found:*

b.1 Information related to the assessment and supervision functions: environmental monitoring reports, acquittals to the observations made by the Direct Supervision Authority, the management instruments in solid waste matters, among others.

b.2 Information related to the progress of an administrative penalty procedure: disclaimers, complementary documents, means of roof, resources, pleas and other actions presented by the company in the framework of an administrative penalty procedure at first or second administrative instance".

management instruments, environmental monitoring reports and management instruments in solid waste, among others.

On the other hand, the information provided by the companies is considered confidential in the framework of environmental assessment, supervision and control activities as the acquittals to the observations by the Direct Supervision authority, as well as disclaimers, complementary documents, evidences, appeals, arguments, and other actions presented by the company within the framework of an administrative penalty procedure at first or second administrative instance.

VII. CONCLUSIONS

The right to access public information is a fundamental right recognized in the Political Constitution of Peru of 1993 and in the main international instruments on human rights. As a fundamental right, its execution is determined by the principle of presumption of publicity, applying minimum restrictions and only in especial cases, as well as the principle of maximum publicity that implied the right of the State of ensuring the largest possible application of this right. In this context, the Law on Transparency and Public Information Access consolidates the obligatory legal framework of the fundamental right to access information, as well as the promotion of transparency in the acts of the State.

Internationally in environmental matters, the importance of the right to access public environmental information is recognized as one of the three pillars of the right of every person to live in an appropriate environmental for their health and welfare, as well as the right public participation in environmental affairs and the access to justice and administrative tutelage in that matter.

In Peru, the regulation on public environmental information access started its implementation in the nineties, with the Environment and Natural Resources Code and the National Environmental Council Law. Afterwards, with the Framework Law of the National Environmental Management System and the General Environmental Law the legal framework that currently regulates this right is established. This was complemented through the Regulation on Transparency and Public Environmental Information Access and Citizen Participation and Consultation in Environmental Affairs, approved by the Ministry of Environment in 2009.

In the framework of these efforts to guarantee the effective exercise of the right to access environmental information, OEFA, as a governing agency of the National Environmental Assessment and Enforcement System, approved the Directive No. 001-2012-OEFA/CD, denominated as the “Directive that promotes greater transparency regarding the information managed by OEFA”, regularized through the De-

cision of the Board of Directors No. 015-2012-OEFA/CD of December 21st, 2012, and published in the official gazette *El Peruano* on December 28th, 2012.

This Directive, created to promote greater transparency in the management of the information in OEFA's possession, foresees public environmental information as a general rule. For that reason, every person has the right to access that information. Furthermore, it establishes the public nature of that information as the only exception, the one considered as secret, reserved and confidential, as disposed in the Single Organized Text of the Law on Transparency and Public Information Access and its Regulation, which must be interpreted restrictively by being a limitation of a fundamental right.

Moreover, within the main measures introduces by the Directive to achieve greater dissemination of the environmental information managed by OEFA, the elaboration of two new instruments is foreseen: a) **Public Account of Direct Supervision**, in the case of supervision activities; and b) **Public Summary of the Penalty Procedure**, in the case of enforcement and penalty activities. It must be noted that before the creation of the Directive, the documents that were generated as a results of the referred functions were qualified as confidential, by misinterpreting their position within the assumed exception states in the Law on Transparency and Public Information Access.

Nevertheless, applying the principles of publicity presumption and maximum publicity that determine the execution of the right to access public information, the Directive achieved an appropriate balance between the citizens' right of freely accessing technical and objective information from sampling, analyzes and monitoring that is managed by OEFA, and the right of the companies under investigation to maintain in confidentiality the sensitive information whose dissemination would be a potential prejudice.

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CITIZEN PARTICIPATION PROMOTION IN ENVIRONMENTAL ENFORCEMENT

MILAGROS GRANADOS MADUJANO

Summary

Considering that citizen participation constitutes one of the pillars of good governance for guiding the action of all public entities, the author underlines in this article that citizen participation plays an essential role in environmental protection policies, as it contributes in guaranteeing an effective environmental rule application.

I. Introduction. II. Citizen Participation as an Environmental Protection Mechanism. III. Citizen Participation Mechanisms Introduced by OEFA. IV. Conclusion.

I. INTRODUCTION

Citizen participation constitutes one of the pillars of good governance for guiding the action of all public entities, in order to overcome the current distancing feeling of the citizens towards political bodies. The introduction of this mechanism involves active citizen participation in the decision-making process that will have a significant impact on their life quality. This aims to strengthening the representation channels, democratizing them and promoting a more balanced pluralism.

Citizen participation plays an essential role in environmental protection policies due to its contribution in guaranteeing an effective environmental norm application. The effectiveness of environmental policies requires citizen participation in all and each one of its different stages, from conception to application of policies. In this regard, citizen participation ought to be promoted both in the process of elaborating environmental norms as well as in the process of the enforcement of its compliance.

The Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) is committed to the consolidation of open governance, in which dialogue and exchange will be promoted among the agency and the organizers from civil society and the public sector. In this regard, a series of measures were introduced to promote citizen participation in environmental enforcement.

Thus, this article intends to explain and analyze the main citizen participation mechanism introduced by OEFA during this year in order to strengthen environmental enforcement.

II. CITIZEN PARTICIPATION AS AN ENVIRONMENTAL PROTECTION MECHANISM

2.1 Citizen Participation in Public Affairs

Article 31 of the Political Constitution of Peru recognizes that *"citizens have the right to participate in public affairs (...)".* In accordance with that, Number 17 of Article 2 of the Magna Carta states that the right of participating is applied individually or in partnership to the nation's political, economic, social and cultural life.

Citizen participation is expressed as the opportunity that citizens have to express their interests and demands in order to influence the Government's decision-making and formulation processes at different levels (nationwide, regional or local), which contributes to the improvement of public management and the citizen's quality of life[1].

This right implies active and aware involvement in the efforts of fully enforcing and protecting human rights and life in democracy, as well as constructing real equality for all the people that are part of the society. Nowadays, the concession of the right to an active citizenship and its enforcement by these sectors is a need and a demand of democracy[2].

Increase in the citizen involvement in collective problems and contribution to the formation of citizens that are interested in Government processes in a sustainable manner are achieved through citizen participation promotion. Additionally, it is more feasible for fulfilling the ideal of each citizen having equal opportunities of achieving their sought and rightful personal development[3].

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1 Cf. National Jury of Elections. *Guía de Participación Ciudadana del Perú.* Lima, 2008, p. 8.

2 Cf. Inter-American Institute of Human Rights: *Participación Ciudadana.* Second edition. San José de Costa Rica: Visión Mundial, 1997, p. 13.

3 Cf. Colombia's Constitutional Court, Judgment No. C-180/94 of April 14, 1994, Docket No. P.E. - 005.

As can be seen, citizen participation involves strengthening the role of the citizens in the management of public affairs. In other words, allowing them to express their ideas to influence the decision-making process. That mechanism enhances public management and guarantees an effective enforcement of the fundamental rights.

2.2 Right – Duty of Actively Participating in the Protection of the Environment

Number 22 of Article 2 of the Political Constitution of Peru states that every person has the right to have a balanced and suitable environment for the development of their life. On the other hand, Article 1 of the Preliminary Title of Law No. 28611 – General Law on Environment[4] states that citizens not only have the absolute right to live in a healthy, balanced and suitable environment for the full development of their lives, but they also have the duty of effectively contributing to environmental management and protection.

As can be seen, the Constitution recognized the environment as a collective interest or good, modifying the benefit of a suitable environment as a right of the community as a whole. The fulfilling of this right not only lies on public powers but also in all of the members of the community, who have the "duty" of protecting the environment as stated in Law No. 28611[5].

In this regard, Article 3 of the Preliminary Title and Article 47 of the aforementioned rule states that every person has the **right – duty** of participating responsibly in the decision-making processes as well as the definition and application of policies and environment-related measures and its components that are adapted in each and all of the governance levels. Citizens must act in good faith, transparently and truthfully according to the rules and procedures of the formal established mechanisms of participation.

Citizen participation in environmental matters involves citizens that are informed and able to participate in the decision-making process of issues that affect their environmental and life quality. These governmental decisions include those that can affect the quality of the air they breathe, the quality of the water they drink

4 Published on the official gazette *El Peruano* on October 15, 2005.

5 Cf. Lozano, Blanca. *Derecho Ambiental Administrativo*. Tenth edition. Madrid: Editorial Dykinson, 2009, p. 216.

and the quality of the natural resources they rely on[6]. In this regard, and as stated in the Statement of Rio on Environment and Development, every person has the right to access information about the environment that is available to public authorities, including the information on materials and activities that involve hazards for their communities, as well as the right to participate in the decision-making processes.[7]

A better decision-making process on public affairs about the environment is guaranteed with an active and aware involvement of the citizens. This is achieved when the citizens (possibly affected) are allowed to counterbalance the economic interests that are exposed in favor of the implementation of a measure that may affect them[8]. In this way, public authority has a complete view of the interests at stake and achieves a decision that coordinates the economic interest and the right to have a healthy and balanced environment.

In effect, according to the "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" ("Aarhus Convention")[9] signed by the European Community[10] *(...) in the environmental area,* ***a better access to information and a greater citizen participation in decision-taking processes allow taking better decisions and applying them effectively****. They contribute in raising awareness about environmental issues, they allow citizens to express their worries and help public authorities to keep them in mind".*

As can be seen, the Constitution considers the right to have a healthy and balanced environment as a collective right. In addition, law guarantees the participa-

6 Cf. Saladin, Claudia. "Public Participation in the era of Globalization". En Picolotti, Romina y Jorge Daniel Taillant (editors). *Linking Human Rights and the Environment*. United States of America: The University of Arizona Press, 2010, p. 57.

7 The Statement was subscribed in the Conference of the United Nations on Environment and Development held in Rio de Janeiro on June 14th, 1992.

8 Cf. Ballesteros-Pinilla, Gabriel. "La Participación en Asuntos Ambientales y su tutela en el Convenio de Aarhus". *Vniversitas*. N° 121, Bogota: Pontificia Universidad Javeriana, 2010, p. 24.

9 The Convention was adopted by the Commission of the United Nations for Europe (UNECE) in the Ministerial Conference "Environmental for Europe" held in Aarhus, Denmark on June 25th, 1998.

10 Although it is said that the Convention is not binding for the Peruvian State, some provisions were cited due to its noteworthy advance in the realization of the citizen participation right.

tion of the community in the taking of decisions that may affect that legal right. In this regard, it was established that citizens have the right – duty of participating in the decision-making process of public decisions on environmental issues, as well as its execution and enforcement. Citizen participation guarantees better public decisions and achieving an effective protection of the environment.

2.3 Citizen Participation Promotion on Environmental Issues

Citizen participation in public affairs not only constitutes a desirable practice within political behavior, but also a founding principle of the State and an essential goal of its activity, which requires public authorities to facilitate it and promote in the different areas of life and promote citizen participation in the decision-making processes that are concern of the collective destiny[11].

In this regard, Principle 10 of the Statement of Rio on Environment and Development establishes that the State has the duty of facilitating and promoting citizen participation and awareness, as it constitutes the best way of handling environmental issues.

According to the aforementioned, Article 50 of Law No. 28611 states that public entities have the following duties regarding citizen participation:

- Promoting timely access to the information related to the issues relating to citizen participation.
- Training and facilitating advice and promoting active participation of entities involved in defense and protection of the environment and organized population in environmental management.
- Establishing citizen participation mechanisms for each process of involvement of individual and legal entities in environmental management.
- Removing demands and requests so that they hold up, limit or hinder the efficient participation of individual and legal entities in environmental management.
- Assuring that every individual or legal entity has access to the mechanisms of citizen participation without any sort of discrimination.
- Being accountable about citizen participation's mechanisms, processes and requests in the matters in charge.

As can be seen, the State has the responsibility of promoting citizen participation. This is, introducing mechanisms that allow a quantitative and qualitative

11 Cf. Colombia's Constitutional Court, Judgment No. C-180/94 on April 14, 1994, in Docket No. P.E. - 005.

increase the citizens' opportunities of taking part in affairs that are of general interest[12]. In other words, the State must create opportunities for dialogue in which all citizens participate actively in the definition and solution of the problems that affect them.

2.4 Citizen Participation Conditions on Environmental Issues

An effective citizen participation requires timely informed citizens about the decision that is going to be made and about their right to participate in said decision-making process. Citizens should be given a suitable period to check the pertinent paperwork and express their opinion. The citizens that are more interested and affected about the decision that is going to be taken have to receive information in simple terms and in their language. Authorities have to take a convenient period to evaluate the citizens' opinions and they must consider them for making their decision[13].

The doctrine[14] recognizes a series of basic conditions for guaranteeing an effective citizen participation, namely:

- Access to the information to achieve informed and efficient intervention.
- Participation must occur in an early stage, from the beginning of the procedure, so it can actually influence the decision or norm taken.
- The deadlines for participation must be sufficient in order to make it effective.
- The final approval or decision must consider the results of the participation.

Our legislation took and developed the aforementioned conditions. In this sense, Article 51 of Law No. 28611 states that every process of citizen participation must take the following criteria:

- The competent authority must make available to the public concerned, the information and relevant paperwork with reasonable time in advance in a simple and clear format and in appropriate means, mainly in the places where the decisions taken have a greater impact.

- The competent authority must call publicly for citizen participation processes through means that facilitate the awareness of that call, mainly to the potentially interested people.

12 Cf. Constitutional Court Judgment of September 3, 2010, in Docket No. 05777-2008-PHD/TC, legal basis 4.

13 Cf. Saladin, Claudia. Op. Cit., p. 64.

14 Cf. Lozano, Blanca. Op. Cit. p. 253.

- When the decision to be taken is supported in the review, approval of paperwork, or studies of any kind and if its complexity justifies it, the competent authority must facilitate simplified versions to the people interested on behalf of the developer of the decision or project.

- The competent authority must promote participation of all social sectors that are possibly interested in the matters dealt in the citizen participation process, as well as the participation of public officials with functions, assignments or responsibilities related to those matters.

- When the areas involved in the matters in regard have people that mainly speak languages other than Spanish, the competent authority must guarantee that means that facilitate their comprehension and participation are brought.

- When the remarks and recommendations made as result of the citizen participation mechanisms are not considered, those who have made them must be informed and supported in writing about its cause.

Therefore, the State must develop said procedure under a series of conditions to guarantee effective citizen participation. In particular, it must bring timely and accessible information to the citizens and give them a reasonable period so they can express their opinions and assess said opinions in their final decision.

2.5 Citizen Participation Mechanisms in Environmental Enforcement

Public authorities must introduce mechanisms to facilitate an effective citizen participation in environmental protection and promote its use by individual or legal entities interested or involved in a particular decision-making process on environmental issues or in its execution, monitoring and control.

There are many citizen participation mechanisms that can be used in environmental enforcement. In effect, Article 134 of Law No. 28611 establishes that citizen participation can adopt the following forms:

- Enforcement and visual control of pollution processes.
- Enforcement and control by environmental measurement, sampling or monitoring.
- Enforcement and control through interpretation or conduction of researches or environmental assessments by other institutions.

In addition, Article 35 of the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Enquiry in Environmental

Affairs, approved by Supreme Decree No. 002-2009-MINAM[15], establishes that participation in environmental control is held through the following mechanisms:

- Citizen Surveillance Committees that are duly registered with the competent authority.
- Follow-up of the environmental norm's compliance indicators.
- Report of the violations or threats of violation to the environmental regulation.
- Publication of the draft rules.
- Participation in other management activities in charge of the competent authorities that determine them, including opinion about documents or instruments.
- Other duly supported mechanisms.

Then, the main citizen participation mechanisms introduced by OEFA are developed during the current year to strengthen environmental enforcement.

III. CITIZEN PARTICIPATION MECHANISMS INTRODUCED BY OEFA

3.1 University Network of Training and Education in Environmental Enforcement – RUCEFA

Citizen participation promotion – as a means to enhance environmental protection- is based in the citizens' alleged high degree of awareness, thus it is expected that they use those means as a tool for pressure in favor of being a guardian of its environment. Nevertheless, if citizens do not have civic behavior compromised with the environment, it is useless to make decisions on public participation issues. This happens in our country, where citizen ecological awareness is still limited, which is why it is intended to strengthen it through education and information campaigns[16].

For that purpose, the University Network of Training and Education in Environmental Enforcement – RUCEFA was created through the Decision of the Board of Directors No. 014-2013-OEFA/CD of May 28th, 2013. This network aims to train university students so that they contribute in promoting the regulation for environmental control and the competences of the Entity in socially vulnerable population sectors emphasizing those that establish the norms for the functions of the National Environmental Complaints Information Service – SINADA.

15 Published in the official gazette El Peruano on January 17th, 2009.

16 Cf. Lozano, Blanca. Op. Cit., p. 231.

In this matter, Article 4 of the aforementioned Decision establishes as follows:

> ***"Article 4.- RUCEFA's target audience***
> 4.1. University students linked to RUCEFA will fulfill the work of training, mainly school students, peasant or native communities, indigenous people, civil society organization members and other population groups established in areas of high social and environmental conflict or established in areas with high poverty rates
> (…)"

As can be seen, RUCEFA's objective is bringing greater knowledge on environmental control to the aforementioned population, thus promote their informed participation. In particular, it aims to promoting citizen surveillance in order to prevent and report facts opposing to the environmental regulation hence strengthening environmental control.

Additionally, social responsibility of university students is promoted through the introduction of RUCEFA, as well as the interest of the university community in the introduction of topics related to environmental enforcement in their respective university curricula. In this way, all social groups are expected to be involved in the environmental enforcement process.

3.2 National Environmental Complaints Information Service – SINADA

Article 38 of the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Enquiry in Environmental Affairs establishes that *"[a]ny person can report the infringement of an environmental norm to the corresponding authorities bringing the pertinent evidential elements"*.

In compliance with the aforementioned legal instrument, OEFA introduced the National Environmental Complaints Information Service – SINADA, through which any citizen is able to inform about the possible negative impacts occurring in the environment. Thus, it is expected that citizens participate in the protection of their environment.

As can be seen, SINADA aims to promote citizen surveillance to report facts opposing to the environmental legislation, thus consolidating a culture of social responsibility with the environment.

Currently, SINADA is not only limited to receiving and processing environmental reports, but it also brings training to the citizens about the environmental regulation and the mechanisms available for filing a report. Given that the project

"Improvement of the National Environmental Complaints Information Service - SINADA" was executed during 2013 and through it workshops to train and raise awareness in civil society were executed.

3.3 Participatory Environmental Monitoring

Article 133 of Law No. 28611 establishes that *"[e]nvironmental surveillance and monitoring aim to generating information that allows orienting to take measures that assure the compliance of environmental policy and regulatory goals (...)".*

Participatory environmental monitoring constitute mechanisms that allow citizens to participate in environmental monitoring works developed by OEFA in exercise of its assessment function. These works are done in order to measure the presence and concentration of environment pollutants. It can also constitute actions in matters related to the conservation of natural resources.

OEFA plans the conduction of participatory environmental monitoring considering criteria in environmental awareness, social and environmental conflict and others. OEFA elaborated a Participatory Environmental Monitoring Plan, in which the activities to be done are detailed.

In general terms, the Participatory Environmental Monitoring Plan has the following content:

- Monitoring goal.
- Localization of the place where the monitoring will be held.
- Methodology that will be used during the monitoring.
- Identification of monitoring points (coordinates UTM WGS-84).
- Geographical location of the points in a map.
- Photo history or other digital media.
- Weather conditions
- Environmental component to be monitored.
- Determination of factors to be assessed.
- Tentative schedule of the activities.
- Maximum number of people that could accompany in the monitoring works, as well as the actions that could be done considering the particular circumstances of the case.
- Identification of other institutions that could participate in the monitoring.

During 2012, seventeen (17) participatory monitoring processes were conducted (5 water monitoring, 5 soil monitoring and 7 air monitoring). However, during 2013, thirty seven (37) participatory monitoring were conducted (12 water, 16 soil

and 9 air monitoring). This growing tendency reflects the positive impact of that practice and the need of continuing its implementation.

3.4 Citizen Participation in the Legal Rule Elaboration Process

Internationally, the European Community recognized in Article 8 of the Aarhus Convention that the States must make an effort and promote effective citizen participation in timely period and when there are options available. In addition, during the elaboration of regulatory provisions by public authorities or other legally mandatory norms of general application that may affect the environment significantly. To this end, the following dispositions must be adopted:

- Setting a sufficient period to allow effective participation;
- Publishing draft rules or make it publicly available by other media; and
- Allow the public to make comments, either directly or through representative advisory bodies.

The results of public participation must be considered in everything possible.

Nationwide, Article 39 of the Regulation on Transparency, Public Environmental Information Access and Citizen Participation and Enquiry in Environmental Affairs establishes that *"[t]he draft norms that regulate general environmental affairs or that have environmental effects, will become known to the public so they can receive opinions and suggestions from the interested ones. The notice of publication will need to be published in the official gazette El Peruano and the full body of the draft in the transparency website of the entity for a minimum period of ten (10) working days"*.

According to the aforementioned legal instrument, OEFA published the draft regulations so that citizens can express their opinions and comments. Moreover, it was considered convenient to carry out meetings with the participants to enrich the debate and achieve better-supported norms even though law in the elaboration of the last draft regulations does not require it. Finally, a matrix of comments was elaborated and published, in which the reason why the suggestions received were accepted or dismissed are detailed.

In this sense, the process of rule approval within OEFA currently starts with the publication of the draft regulation, then the comments from the public are received and a series of meetings with the participants are carried out in order to listen and absolve their enquiries. Lastly, after assessing the suggestions received, the norm approved and the comment matrix are published, in which all the suggestions and comments received during this process are absolved in writing.

In the process of environmental norm elaboration, the participation of the environmentally controlled companies as well as non-governmental organizations and environmental defender civil associations (peasant communities, native communities and indigenous peoples) is being promoted to deliberate properly among the involved interests.

In this way, it is guaranteed that citizens and citizenship in general have effective participation in environmental management, which is that their opinions are considered in the approval of draft regulations, which affects positively the efficiency of environmental enforcement policies adopted by OEFA.

It is worth indicating that this citizen participation mechanism is being gradually introduced since the end of 2013. The last legal regulations approved according to this methodology are the following:

- The Regulation for Administrative Penalty Proceedings of OEFA approved by the Decision of the Board of Directors No. 012-2012-OEFA/CD published on December 13th, 2012.

- Directive No. 001-2012-OEFA/CD – Directive that promotes greater transparency regarding the information managed by the Agency for Environmental Assessment and Enforcement – OEFA, approved by the Decision of the Board of Directors No. 015-2012-OEFA/CD published on December 28th, 2012.

- Regulation for Directive Supervision of OEFA, approved by the Decision of the Board of Directors No. 007-2013-OEFA/CD published on February 28th, 2013.

- Methodology for the calculation of base fines and the application of aggravating and mitigating factors in the qualification of penalties, approved by Order of the Presidency of the Board of Directors No. 035-2013-OEFA/PCD published on March 12th, 2013.

- Guidelines for the application of corrective measures foreseen in Item d) of Number 22.2 of Article 22 of Law No. 29,325 – National Environmental Assessment and Enforcement System Law, approved by the Decision of the Board of Directors No. 010-2013-OEFA/CD published on March 23rd, 2013.

- General Rules of OEFA's Power to Impose Penalties approved by the Decision of the Board of Directors No. 038-2013-OEFA/CD published on September 18th, 2013.

- Infringement Classification and Penalty Scale linked to the Efficiency of Environmental Enforcement approved by the Decision of the Board of Directors No. 042-2013-OEFA/CD published on October 16th, 2013.

- Infringement Classification and Penalty Scale related to the unfulfillment of the Maximum Permissible Limits approved by the Decision of the Board of Directors No. 045-2013-OEFA/CD published on November 13th, 2013.

- Regulation for the Voluntary Remedial Action of Minor Unfulfillments approved by the Decision of the Board of Directors No. 046-2013-OEFA/CD published on November 13th, 2013.

- Infringement Classification and Penalty Scale related to Environmental Management Instruments and development of activities in forbidden areas approved by the Decision of the Board of Directors No. 049-2013-OEFA/CD published on December 20th, 2013.

As can be seen, OEFA introduced mechanisms to strengthen citizen participation in the process of environmental norm elaboration beyond what is required by legal system. Thus, norms are approved after listening, valuing and assessing the interests involved.

IV. CONCLUSIONS

OEFA introduced a series of mechanisms to promote citizen participation in environmental enforcement. In this regard, the University Network of Training and Education in Environmental Enforcement – RUCEFA was created in order to bring information to the citizens (specially the vulnerable people) so they can participate in the protection of their environment. Thus, citizen awareness and involvement in environmental enforcement are intended.

Furthermore, SINADA was introduced in order to promote citizen surveillance to report the facts opposing to the environmental legislation (possible violations). In addition, participatory environmental monitoring took place in order to involve citizens in the environmental assessments conducted by OEFA.

Lastly, citizen participation was strengthened in the environmental rule elaboration process creating opportunities for dialogue among the Entity, citizens and civilians in order to respond their inquiries. Thus, the interests of all of the parties involved in the process of approval of this norm can be analyzed properly.

Thus, there is a collaboration in the formation of a more efficient State bringing timely and proper information to the citizens so that they can participate actively in the conformation of public policies in environmental issues.

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REGULATION FOR DIRECT SUPERVISION

DELIA MORALES CUTI

Summary

In this article, the author explains the scope of the Regulation for Direct Supervision of OEFA in contrast with its previous rule, the Regulation for Supervision of Energy and Mining Activities of OSINERGMIN, given that the current development of the economic activities requires an appropriate regulatory framework that allows to tackle effectively the environmental impacts of those activities, so the environmental component or the natural resources affected would return to the condition they were in before the activity started or, that they are restored to an equivalent condition. In that line, the types of supervision, stages and warranties of the companies are stated.

I. Introduction. II. Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA and its preceding rule. III. Towards a New Approach on Direct Supervision. IV. Types of Supervision Stages and Warranties of the Companies in Direct Supervision Activities. V. Supervision Stages and Warranties of the Companies. VI. Supervision Reports and Technical Reports. VII. Preventive Measures and Specific Orders. VIII. Conclusion.

I. INTRODUCTION

Direct Supervision is one of the functions of environmental control. Although the of the Regulation of Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA ("Regulation for Direct Supervision") had a legal framework that allowed the execution of that function, the current regulation was not suitable for the needs of the environmental condition. In this context, the Regulation for Direct Supervision was approved, which introduced a series of tools oriented to return the environmental component affected by the economic activity to the condition it was prior to the start of the activity or to restore it to an equivalent condition.

This article aims to develop the updates introduced in the Regulation for Direct Supervision, as well as the solution to various problems posed during the validity of the previous regulatory framework.

One of the aforementioned updates is the adoption of a new approach on direct supervision actions, which includes the verification of the enforceable environmental obligation and the verification of the productive process performance, in order to bring a solution to insufficiency of the environmental commitments contained in many environmental management instruments. In this context, the approach overtakes danger caused by the critical factors of the productive process that are a harm for the environment even though they are not considered environmental obligations. This concern is compiled in the Regulation for Direct Supervision of OEFA when the power of dictating preventive measures and specific order are given to the Direct Supervision Authority due to a potential or imminent risk of harm to the environment.

It must also be noted that, in the previous regulatory framework, the supervision report was the only document that contained and developed every sort of findings during supervision, independently of its seriousness, generating backlogs, delays and more work during the administrative penalty procedure stage, due to the Prosecuting Authority should distinguish what aspects of the Supervision Report would evaluate the start of an administrative penalty procedure. With the Regulation for Direct Supervision, the supervision report is still contemplated as the documents that contain the results of the supervisions. Also, the Technical Report is introduced as the document that has the finding of presumed infringements detected during supervision with its corresponding legal and technical support.

II. REGULATION FOR DIRECT SUPERVISION OF THE AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT – OEFA AND ITS PRECEDING RULE

The Decision of the Board of Directors No. 007-2013-OEFA/CD that approved the Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement (OEFA), compiling thirty one articles, seven final supplementary provisions and two temporary supplementary provisions.

The Regulation for Direct Supervision is the first regulation approved by OEFA in that sector. Previously, direct environmental supervision was regulated by the Regulation of the Supervisory Body for Investment in Energy and Mining - OSINERGMIN, approved by the Decision of the Board of Directors Supervisory Body for Investment in Energy and Mining – OSINERGMIN No. 205-2009-OSCD[1],

1 Published in the official gazette El Peruano on November 4th, 2009.

which is OEFA's preceding public agency for environmental control of mining and energy (hydrocarbons and electricity)[2].

The Regulation of Supervision of Energy and Mining Activities of OSINERGMIN regulated the supervision procedure in its Title V, which precedes the annual programming that were basically in charge of other supervision companies outside OSINERGMIN, whose reports included recommendations for said agency and were supposed to contain verified findings and obligations for it in each case. This Regulation was mainly oriented to regulate the relationships between the Supervision Company and OSINERGMIN (subscription of service contract, registering of supervision companies in the record, their categories, and the penalty regime for obligation infringement, among others). It also foresaw the supervision methods (regular and special) –situation that is collected with some changes in the Regulation for Direct Supervision of OEFA. However, the Regulation of OSINERGMIN did not regulate the rights and obligations of the supervised companies in the framework of this function.

In contrast with OSINERGMIN's norm, the Regulation for Direct Supervision of OEFA focuses its objective in the relationships with the supervised companies, stating the new sources of environmental obligation, including administrative measures provisioned by OEFA. The regulation establishes the requirements and stages that must be fulfilled to carry out direct supervision to the supervised productive units, the documents emitted in each case and the obligations of the companies during the supervision to guarantee impartial technical interventions that contribute to a rightful verification of the environmental obligations

Furthermore, the Regulation for Direct Supervision of OEFA mends the formality that oriented the supervision function and that only applied on those companies that had environmental management instrument. Thus, Article 2 establishes that the Regulation for Direct Supervision is applicable to all companies that carry out economic activities subject to OEFA's competence, even if they do not have permits, authorizations or operating licenses for executing their activities[3]. This topic is not

2 The transfer of environmental enforcement functions to OEFA and of occupational status enforcement to the Ministry of Labor and, currently, to the National Superintendency of Labor Enforcement – SUNAFIL left OSINERGMIN only in charge of security enforcement matters.

3 **Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA approved by the Decision of the Board of Directors N° 007-2013-OEFACD and published in the official gazette El Peruano on February 28th, 2013.**

lesser important because it allows indicting all those who execute informal or illegal economic activities.

III. TOWARDS A NEW APPROACH ON DIRECT SUPERVISION

Direct Supervision is an environmental enforcement function oriented to verify the performance of productive units (industrial plans, mining units, exploration projects, oil bricks, hydroelectric power plant, etc.) subject to OEFA's competence. In situ intervention actions oriented to value the ordinary or daily performance of the supervised productive units are direct supervision features for this. In these interventions (denominated field monitoring) samples of effluents, emissions, sediments, etc. are taken and the productive process and operational components of greater environmental impact of the supervised activity are evaluated.

Environmental supervision is an eminently technical function that requires direct knowledge of the productive process to detect aspects that are critical for the environment. For example, the construction stage of a hydroelectric power plant, the emissions and noise are critical, as well as the ecological flow that might be affected by the deviations of waters; in open pit mining, the use of cut and tailing deposits (by being potential generators of acid water that might have an impact of underground waters and in hydric bodies in general); in the process of concentrating minerals, its loading and the control of particulate material generated during the process, etc. constitute critical topics.

Supervision constituted a prior or preliminary investigation stage within the outline of a penalty procedure. However, operating as a medium for the identification of presumed administrative infringements is only one of the goals or objectives of the direct supervision function.

Although normatively the supervision function is defined as the tracking and verification of the fulfillment of environmental obligations regardless of its origin

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"Article 2.- Application scope

2.1. This Regulation is applicable in all those that execute or contribute to executing the direct supervision function in charge of the Agency for Environmental Assessment and Enforcement – OEFA.

Moreover, it is applicable to the companies subject to OEFA's direct supervision competence even if they do not have permits, authorizations or operating licenses for executing their activities, if it were the case.

(...)"

(management instruments, environmental regulation or administrative measures provisioned by OEFA), said function affects the fulfillment of the existing environmental obligations[4] and the unfulfillment report.

In practice, the supervision function is also oriented to verify that the performance of the supervised productive units is in harmony with an effective environmental protection. In other words, if during a supervising the risk of environmental damage – or environmental damage– is detected by the productive process, OEFA would report said situation even when it does not disobey any environmental obligations to be controlled. For that reason, the execution of direct supervision is preceded either by administrative measures as *preventive measures* (that includes the stoppage of activities, among others) and by *specific orders*. These measures operate in case of imminent risk of the environment or that impose demands to the company to guarantee the efficiency of environmental control, even when the unfulfillment of any environmental obligation is mediated.

In its positive side, supervision should also allow esteeming improvements in productive processes and the fulfillment above the limits settled in environmental legislation or in the commitments that were effectively assumed by a company in the stage of prior control (environmental certification),[5] aiming to support the granting of incentives.

Having said this, it can be understood that the prevention principle defines the function of direct environmental supervision. It is not about prevention through an environmental impact result –which is part of environmental certification and is carried out when any economic activity mediates–, it is about the supervision of the performance without an emergency or grave event mediating, which aims for the company adopting timely measures without waiting for a critical event in the performance of its activities.

Although environmental enforcement is more visible or reactively demanded by communities on a daily basis when the spill of a concentration of minerals, hy-

4 Demands or prohibitions that must be observed by the companies for the protection of environmental components (water, air, soil and spectrum) and natural resources.

5 For a more detailed explanation of the environmental certification stage: Villegas, José Luis. "Aproximación a la Configuración del Derecho Administrativo Ambiental en Venezuela". Ponencia presentada en el *XIII Congreso Venezolano de Derecho Ambiental*. Valle de Sartenejas: Universidad Simón Bolívar, p. 9. Accessed on November 25th, 2013. <http://www.xiiiderechoambiental.eventos.usb.ve/sites/default/files/Aproximaci%C3%B3n%20al%20Derecho%20Administrativo%20Ambiental.pdf>.

drocarbons or other dangerous substances occur, the supervision of these situations constitutes a minimum percentage of the direct supervision actions executed by OEFA[6]. Daily, OEFA silently carries out a great number of supervision actions along the country, anticipating negative impacts aiming to introduce timely correctives and make the companies acknowledge this situation, giving them the opportunity to atop measures that reduce the possibility of environmental emergencies.

The new environmental enforcement approach defines direct supervision as the most powerful and versatile tool for an effective prevention of environmental impacts since it can go beyond the verification of the compliance with the obligation, warning about the effective impacts of the supervised activities. At this point, direct environmental supervision allows confirming what occurs in practice when an economic activity is performed, being the best mechanism for corroborating the result of environmental certification impacts given and for determining if it is necessary to adopt complementary measures.

IV. TYPES OF SUPERVISION STAGES AND WARRANTIES OF THE COMPANIES IN DIRECT SUPERVISION ACTIVITIES

Chapter I of Title II of the Regulation for Direct Supervision of OEFA classifies the direct supervision types regarding its programming and the place where it is performed. However, as every classification, it would not be relevant if there were not effective differences between the criteria in the face of the companies and the executing authorities.

Article 6 establishes that, regarding its programming, supervisions can be **regular or special**[7]. However, the supervision programming is not what defines both

6 Regarding hydrocarbons, OEFA carried out eight hundred seventy (870) supervisions from January to October 2013, from which seventy-one (71) were supervisions triggered by environmental emergency reports by the companies, complaints or others. In the other cases, OEFA's performance was preventive and carried out applying the Annual Environmental Assessment and Enforcement Plan – PLANEFA, instruments that every environmental control entity must have.

7 Similarly to the Peruvian legislation, Colombian legislation classifies its "environmental tracking visits" (supervision actions) in ordinary (total or partial) and extraordinary. Mouthon, Alberto et al. Manual de seguimiento ambiental de proyectos: *Criterios y procedimientos*, 1ª ed. Ministry of Environment, 2002, p. 73. <http://www.minambiente.gov.co/documentos/manual_seguimiento.pdf>

types, but its scope in a case or another, due to the fact that every supervision implies preliminary programming actions[8]. In fact, a regular supervision is comprehensive

Furthermore, the environmental legislation of Spain (particularly, Madrid's regulation) divides supervisions in: routine monitoring (carried out as part of a anticipate program of inspections) and not routine monitoring (carried out as a response to a claim regarding issuance, renovation or modification of an authorization or permit, or to investigate accidents, incidents or unfulfillment cases). In: Comunidad de Madrid. Consejería de Medio Ambiente y Ordenación del Territorio. Supervision Bureau for Environmental Assessment, Bureau of the General Assistant Director of Environmental Discipline. Programa de Inspección Ambiental, Madrid, 2013, p. 3.
<http://www.madrid.org/es/Satellite?=CM_Actualidad_FA&language=es&pagename=ComunidadMadrid%2FEstructura>

Cf. Escobar, Eva María and Daniel Martín-Montalvo Álvarez, "Inspección y seguimiento ambiental de proyectos y actividades en la Comunidad de Madrid". Especial Comunidad de Madrid, N° 52, Madrid, 2013. pp. 114-115. <http://www.forestales. net/archivos/forestal/especial%20comunidad%20de%20madrid/EA4-Inspeccion-yseguimiento-ambiental-de-proyectos-y-actividades-en-la-Comunidad-de-Madrid.pdf>

8 **Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA approved by the Decision of the Board of Directors N° 007-2013-OEFACD, published in the official gazette El Peruano on February 28th, 2013.**
"Article 6.- Types of Direct Supervision
6.1. Direct supervision is classified regarding its programming or the existence of a verification field and it is executed through samples on the index of obligations in charge of the company.
6.2. Regarding its programming, direct supervision can be:
a) Regular Supervision: Supervision programmed in the Annual Environmental Assessment and Enforcement Plan – PLANEFA that contains the verification of the enforceable environmental obligations.
b) Special Supervision: Not programmed supervision oriented to verify specific environmental obligations due to circumstances such as:
(i) Informal or illegal activities.
(ii) Accidents: fire, explosion, spill, collapse, etc."
(iii) Complaints
(iv) Verification of the compliance of environmental management instruments whose supervision has not been under annual programming or that require more tracking regarding results of prior regular supervisions.
(v) Intervention request formulated by public agencies according to the legislation in that matter.
This list is expository and not specific.
6.3. Regarding the places where it is carried out, direct supervision can be:
a) ***Field supervision: Carried out within or in areas of activity influx in charge of the company.*** This supervision also involves a stage of documentary revision.
b) *Documentary supervision:* It is not carried out within the facilities of the company and consists in the analysis of relevant documentary information corresponding to the activity executed by the company."

and oriented to verify the integrity of the environmental obligations assumed by a company for a productive unit, whereas a special supervisor is focalized[9].

Supervision authority does not require prior supervision plans in this case. Moreover, when informing the community or social society that a special supervision has been carried out, it can be understood that it was focalized to determined components or stages of the productive process.

Number 6.3 of Article 6 classifies supervisions in field and documentary supervisions. The utility of this classification is giving width to the function, avoiding that the supervisions restricts in situ actions and, with that, the evidences or findings that may be found. The purpose is including the analysis of documents that may account the compliance of obligations as a supervision activity, and the performance of the productive unit in general. For example, the infringement of performing activities without environmental management instruments can be accredited if the performing of the effective activities constitutes a public fact, adding the revision or the record of environmental instruments compiled in the website of the competent sector[10].

V. SUPERVISION STAGES AND WARRANTIES OF THE COMPANIES

Supervision always has a preliminary or prior programming stage, and its details are of an internal nature[11]. The realization of supervision is informed to the company so

9 The aforementioned cases in Item b) of Number 6.2 of Article 6 are the complaints, emergency reports and the findings of the previous supervision justify a special supervision (restricted to punctual aspects) but can be programmed as occurred in the last of the cited cases. Thus, for example, if a cement plant is supervised, different findings can be found, which –if less important– could trigger recommendations whose implementation would require special supervision to verify that implementation. In that case, a special supervision would be programmed in advance, which would still be focalized.

10 The control in charge of OEFA involves a subsequent control, which is the control of effective activities. However, these activities are under prior control in charge of the sectorial activities (environmental certification stage). These authorities approve the environmental management instruments (that compile the obligations assumed by the holders to mitigate environmental impacts that can be generated by their activities) and lead to their registration.

11 In comparative matters, the Colombian legislation has some similarities and differences with the Peruvian one that are worthy of mention. For examples, the environmental tracking works in Colombia have more steps than can be summarized in:

it can be valued in the ordinary conditions in which the productive unit operates. Only in cases of difficult access (usually, in locations in the rainforest or platforms in the high seas), the companies maintain greater collaboration duties than the ordinary ones (access facilitation) and the supervision can be informed in advance. Other supervision stages are execution, management of the results obtained and its use in eventual penalty procedures.

For the companies, the warranties in their favor foreseen in the Regulation for Direct Supervision are more relevant than supervision stages. For example, the supervisor's obligation of placing any observations of the company as well as fulfillment of findings, if it were the case. Although these documents already existed, the Regulation is applied for the first time in its content and it includes the right of the companies of formulating observations that file the report and a copy of it.

Another extremely important aspect that the Regulation for Direct Supervision proposes is the **restriction to the powers of the field supervision personnel**. Previously, supervisors could establish recommendation to the recorded findings, in other words, they could value those findings and prepare the company for realizing a series of measures to fulfill them, everything in the same field supervision action. This situation has substantially varied the Regulation, which currently establishes that field supervisions only have the duty of identifying the performance of the productive unit through findings, without valuing them and applying actions.

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1) Preliminary meeting of the team that will carry out the following: Similarly to OEFA, a team consisting of technical experts and lawyers information exchange, identification of the documentation that needed for the visit, and division of tasks during the visit; afterwards, the necessary tools for the visit are prepared, which consist of:

(i) Various formats of the programming of the tracking visit, verification of the status of the compliance of the programs that constitute the Environmental Management Plan, verification of the status of the compliance of the projects that are part of the programs of the Environmental Management Plan (if applied). In the case of OEFA, it mainly uses two tools: the environmental commitment sheet (which is separated in terms of environmental commitment of the company) and the supervision matrix (which is separated in terms of the phase of the productive process to be supervised, regardless of the company having a commitment or not).

(ii) Figures, themes drawings and other information identified in the meeting. In the case of OEFA, it relies on the Geographic Information System – SIG, which provides detailed maps of basins and bays with the geographic identification of plants, units or establishments that operate in the area.

(iii) Cameras, monitoring equipment and other tools that help collecting proofs. This case is similar to the one used by OEFA.

(iv) Planning the recognition of areas surrounding the site of the project.

(v) Clarifying the general purposes of the tracking visit.

There was concern around this change due to the risk that immediate measures might not adopted in critical situations like spills or sitting of channels, among other that can be seen when supervising the field[12]. However, there are currently real-time media that reduces this risk and those measures could be establishes based on preliminary reports, photographic proof and others that can be accessed online. Additionally and without prejudice of the measures that the Direct Supervision Authority can dictate, the actions that companies ordinarily and immediately adapt and of *motu proprio* when there is a field finding and of which the company is aware, must be considered.

Another warranty granted to the company is the **notice of findings** registered in the supervision of its valuation by the Direct Supervision Authority. This change allows differentiating the findings according to their condition: (i) findings that can trigger a penalty procedure, (ii) findings of less importance (transitory) and (iii) findings that are not linked to obligation but which can generate negative impacts if not mended. Each of these findings, like their effects, are notified to the companies.

Currently, according to Article 12 of the Regulation for Direct Supervision, a company can acknowledge the findings of presumed administrative infringements that can trigger a penalty procedure and that the defense to be carried out must be presented to an eventual penalty procedure started, not to the Direct Supervision Authority.

In the case of less important findings, they are object of charge (for the start of a penalty procedure) in spite of expressing unfulfillment of obligations. As its name indicates it, these findings are notable because of their lightness or absence of risk or negative impacts to the environment. In order to generate incentives for the voluntary compliance of environmental obligations, as well as focusing on the supervisions on aspects –environmentally– more relevant, OEFA recently published in the Regulation for Voluntary Remedial Action of Minor Infringements, approved through the Decision of the Board of Directors No. 046-2013-OEFA/CD[13].

The Regulation for Direct Supervision foresees that these findings will not be object of Technical Report as long as its remedial actions are mediated through the

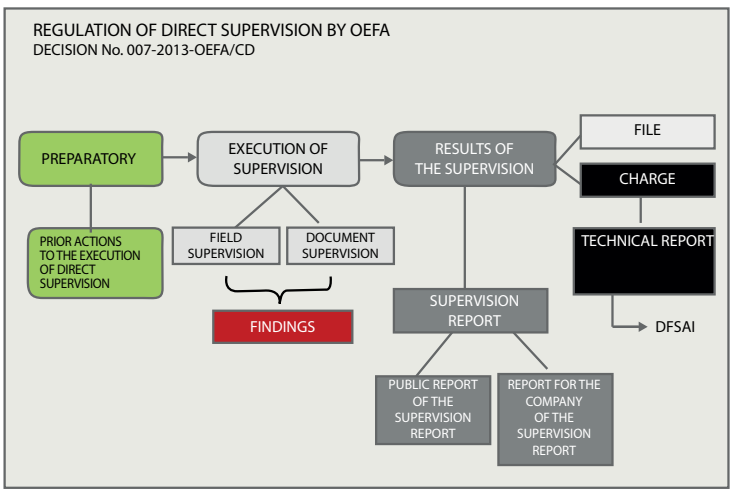
12 As can be analyzed in the following sections, adopting preventive measures and specific order, which are the two administrative measures that can be adopted in the execution of the supervision function, only corresponds to the Supervision Authority, not to its employees (supervising personnel).

13 Published in the oficial gazette El Peruano on November 28th, 2013.

implementation of recommendations for these effects. However, there can be less important situations and of immediate remedial action that should also be evaluated to avoid increasing the number of penalty procedures for minor situations[14].

In the light of the above, the possibility for remedial actions is not –strictly– what characterizes minor findings, but merely its lightness. In this point, it must be indicated that the unfulfillments of great impact can cease during the action or trigger the application of contingency plans of equal opportunity, but they should not be classified as minor findings because of that reason. Adopting immediate measures in situations of this kind can be considered as a mitigating factor in an administrative penalty procedure without changing the initial seriousness of the registered finding.

The following chart summarizes the development of the direct supervision functions.



Source; Agency for Environmental Assessment and Enforcement (2013)
Own elaboration

14 It must be indicated that all types of findings can be mended voluntarily by the company. In some cases, this remedial action can occur in the same moment of the field supervision, even before the Direct Supervision Authority carries outs the field supervision or even when the Administrative Penalty Procedure has already started.

VI. SUPERVISION REPORTS AND TECHNICAL REPORTS

The results of the supervision functions are included in a document par excellent: the supervision report. This report compiles the performance of the productive unit and includes the effective compliance of the obligations, unfulfillments and unforeseen situations, but that can cause impacts on the environment if preventive measures or specific orders are not adopted[15].

Normally, this was the only document that contained the results of a supervision, it was used as a proof of the beginning of the penalty procedures, even when the purpose of the Supervision report was not punishing. The previous caused delay in the analysis by the Investigating Authority in charge of the penalty procedure.

The Regulation for the Administrative Penalty Procedure of OEFA, approved by the Decision of the Board of Directors No. 012-2013-OEFA/CD overcame this situation introducing the supervision function of the Technical Report[16] as a new product, as a technical and legal support elaborated based on the Supervision Report or the Preliminary Supervision Report and that has to be sent to the Prosecuting Authority. In this report, the Supervision Authority only expresses the findings of presumed unfulfillments of obligations of importance and relevance, detected in the

15 In Chile, there is the "Enforcement Report" that ceases the environmental control procedure carried out by the Superintendency of Environment. That report must contains the following elements:

- Identification of the project, activity or controlled force (date, location, holder, among other aspects of interest).
- Motive for the control activity.
- Summary of the controlling activities with little relation to the facts, when appropriate.
- Identification of all the facts that constitute non-compliances regarding the environmental management instrument that regulates the project, activity or controlled source.

For more related information, it is recommended to go to the website of the Superintendency of Environment of Chile <http://www.sma.gob.cl/> Accessed on November 18th, 2013.

16 **Agency for Environmental Assessment and Enforcement – OEFA approved by the Decision of the Board of Directors No. 007-2013-OEFACD, published in the official gazette El Peruano on February 28th, 2013**
"Article 7.- Technical Report
7.1. Through the Technical Report, the Charging Authority submits to consideration of the Prosecuting Authority, the presumed existence of administrative infringements with the evidences obtained in direct assessment or supervision activities.
7.2. The Prosecuting Authority will be able to request the clarification of the Technical Report".

supervision actions to accelerate the penalty procedure[17]. That does not affect that, subsequently and with a more detailed analysis, other findings that complement the ones initially considered in the Technical Report can be warned.

The Regulation for Direct Supervision of OEFA deals with details in the content of the Technical Report in Chapter V of Title II. A relevant aspect is that the evidences can support this report are not restricted to those who collect supervision actions, but those that are pertinent. Thus, Technical Report was elaborated by presumed infringements consisting on realizing large and medium scale mining activities without having management instruments, in which there was not field supervision in areas impacted by these activities, using information of public interest about those impacts, highlighted in journals.

Furthermore, the Regulation for Direct Supervision foresees the consideration of the reports on environmental quality assessments as one of the information sources that can be used as a support for supervision.

Unlike supervision that involved a photographic sort of the performance of a productive unit, environmental quality assessment of the affected area can contribute with a more detailed recognition or investigation about other aspects that may explain the reason for the condition (mineralogy associated to the area, wind roses, signs of the supervised activity in geochemistry of the area, etc.).

The immediacy of the Supervision authority the proof of the presumed unfulfillments by the companies and the technical specialty that requires this function, it justifies a more active role in the penalty procedure through Technical Report.

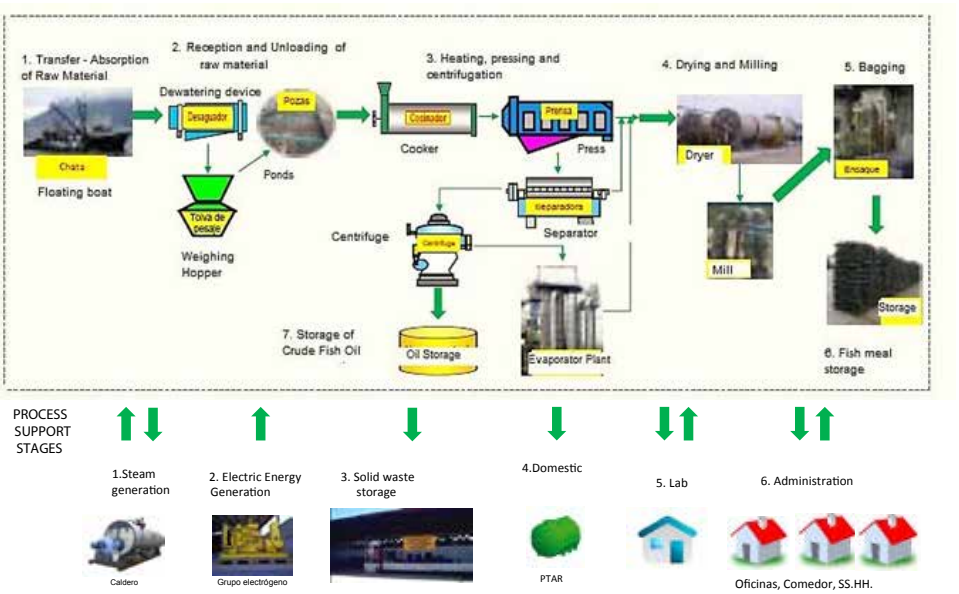
Although the Regulation for Direct Supervision does not mention it, the criteria of specialty and immediacy support that in Technical Reports the necessary remedial measures to reverse the effects of the punishing conduct can be proposed

17 **Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA approved by the Decision of the Board of Directors No. 007-2013-OEFACD, published in the official gazette El Peruano on February 28th, 2013**
"Article 8.- Content of the Technical Report
The Technical Report must contain the following:
(i) Exposition of the activities or omissions that constitute signs of presumed administrative infringements, identifying the presumed persons responsible, the evidences, the presumed norms or commitments infringed or unfulfilled or other enforceable environmental obligations;
(ii) Identification of preventive measures previously imposed, if it were the case; and,
(iii) Request of appearance in the procedure, is pertinent".

preliminarily. As mentioned above in the introductory paragraph of this article, the direct supervision function requires knowing the productive process of the supervised units, which is very important for adopting corrective measures.

The following graphic shows the process of fish meal production, whose knowledge allow identifying the most critical environmental aspects of that process that will be considered during the development of supervisions.

PROCESS OF FISH MEAL PRODUCTION



Source: Agency for Environmental Assessment and Enforcement (2013)

VII. PREVENTIVE MEASURES AND SPECIFIC ORDERS

The supervision function consists of verification of the environmental obligations and, in general, of the performance of productive units would not be effective if it did not have the possibility of taking administrative measures as the findings that notify an imminent environmental hazard or of situations that require the realizations of complementary studies or other implementation measures needed to guarantee the efficiency of controlling and assuming the compliance of the environmental protection objectives.

These administrative measures give efficiency to direct environmental supervision, enabling the possibility of taking immediate and concrete actions without awaiting for the cessation of an administrative penalty procedure and the amendment measures applied in that context[18]. However, this power is restricted to classified situations that require fast results, for that reason its execution is regulated by the principles of reasonability, prevention and proportionality.

Title IV of the Regulation for Direct Supervision regulates **preventive measures** in seven articles[19], in which the nature of this administrative measure is defined associating it situations of imminent danger or situation with high risk of serious harm to the environment or the natural resources (direct environmental damage or pure ecological damage) or as a results of them, human health is damaged (traditional environmental damage or pollution damage[20]). Furthermore, as mentioned in

18 In this legislation, there are cases like the communitarian regime that establishes an administrative responsibility regime oriented to adopting corrective measures (adaptation, reparation, compensation, etc.) without a punishing nature, in which monetary penalties are not discussed, but only the responsibility in an event with the purpose of reversing the effects of the generated impacts. In: PERNAS, José. "Ley de Responsabilidad Ambiental en España" [diapositivas]. *Primer Seminario Internacional Derecho Administrativo Sancionador y Ambiental*, Lima, October 25th, 2013 <http://www.slideshare.net/oefaperu/presentacion-penasper-mreducida2>. DÍAZ, Mercedes. "Derecho Ambiental Sancionador - Función Administrativa" [Diapositivas]. Madrid. http://www.ambiente.gov.ar/archivos/web/Ppnud08/file/Clase%203_Dra_%20Mercedes%20D%C3%ADaz%20Araujo.pdf

19 **Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA**
Decision of the Board of Directors No. 007-2013-OEFA-CD
"Article 5.- Definitions
For effects of this Regulation, it is pertinent establishing the following definitions:
(...)
j) ***Preventive measure****: Provision through which a company is ordered to execute a particular obligation –whether to be done or not– when there is evidence of an imminent hazard or high risk of the generation of a serious harm to the environment, natural resources and people's health, as well as mitigating the cases that generate environmental deterioration or harm".*

20 This difference between environmental damages was widely adopted by the doctrine. Thus, for example there is: Ruda, Albert. *El daño ecológico puro. La responsabilidad civil por el deterioro del medio ambiente*. Tesis Doctoral. Dirigida por el Profesor Dr. Miguel Martín Casas. Cataluña: Universidad de Girona, 2005, pp. 65 y 117. Gonzáles, José Juan. *La responsabilidad por el daño ambiental en América Latina*". México D.F.: Programa de las Naciones Unidas para el Medio Ambiente, 2003, p. 26. Sands, Philippe. *Principles of International Enviromental Law*. Segunda edición. Cambridge: Cambridge University Press, 2012. p. 876. De Miguel, Carlos. *La responsabilidad civil por daños al medio ambiente.* Madrid: Civitas S.A., 1993, p. 85.

previous lines, it establishes that it can only be dictated by the Supervision Authority. With this authority, a greater warranty is offered to the companies for the extraordinary nature of these measures for adopting the only criterion of the supervisor in the field stage, but that they are evaluated at a higher degree by the maximum authority that executes the supervision function without delaying its adoption.

In Article 24 of the Regulation, preventive measures that can be adopted are established illustratively, highlighting the end or cessation of the activity.

Finally, Title V of the Regulation for Direct Supervision of **specific orders**[21], like those provisions dictated by the Environmental Enforcement Entities (EFA) so the company executes a determined action or actions related to a finding to guarantee an effective environmental control and assure the compliance of the environmental protection objectives. Although specific order are normally used to request certain information to the company, its nature goes beyond that function, also including other assumptions that must be studied in detail depending of the case.

VIII. CONCLUSION

The Regulation for Direct Supervision constitutes the first rule issued by OEFA destined to regulate the supervision actions for the compliance of environmental obligations and performance of the supervised units. This rule focuses on warranties for the companies, including information mechanisms that allow them to know the results of the interventions, as well as the way in which they must proceed in each case. This regulation distinguishes itself from the preceding norms that regulated this function and that were basically oriented to the relation between the Supervision Authority and the third parties subcontracted as collaborators of the function.

The Regulation for Direct Supervision of OFEA proposes a range of evidences that goes beyond field supervision activity and that allows integrating any type of proof relevant to the investigation, including the collaboration of other agencies of OEFA, such as the Assessment Bureau.

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21 **Regulation for Direct Supervision of the Agency for Environmental Assessment and Enforcement – OEFA approved by the Decision of the Board of Directors No. 007-2013-OEFA-CD, published in the official gazette El Peruano on February 28th, 2013**
"Article 5.- Definitions
For effects of this Regulations, it is pertinent to establish the following definitions:
(...)
i) ***Specific order:*** *Provision through with a company is ordered to perform actions related to a finding, with the purpose of guaranteeing the efficiency of environmental control and assuring the compliance of environmental protection objectives".*

Moreover, it foresees the existence of two different reports: the Supervision Report and the Technical Report to inform the development of the supervised activity and the unfulfillment of the environmental obligations in that context.

The Regulation for Direct Supervision adopts a series of tools that allow the execution of an effective environmental enforcement aimed to achieve that the companies perform a series of actions to protect the environment and, at the same time, it achieves that the companies have warranties during the development of the direct supervision actions.

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COMPETENCE OF THE OEFA IN CASES OF MINING CLAIM AGREEMENTS

SKARLEY LLANOS BUIZA
JORGE ABARCA GARCÍA

Summary

In this article, the authors analyze, following the principle of primacy of reality, the competence of the OEFA in cases where holders of large- and medium-scale mining properties have signed mining claim agreements with small-scale producers, a situation which has led many assignees to question the competence of the OEFA to supervise them.

I. Introduction. II. Application of the principle of primacy of reality in mining claim agreements. III. Conclusions

I. INTRODUCTION

Through mining claim agreements, the holder of a mining concession may assign his/her mining concession - whether beneficiation, general labor or mining transport concession - to a third person, receiving a compensation for this. Under such scheme, the third party or assignee takes the place of the mining holder or assignor in all his rights and obligations.

In the framework of supervisory actions carried out by the Agency for Environmental Assessment and Enforcement (hereinafter, the OEFA, by its initials in Spanish), there has been evidence of the existence of many situations where holders of large- and medium-scale mining properties have signed mining claim agreements with small-scale producers. This has led many assignees to question the competence of the OEFA to supervise them – as was previously the case with assignors, arguing that the agency can only verify compliance with environmental obligations performed by companies belonging to the large- and medium-scale mining. Therefore, they conclude that, given their legal status of small-scale mining producers, another authority must carry out that task.

On certain occasions, due to costs implied in compliance with obligations imposed by the authority of a certain sector, risks involved in their eventual control,

and, if it be the case, penalties, some companies look for ways to circumvent such obligations. One of such ways is to pretend that the conditions under which they carry out their activities are not within the scope of jurisdiction of the authority.

In view of these dangers, the Law - as a dynamic system interrelated with reality -requires that the authority, when making decisions, give priority to the true nature of the companies' activities, considering the economic situations and relationships they actually maintain and which underlie the way in which they declare them.

The application of the principle of primacy of reality is a tool by which, when there is an inconsistency between what is happening in practice and the appearance or legal form such conduct has, the former should be preferred, that is, what happens in the facts on the ground. The above, is of special interest for Public Administration, as it is obliged, by the principle of material truth, to fully verify the truth of the facts which serve as a reason for their decisions.

The use of the principle being discussed has been successfully mirrored in different areas of law. Thus, for example, the application of this principle in the field of employment makes it possible to determine when a private contract is a mask to hide an employment relationship. In the field of the Free Competition Law it has been used to indicate in which cases a business concentration (such as a merger) is an excuse to hide a restriction of competition between economic agents.

However - as will be explained below- its usefulness and application also turns out to be fundamental in mining control activities, as they allow to delimit the competence of the OEFA in those cases where the existence of agreements is verified, whose purpose is the temporary transfer of a mining concession,[1] or a beneficiation,

1 Mining claims grant their holders the right to explore and exploit mineral resources awarded, in extensions ranging from 100 to 1,000 hectares, in grids or group of grids adjacent on one side at least, except those located at sea, where they may be granted in grids from 100 to 10,000 hectares. Mining units or production units stand on one or more mining claims and should have the respective environmental management instrument approved for the development of the mining activity.
In accordance with the Plenary Session of the Constitutional Court 0048-2004-PI/TC, the mining concession is an administrative act which determines a legal public relationship through which the State grants, for a certain period of time, the exploitation of natural resources, provided the terms of the concession are respected and the intervention capacity is preserved, as required by public interest. The mining concession must be understood as a legal act of public law under which the Public Administration, underpinned by the principle of legality, establishes the legal system of rights and obligations for the exploitation of non-renewable mineral resources.

mining transport or general labor concession, from a holder of a large- or medium-scale mining property to another classified as artisanal or small-scale mining.

II. APPLICATION OF THE PRINCIPLE OF PRIMACY OF REALITY IN MINING CLAIM AGREEMENTS

According to the legal framework applicable to mining activity,[2] this is carried out exclusively under the system of concessions. Exploration, exploitation, beneficiation, mining transport and general labor activities may be the object of a concession. These activities can be developed[3] in any of the different mining strata: large-scale, medium-scale, artisanal and small-scale mining. The classification of the holder of a mining property is made according to the installed production capacity and the mining concession area, although in the latter case it is only applied to artisanal and small-scale mining. Table 1 details the features of this classification.

The importance of distinguishing each one of these strata lies mainly in the environmental obligations assumed by holders of mining properties and the different authorities responsible for certification and environmental control of their activities.

With regard to certification, it should be noted that, for the development of mining activities, the holder must submit to the consideration of the competent authority the following environmental studies:

- *I Category - Environmental Impact Statement (EIS)*: An environmental management instrument for projects whose implementation does not cause significant negative environmental impacts.
- *II Category – Semi-detailed Environmental Impact Study (EISsd):* for projects whose execution can cause moderate environmental impacts, and whose negative effects can be eliminated or minimized by the adoption of easily applicable measures.
- *III Category - Detailed Environmental Impact Study (EISd):* For projects whose characteristics, size and/or location may cause significant nega-

2 In accordance with the Single Organized Text (TUO, by its initials in Spanish) of the General Mining Law, approved by Supreme Decree No. 014-92-EM, mining activities which can be developed are: informal exploration, prospecting, exploration, exploitation, beneficiation, mining transport, general labor and marketing of minerals. Except for informal exploration, prospecting and marketing activities mentioned above, the execution of the mining activities of exploration, exploitation, beneficiation, mining transport and general work is solely performed under the system of concessions.

3 t should be noted that, in accordance with Law 27651 - Law on Formalization and Promotion of Artisanal and Small-Scale Mining, artisanal and small-scale mining activities include works for the extraction and recovery of metallic, non-metallic, and construction materials, on soil and subsoil, developed only by natural persons or a group of natural persons or legal entities composed by natural persons.

tive environmental impacts, quantitatively or qualitatively, requiring an in-depth analysis to review their impacts and propose the corresponding environmental management strategy.

As can be seen, environmental management instruments for each category are in accordance with environmental risks projects may generate. Thus, for example, it is expected that exploration activities carried out by large- and medium-scale mining, will not cause negative environmental impacts or, if they occur, they will be moderate. On the contrary, in the case of exploitations, there is the risk that their negative effects on the environment will be of such magnitude that it is essential not only to make a thorough assessment of each stage of the productive scheme of this activity, but also an environmental management strategy to minimize or eliminate, to the extent possible, the impacts that may arise.

In contrast to large- and medium-scale mining activities mentioned above, environmental management instruments reserved for artisanal and small-scale mining are the EIS and the EISsd. Such legislative option is consistent with their installed production capacity, which, *per se*, does not have a significant increased risk for the environment. For example, in the case of large- and medium-scale mining, the disposal of tailings, product of ore processing, should be carried out in an area of a greater extension, where management measures, technology used and trained staff to prevent or mitigate possible damages will be more demanding for the company than for an artisanal miner or a small-scale miner in case a mining concession with these features is assigned to them.

For large- and medium-scale mining, the environmental certification is issued by the General Directorate of Mining Environmental Affairs of the Ministry of Energy and Mines (hereinafter, DGAAM, by its initials in Spanish), while artisanal and small-scale mining are under the responsibility of the Regional Directorate of Energy and Mines (hereinafter, DREM, by its initials in Spanish) of the Regional Government.[4]

With respect to environmental control, verification of compliance with environmental obligations in charge of artisanal and small-scale miners is under the jurisdiction of the DREM. In the case of large- and medium- scale mining, the OEFA plays this role.

4 In the case of mining activities (artisanal and small-scale mining) planned for Metropolitan Lima, the competent authority is the General Mining Directorate of the Ministry of Energy and Mines pursuant to the Fourth Final Supplementary Provision of Legislative Decree 1101.

TABLE No. 1

Mining strata, requirements, limits and competent authorities in charge of certification and environmental control

Stratum	Extension of concessions	Installed production capacity	Competent entities in charge of certification and environmental control
Large-scale mining	Has not been established	More than 5,000 MTPD*	DGAAM/OEFA
Medium-scale mining	Has not been established	Between 350 and 5,000 MTPD	DGAAM/OEFA
Small-scale mining	Up to 2,000 HA**	Up to 350 MTPD	DREM/DREM
Artisanal mining	Up to 1,000 HA	Up to 25 MTPD	DREM/DREM

* MTPD; Metric tons per day
**HA: Hectare
Source: Prepared by the authors

In the specific case of the OEFA, supervisory actions in charge of holders of large- and medium-scale mining properties are generally focused on performing follow-up and verification of compliance with enforceable environmental obligations contained in environmental legislations, environmental management instruments and orders or provisions issued by the competent bodies of the OEFA.[5]

However, there are special circumstances that could imply modifying the competences of controlling bodies without taking into account environmental

5 Compliance with environmental obligations to be controlled is mandatory for all natural persons or legal entities engaged in activities which are within the competence of the OEFA, even if they lack permits, authorizations or operating permits to carry them out; in other works, informal or illegal economic activities. In summary, verification of compliance with environmental obligations to be controlled falls not only on formal activities carried out by a holder of a large- and medium-scale mining property (in so far as he has the respective environmental certifications and authorizations), but above all on every activity carried out by the large- and medium- scale mining, including those activities undertaken without an environmental management instrument.

impacts that were matters of assessment for granting the environmental certification.

In such a scenario, we could be facing large- and medium-scale mining activities with detailed environmental impact studies,[6] whose approval is reserved to the DGAAM, but which will be controlled by a different authority (for example, the DREM), which is in charge of approving environmental management instruments for projects whose execution does not cause significant negative environmental impacts (Environmental Impact Statement) or that, although causing environmental impacts, these are moderate (Semi-detailed Environmental Impact Study).

One of these figures are the so-called mining claim agreements, regulated by the Single Organized Text of the General Mining Law, approved by 014-92-EM[7], where it is established that the mining claim holder is entitled to assign his mining concession, beneficiation, general labor and mining transport concession to a third party, called the assignee, receiving a compensation for this.[8]

On the basis of this contractual modality, a substitution of the assignee in all the rights and obligations of the assignor is configured. This substitution involves, on the one hand, complying with the various obligations in charge of the assignor and, on the other hand, enjoying all the attributes specific of the mining claim awarded.[9]

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6 These environmental management instruments are reserved for projects whose characteristics, size and/or location may result in significant negative environmental impacts, both quantitatively or qualitatively, requiring an in-depth analysis entrusted to the DGAAM, in order to review their impacts and propose the corresponding environmental management strategy.

7 Published in the Official Gazette "El Peruano," on June 3, 1992.

8 While the Single Organized Text of the General Mining Law does not establish temporality as an essential element to enter into this type of agreements, the Regulation on the Registration in the Registry of Mining Rights, where these agreements must be registered, does require as a prerequisite to proceed with registration that such agreements consider the deadline of the assignment.

9 In the case of assignment of mining concessions and exploration claims, the assignee's attributes would be the exploration and exploitation of mineral substances found within the mining claim area; for the assignment of beneficiation and mining transport mining concessions, the original attribute of the assignee will be the operation of relevant facilities. In the case of general labor mining concessions, the main attribute will be the maintenance of activities to allow drainage, ventilation and communication in favor of the benefitted mining claims. See Lastres, Enrique. "Mining contracts." *Administrative Law Journal*, N° 8, Year 4, Circle of Administrative Law, November, 2009, p. 19.

It is precisely substitution for compliance with obligations which calls our attention and requires further analysis, since these obligations do not only involve the payment of annual fees for mining claims, but also compliance with environmental obligations corresponding to mining claims.

In this regard, we can mention Article 19 of the Regulation for Environmental Protection in Mining-Metallurgical Activities, approved by Supreme Decree 016-93-EM,[10] which establishes that in case the holder of the mining activity transfers or assigns the operation, the purchaser or assignee will be obliged to implement the Environmental Compliance and Management Program (PAMA, by its initials in Spanish) or the EIS which has been approved to his transferor or assignor.

In the case of mining exploration activities, Article 6 of the Environmental Regulations for Mining Exploration Activities, approved by Supreme Decree 020-2008-EM, points out that, in cases where the holder transfers or assigns his mining concession, the purchaser or assignee will comply with all the measures and obligations set forth in the environmental study that has been approved to his transferor or assignor.

The regulatory bodies mentioned above emphasize the fact that the substitution of the assignor by a third party should be given in the same conditions in which the environmental certification was awarded.

The experience of the OEFA, specifically of the Supervision Bureau, in supervising mining activities of large- and medium-scale mining, shows the existence of situations where the holders of these mining properties have signed mining claim agreements with small-scale miners. Notwithstanding this situation, it is alleged that the responsibility to supervise them does not fall solely on the OEFA, but on the DREM, given their status or mining stratum.

In this sense, following this argument, if, the control of environmental obligations in charge of a holder of large- and medium-scale mining has been regulated in the mining claim assigned, then its compliance should be required in the same conditions in which the holder (assignor) took them, but the competent authority to control these activities would not be the OEFA, because they use as excuse that the formal legal classification of their activities are included within the artisanal or small-scale mining strata.

10 Published in the Official Gazette, “El Peruano,” on May 1, 1993.

As indicated before, the application of the principle of primacy of reality is the fundamental tool by means of which, before an inconsistency between what is happening in practice and the appearance or legal form such conduct has, the former should be preferred, that is, what is happening in the facts on the ground.

Under this principle, if it is verified that from the date of such assignment, environmental obligations in charge of a holder of the large- and medium-sized mining are transferred, regardless of whether the assignee has been classified as artisanal or small-scale miner, the control of such environmental management instrument corresponds exclusively to the OEFA.

In other terms, if in the mining concession assigned, the control of environmental obligations was regulated by a holder of the large- and medium-scale mining, compliance of such obligations should be required to the third party acquiring them in the same conditions as the holder took them, regardless of its appearance or legal status. Consequently, verification of compliance will be in charge of the environmental obligations enforcement body for large- and medium-scale mining, in this case, of the Supervision Bureau of the OEFA.

The application of the principle of primacy of reality in this case, is based on the need to avoid any attempt to circumvent, as of the date mining claim agreements were entered into, the competence of the OEFA in those mining activities which by their size require, on the part of the authority, greater control with respect to compliance by the assignor with controllable environmental obligations, so that they may not be infringed or violated. For this reason, the interpretation of such situation must not correspond to the subject carrying out the activity, but to the object of the obligations undertaken.

In this order of ideas, currently, there is an environmental legislation on mining that aims to prioritize the truth of the facts rather than the appearance or facade that is shown, a situation which is therefore consistent with the criterion exposed in the preceding paragraphs.

Thus, for example, Article 17 of Law 29325 - Law on the National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish),[11] amended by Law 30011,[12] establishes that when the OEFA gets prima facie and verifiable evidence of non-compliance with the conditions required for a particular

11 Published in the Official Gazette "El Peruano" on March 5, 2013.
12 Published in the Official Gazette "El Peruano" on April 26, 2013.

activity to be considered within the scope of jurisdiction of the regional Governments, and, therefore, according to its status it should be under the competence of the OEFA, the OEFA will be automatically entitled to take the environmental control measures required.

More to the point, for mining claims, the OEFA, by Decision of the Board of Directors No.028-2013-OEFA-CD,[13] has approved the rules that control the power of Environmental Enforcement Entities (hereinafter, EFA, by its initials in Spanish) in mining claim agreements, through which it has established rules to ensure the continuity of environmental control, regardless of the stratum, that is, if the assignment was made with an artisanal miner or a small miner.

By virtue of this body of regulations, a series of rules to determine the competence of the EFA in cases of mining claim agreements has been established.

First scenario: when a holder of the large- and medium-scale mining (assignor) enters into a mining claim agreement with an artisanal or small-scale producer (assignee), the following guidelines should be followed:

a) If the assignor has an approved environmental management instrument, the assignee shall comply with the obligations laid down in this instrument.

b) In the previous case, the OEFA will carry out environmental control with the environmental management instrument approved for the assignor, regardless of the classification or status of the assignee.

c) In case the assignee requests before the competent authority the modification of the environmental management instrument approved for the assignor, whether before the Regional Government or the General Mining Directorate of the Ministry of Energy and Mines in the case of Metropolitan

   Lima, the environmental control will no longer be carried out by the OEFA but will be assumed by the corresponding Regional Government or the above-mentioned General Mining Directorate, using the new approved environmental management instrument.

Second scenario: when a small-scale producer (assignor) enters into a mining claim agreement with a holder of the large- and medium-scale mining (assignee), the following parameters will be followed:

13 Published in the Official Gazette “El Peruano” on June 5, 2013.

a) If the object of the assignment is a mining concession adjacent to that of the assignee, or forming part of his operation without being adjacent, the assignee may request the amendment of the corresponding environmental management instrument, integrating the environmental study of the original mining claim with that of the concession assigned.

b) In case the assignee requests the modification of the environmental management instrument that was approved for the assignor, the OEFA will control the assignee using the modified environmental management instrument (the integrated instrument).

c) In case the amendment of the environmental management instrument that was approved for the assignor is not requested, the OEFA will control the assignee with respect to the mining concession assigned with the environmental management instrument of the assignor. In this case, and as both environmental management instruments of the assignor and the assignee have not been integrated in one instrument, the OEFA will control both instruments, to the extent that they correspond to different facilities.

d) In the case mentioned in the preceding paragraph, if in the supervisory actions carried out, it is found out that the facilities involved have been integrated into a single operation or process, the OEFA, to guarantee the effectiveness of environmental control and ensure the objectives of environmental protection, will order the assignee, through a specific order, to request to the competent authority the integration of both environmental management instruments.

Third scenario: when a small-scale producer (assignor) enters into a mining claim with another artisanal or small-scale producer (assignee):

a) If under the assignment the assignee loses any of the three conditions

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14 Supreme Decree 014-92-EM which approves the Single Organized Text of the General Mining Law

"*Article 91.- Small-mining producers are those who:*

1. Individually or as a group of natural persons or legal entities composed of natural persons or mining cooperatives or associations of mining cooperatives are usually engaged in the exploitation and/or direct beneficiation of minerals; and
2. Possess, by any title, up to two thousand (2,000) hectares, including applications for mining claims, exploratory claims and mining concessions; and, moreover.

provided for in Article 91 of the Single Organized Text of the General Mining Law,[14] the OEFA will be in charge of the environmental control of the assignee, in accordance with Article 10 of Legislative Decree 1100 - Legislative Decree amending Article 14 of Law 27651, Law on Formalization and Promotion of Artisanal and Small-Scale Mining.[15]

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3. Possess, by any title, an installed capacity of production and/or beneficiation not greater than three hundred fifty (350) metric tons per day. In the case of producers of non-metallic minerals and building materials, the maximum limit of the installed capacity of production and/or beneficiation will be up to one thousand two hundred (1,200) metric tons per day.
   For placer type mineral deposits, the maximum limit of the installed capacity of production and/or beneficiation will be of three thousand (3,000) cubic meters per day.
   Artisanal producers are those who:
   1. Individually or as a group of natural persons or legal persons composed of natural persons or mining cooperatives or associations of mining cooperatives usually engaged in the exploitation and/or direct beneficiation of minerals, which also serves them as a means of subsistence, carrying out their activities with manual methods and/ or basic equipment; and;
   2. Possess, by any title, up to one thousand (1,000) hectares, including applications for mining claims, exploratory claims and mining concessions; or signed agreements or contracts with holders of mining properties as provided for by the regulation of this law; and, additionally;
   3. Possess, by any title an installed capacity of production and/or beneficiation not greater than twenty-five (25) metric tons per day. In the case of producers of non-metallic minerals and building materials, the maximum limit of the installed capacity of production and/or beneficiation will be up to one hundred (100) metric tons per day.

   In the case of placer-type mineral deposits, the maximum limit of installed capacity of production and/or beneficiation will be of two hundred (200) cubic meters per day.
   The artisanal or small mining producer status will be certified before the General Mining Directorate through a biennial affidavit."

15 **Legislative Decree 1100 - Legislative Decree that regulates the interdiction of illegal mining throughout the Republic and provides for supplementary measures**
Article 10.- Amendment of Article 14 of Law 27651, Law on Formalization and Promotion of Artisanal and Small-Scale Mining.
Article 14.- Sustainability and Enforcement
Regional governments are responsible for control, penalties and other powers that have been transferred in the framework of the decentralization process, of those who carry out mining activities in compliance with the three conditions foreseen in Article 91 of the Single Ordered Text of the General Mining Law, irrespective of whether or not they have been accredited as artisanal or small-scale mining producers before the General Mining Directorate. In the event that any of the three aforementioned conditions is not met, control and penalties will be in charge of the OEFA, the Ministry of Labor, Promotion and Employment and Osinergmin (Supervisory Body for Investment in Energy and Mining,) according to their respective powers.

b) On the contrary, if the assignee maintains his status of artisanal or small-scale producer with the mining claim agreement, the environmental control will continue in charge of the corresponding Regional Government or the General Mining Directorate of the Ministry of Energy and Mines for the case of Metropolitan Lima.

Additionally, it should be mentioned another exception where there would be no reason for the OEFA to control mining activities. Thus, when the assignment operates in respect to a mining concession where the holder of the mining property (classified as holder of a medium or large-scale mining) has not carried out any mining activity whatsoever, i.e., where there is not a mining unit, but only the potential right to perform mining activities. In such scenario, the action of the OEFA might not materialize, because, as mentioned above, there must be an effective mining activity capable of being controlled for an intervention to take place.

Furthermore, the assignee must obtain the environmental certification before the authority whose competence will be determined according to the conditions generated by the assignment on the assignee.

Thus, for example, the assignee will maintain his status as artisanal or small-scale miner and, accordingly, will remain under the scope of jurisdiction of the Regional Government if the assigned mining concession (with no mining activity) together with the one the assignee already owns as artisanal or small-scale miner, do not surpass 2,000 hectares and provided that mining activities with a productive capacity of less than 350 MTD are included, using to this end manual methods and basic equipment.[16]

The responsibility of the National Government is to approve plans and determine the actions related with the formalization of activities carried out by artisanal and small-scale mining, which will of mandatory compliance on the three levels of Government and on those carrying out this mining activity.

16 On the contrary, and only considering the number of hectares, if the mining concession assigned (without mining activity) exceeds 2,000 ha, the assignee will be obliged to obtain an environmental certification issued by the General Directorate of Mining Environmental Affairs (DGAAM, by its initials in Spanish) before developing any activity. The same procedure should be followed if the concession granted, even if it does not exceed 2,000 hectares exceed this extension, when coupled with the concession the assignee already owns as a small-scale producer,

III. CONCLUSIONS

Practice has shown that as of the signing of a mining claim agreement scenarios appear where small-scale producers, as assignees, acquire environmental obligations from holders of mining properties belonging to the large- and medium-scale mining. In such context, it is essential to determine who the competent authority to enforce such obligations is.

With the implementation of the principle of primacy of reality, the OEFA has been able to settle disputes, placing emphasis on the elements of fact (this is, in the object of environmental obligations undertaken) rather than on the appearance of the legal form (i.e., in the subjects involved in the assignment).

In this way - giving priority to what happens and can be seen in reality-, it is possible to set the limits of the institution's sphere of responsibility with the purpose of ensuring compliance with obligations to be controlled, proper of large- and medium-scale mining, protecting in this way legal assets at risk, such as the environment, natural resources and the health of people.

In short, the most important adoption in the regulatory field of our position has been the Decision of the Board of Directors No. 028-2013-OEFA-CD, which approved the rules governing the powers of the EFA in the case of mining claim agreements, thereby ensuring continuity of environmental control regardless of the stratum of the holder of the mining property.

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THE NEW REGULATIONS ON THE ADMINISTRATIVE PROCEEDINGS TO IMPOSE ENVIRONMENTAL PENALTIES

MARIA LUISA EGÚSQUIZA MORI
MERCEDES PATRICIA AGUILAR RAMOS (*)

Summary

This paper is a brief description of the environmental enforcement background in Peru. First, an exposition of the new national environmental enforcement approach is made, in the framework of which the Regulations on the Penalty Administrative Proceedings were issued, and then, a description of the main characteristics of this legal standard is outlined. The article also explains the formalities needed to carry out penalty administrative proceedings and finally, the most important criteria issued by decision divisions in charge of these formalities are reviewed.

Introduction
Environmental Enforcement in Peru
The new approach for environmental enforcement and the RPAS
The RPAS
Conclusions

I. INTRODUCTION

In accordance with number 22 of Article 2 of the Political Constitution of Peru, one of the fundamental rights governing the Peruvian legal system is that every person has the right to enjoy a balanced environment suitable for the development of the person's life.

The Constitutional Court has developed the content of the above-mentioned constitutional provision in a Judgment issued on November 6, 2002, recorded in

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Docket No. 0018-2001-AI/TC, stating that environmental protection *"involves the complex and dynamic system of all its components in symmetric and stable ecosystems, which will make possible precisely, the adequate development of the lives of human beings*."

The duty of the State is to protect the right to enjoy a balanced environment is materialized in its power to control environmental obligations of legal subjects, in the context of the performance of their productive or income-generating activities, to avoid causing alterations to the environment.

Environmental enforcement is defined as the power (authority) and duty (obligation) of the State designed to ensure compliance with environmental regulations, whose main objective is the protection of the environment, natural resources and human health.

In this context, and under the provisions set forth in Article 67 of the Political Constitution of Perú, which establishes that the State determines the national environmental policy, several regulatory provisions have been issued in order to regulate the power of the State regarding environmental enforcement. Among them, we can mention the National Environmental Assessment and Enforcement System – (SINEFA [by its initials in Spanish]) which was created in 2009.

II. MAIN ENVIRONMENTAL ENFORCEMENT RULES IN PERU

In 1992, Decree Law No. 25763[1] was enacted, which *"[e]stablishes that compliance with obligations related to mining, electricity and hydrocarbon activities, may be controlled by Audit and Inspectorate Companies."* Such firms should be registered with the Ministry of Energy and Mines, and be hired by mining and energy companies. It was also specified that no official of the Ministry could carry out inspection visits, except in cases of emergency.

Later, by Law No. 26734[2] the Supervisory Body for Investment in Energy (OSINERG, by its initials in Spanish) was created as "*the controlling body for the activities carried out by companies in the electricity and hydrocarbon subsectors,*

1 Published in the Official Gazette "El Peruano" on October 11, 1992, revoked by Article 1 of Law No. 29477, published in the Official Gazette "El Peruano" on December 18, 2009.

2 Published in the Official Gazette "El Peruano" on December 31, 1996.

and for ensuring compliance with rules in the electric sector."[3] One of its functions was controlling compliance with technical and legal provisions related to environmental conservation and protection of the activities carried out in the electricity and hydrocarbon subsectors.

By Law No. 27474 – Mining Activities Control Law,[4] the concept of external auditors was introduced, qualified and hired by the Ministry of Energy and Mines, according to the established tariff rates.

By Supreme Decree No. 038-2004-PCM,[5] the 2004 Annual Plan for the Transfer of Sectoral Competences to Regional and Local Governments was approved, including the transfer of competences regarding the supervision and control of smaller-scale mining activities: artisanal and small-scale mining to Regional Governments. Within the competences transferred, was environmental control of mining holders in those strata.

In Article 130 of Law No. 28611 - General Law on Environment[6] (hereinafter, LGA, by its initials in Spanish) the system for environmental control and imposition of penalties, is established. The rule states that environmental control includes surveillance, control, follow-up, verification and other similar activities carried out by the National Environmental Authority[7] and other competent authorities. The aforementioned Article further provides that every natural person or legal entity is subject to actions of control, as determined by the National Environmental Authority and other competent authorities.

By Law No. 28964,[8] functions that regulate, supervise and control, at the national level, compliance with legal and technical provisions related to activities of the

3 Article 1 of Law No. 26734.

4 Published in the Official Gazette "El Peruano" on June 6, 2001.

6 Published in the Official Gazette "El Peruano" on October 15, 2005.

7 **Law No. 28611 - General Law on Environment**
"Article 56.- On the National Environmental Authority
The National Environment Council (CONAM, by its initials in Spanish) is the National Environmental Authority and governing body of the National Environmental Management System. Its specific functions and responsibilities are established by law and developed in the regulation of Organization and Functions."

8 Published in the Official Gazette "El Peruano" on January 24, 2007.

mining sector were transferred to OSINERG. These functions were added to those already held by the OSINERG as regulatory body of the electricity and hydrocarbon subsectors, and responsible for controlling compliance with legal and technical rules for the conservation and protection of the environment in the performance of such activities.[9] With this transfer, OSINERG's name was changed to that of Supervisory Body for Investment in Energy and Mining (OSINERGMIN, by its initials in Spanish).

Through Legislative Decree 1013,[10] which created the Ministry of Environment, the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish)[11] was also created. The OEFA is a specialized technical agency of the public sector attached to the Ministry of the Environment, with legal personality under public internal law in charge of the control, supervision, oversight and imposition of penalties on environmental matters. The OEFA was named as a "specialized technical agency" with the purpose of providing this agency with a high degree of independence and functional autonomy.

In this context, by Law No. 29325[12] (hereinafter, the SINEFA Law) the National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish) was created, with the OEFA as the governing body. Article 2 of the SINEFA Law establishes that the system is intended to ensure compliance with environmental legislation by all natural persons or legal entities and supervise and guarantee that the functions carried out by different entities of the state regarding assessment, supervision, control, monitoring and power to impose penalties on environmental matters, are performed in an independent, impartial, swift and efficient manner.

Through Article 11 of the SINEFA Law, the OEFA was given the general functions of assessment, direct supervision, supervision of public entities, control,

9 Indeed, one of OSINERG's functions was the supervision and control of the activities carried by the electricity, hydrocarbons and mining subsectors in order that they may develop according to legal provisions and technical regulations in force, and also, the supervision and control of compliance with technical and legal provisions relating to the protection and conservation of the environment in the activities performed in the electricity, hydrocarbons and mining subsectors (letters c and d of Article 5 of Law No. No. 26734).

10 Published in the Official Gazette "El Peruano" on May 14, 2008.

11 Second Final Supplementary Provision of Legislative Decree No. 1013.

12 Published in the Official Gazette "El Peruano" on March 5, 2009.

power to impose penalties and a normative role.[13] In view of the foregoing, the First Final Supplementary Provision of said law establishes that by Supreme Decree will be specified the entities, whose functions of assessment, supervision, control, oversight and imposition of penalties on environment matters will be assumed by the OEFA.

Therefore, in the years 2010, 2011, 2012 and 2013, competences in environmental enforcement related to mining (large- and medium-scale mining)[14] and energy sectors were transferred to the OEFA.[15] Also, those related to large-scale industrial fisheries and aquaculture subsectors,[16] and to the businesses of beer, paper, cement and tannery of the manufacturing industry of the industrial subsector.[17]

13 It must be noted that the article under consideration was amended by Law No. 30011 - Law amending Law No. 29325 – the SINEFA Law.

14 By Supreme Decree 001-2010-MINAM, published in the Official Gazette "El Peruano" on January 21, 2010, the process for the transfer of the functions of OSINERGMIN to the OEFA regarding the supervision, control and imposition of penalties in environmental matters was started; and by Decision of the Board of Directors 003-2010-OEFA/CD of July 23, 2010, those aspects object of the transfer of the functions of environmental monitoring, control and imposition of penalties in mining issues, between the OSINERGMIN and the OEFA were approved, establishing the 22th of July, 2010 as the effective date for such transfer.

15 By Decision of the Board of Directors No. 001-2011-OEFA/CD, published in the Official Gazette "El Peruano" on March 3, 2011, it was established that the OEFA would take over the functions of supervision, control and imposition of penalties in environmental matters carried out by OSINERGMIN in relation to electricity and hydrocarbons in general, from March 4, 2011.

16 By Supreme Decree No. 009-2011-MINAM, published in the Official Gazette "El Peruano" on June 3, 2011, the beginning of the process of transfer of the functions of follow-up, surveillance, supervision, control, oversight and imposition of penalties in relation to environmental matters of the industrial and fisheries sectors of the Ministry of Production to the OEFA. By Decision of the Board of Directors No. 002-2012-OEFA/ CD, published in the Official Gazette "El Peruano" on March 17, 2012, the 16th of March was established as the effective date for the transfer of functions of follow-up, surveillance, supervision, control, oversight and imposition of penalties in environmental matters in the fisheries sector.

17 By Decision of the Board of Directors No. 001-2013-OEFA/CD, published in the Official Gazette "El Peruano" on January 17, 2013, it was established that the OEFA would assume the functions of follow-up, supervision, enforcement, control and imposition of penalties in environmental matters of the Beer Business of the Manufacturing Industry of the Industry Subsector from the Ministry of Production.

Furthermore, by Law No. 29811, known as the Moratorium Law, a ban for the entry of Living Modified Organisms (LMOs) or transgenic organisms to be released into the environment during a period of 10 years was established.[18] During this time, national capacities should be strengthened, infrastructure developed and baselines of Peru's biodiversity generated, in order to allow an adequate assessment of the activities for the deliberate release into the environment of these organisms. The Regulation of the above-mentioned Law, approved by Supreme Decree No. 008-2012-MINAM,[19] develops the provisions on the procedure for monitoring the entry of LMOs, where it is established that the OEFA will carry out these control functions.

Thus, by Decision of the Board of Directors No. 003-2011-OEFA/CD, the Regulation for the Administrative Penalty Proceedings of the OEFA (hereinafter, the previous Regulation,)[20] was approved, which was in force from May 15, 2011 to December 13, 2012, date on which the new Regulations on the Administrative Pe-

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By Decision of the Board of Directors 004-2013-OEFA/CD, published in the Official Gazette "El Peruano" on February 20, 2013, it was established that, as of February 20, 2013, the OEFA would assume the functions of follow-up, supervision, control, monitoring and imposition of penalties in environmental matters of the Paper Business of the Manufacturing Industry of the Industry Subsector, from the Ministry of Production.

By Decision of the Board of Directors 023-2013-OEFA/CD, published in the Official Gazette "El Peruano" on May 29, 2013, it was established that, as of May 31, 2013, the OEFA would assume the functions of follow-up, supervision, control, monitoring and imposition of penalties in environmental matters in the Cement Business of the Manufacturing Industry of the Industry Subsector of the Ministry of Production.

Through Decision of the Board of Directors No. 033-2013-OEFA/CD, published in the Official Gazette "El Peruano" on August 9, 2013, it was established that as of August 9, 2013, the OEFA would assume the functions of follow-up, supervision, control, oversight and imposition of penalties in environmental matters of the Tannery Business of the Manufacturing Industry of the Industry Subsector from the Ministry of Production.

18 Law No. 29811 - Law establishing the moratorium on the entry and production of living modified organisms, into the national territory for a period of 10 years, published on December 9, 2011.

19 Supreme Decree No. 008-2012-MINAM - The regulation of the Law establishing the moratorium on the entry and production of living modified organisms into the country for a period of 10 years is approved, published on November 14, 2012.

20 Published in the Official Gazette "El Peruano" on May 14, 2011.

nalty Proceedings of the OEFA (hereinafter, the RPAS) were published, and approved by Decision of the Board of Directors No. 012-2012-OEFA/CD.[21]

The purpose of the RPAS is to regulate administrative penalty proceedings in the framework of which administrative offenses within the scope of jurisdiction of environmental control in charge of the OEFA, are investigated and established, as well as the imposition of penalties and the adoption of precautionary and corrective measures.

Through Law No. 30011,[22] which amended the SINEFA Law, more effectiveness to environmental control was given, promoting environmental control transparency and strengthening the functions of the OEFA and the leadership of the SINEFA.

Finally, by Decision of the Board of Directors 038-2013-OEFA/CD,[23] the "General Rules for the exercise of the Power of the OEFA to Impose Penalties" were approved (hereinafter, the General Rules). In this rule, the guidelines for the exercise of the power of the OEFA to impose penalties were established, including classification of offenses, establishment of penalties and issuance of corrective measures. These guidelines are intended to ensure the implementation of the principles of legality, classification, proportionality and non-confiscation governing the power of the OEFA to impose penalties.

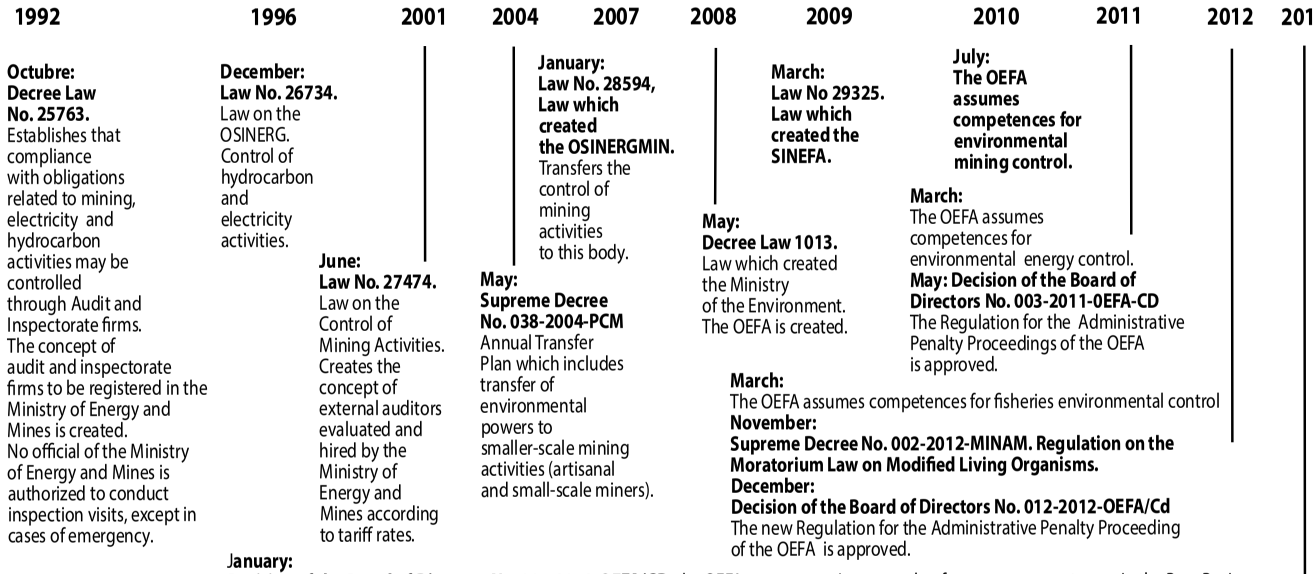
The evolution of environmental control over time we have described is represented in the following chart:

21 The Decision of the Board of Directors 012-2012-OEFA/CD established that the provisions of procedural nature of the RPAS apply to administrative penalty proceedings in process, at whatever stage they may be.

22 Published in the Official Gazette "El Peruano" on April 26, 2013.

23 Published in the Official Gazette "El Peruano" on September 18, 2013.

Chart No. 1 Environmental Enforcement in Peru



Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013)
Elaborated by the OEFA

III. THE NEW APPROACH FOR ENVIRONMENTAL ENFORCEMENT AND THE RPAS

In the OEFA a new approach for environmental enforcement is built up, which seeks to harmonize citizens' economic and civil rights, with the right to live in a healthy environment and the need to protect ecosystems. Such balance of interests seeks to promote sustainable development in the country, i.e., economic growth with benefits in both the present and the future, through a rational and/or responsible exploitation of natural resources.[24]

The new environmental control enforcement implies that the OEFA will carry out learning processes of the criteria and recommendations set out in international forums, oriented to establish clear, consistent, predictable procedural rules to guarantee the rights of companies. Therefore, the design of the RPAS is in line with the guidelines on compliance and control of environmental obligations of the International Network for Compliance and Enforcement with Environmental obligations (INECE, by its initials in English).[25]

Thus, the RPAS has specified environmental obligations subject to the scope of jurisdiction of the OEFA in order to create certainty about which behaviors may be subject to an administrative penalty proceeding.

As part of this spirit conceived to protect the rights of companies, the RPAS regulates in detail the formalities to be followed in the two instances of the administrative penalty proceeding. The previous Regulation only regulated the first administrative instance, while the formalities corresponding to the second instance

24 The new approach for Environmental Enforcement has been described by Gomez, Hugo and Granados, Milagros, "Strengthening environmental control." *Economics and Law Journal* No. 39, Lima: Peruvian University of Applied Sciences, 2013 p. 45.

Moreover, according to the website of the Information Center of the United Nations (http://www.cinu.mx/temas/medio-ambiente/,) the concept of sustainable development is the ability to meet current needs without compromising the ability of future generations to meet their own needs. In this regard, conservation of natural resources is sought, balancing human needs with the exploitation thereof. In this sense, it is considered, by way of example, that renewable resources are not be used at a higher rate than its regeneration process and should not emit pollutants exceeding the neutralization capacity of the atmosphere. (Accessed November 19, 2013).

25 International Network For Environmental Compliance And Enforcement (Inece), *Manual on the Principles of Environmental Compliance and Enforcement*, 2009, p. 15.

were recorded in the Internal Rules of the Tribunal of Environmental Enforcement of the OEFA.[26]

In this regard, the competences of the participating authorities were adequately defined in the administrative penalty proceeding, establishing the Supervision Bureau of the OEFA as the Accusing Authority and the Bureau for Enforcement, Penalty and Application of Incentives (hereinafter, the DFSAI, by its initials in Spanish) as the Prosecuting Authority and the Decision-Making Authority.

On the other hand, at the discretion of the INECE -on the need to identify specific criteria to help determine cases of non-compliance[27]-, the RPAS, as in the previous regulation, includes the criterion of strict liability of the offender, while establishing more precisely its scope of application -these will be discussed later in this article-.

Also, according to the Guidelines of INECE, it is necessary that systems for compliance with environmental obligations establish a guide on how to calculate the monetary penalties. In this line, the RPAS includes specific criteria to adjust administrative penalties, as well as the circumstances aggravating and mitigating the penalties to be imposed.

When making a comparison between the previous regulation and the RPAS, it can be seen that the second one contains a number of regulatory innovations outlined and developed in its Statement of Reasons and, which are briefly stated, as follows[28]:

26 Regulations approved by Decision of the Board of Directors No. 005-2011-OEFA-CD, amended by Decision of the Board of Directors No. 014-2012-OEFA CD. That Regulation was replaced by the current Regulation of the Tribunal of Environmental Enforcement, approved by Decision of the Board of Directors No. 032-2013-OEFA CD, published in the Official Gazette "El Peruano" on August 2, 2013.

27 International Network For Environmental Compliance And Enforcement (Inece). Op. cit., p. 77.

28 The Statement of Reasons of the Decision of the Board of Directors No. 012-2012-OEFA/CD can be found at the following web link: http://www.oefa.gob.pe/wp-content/uploads/2012/12/Exposici%C3%B3n-de-Motivos-nuevo-RPAS-Versi%C3%B3n-Final.pdf

TABLE 1. Comparison between the previous Regulation and the RPAS

Subjects	Previous Regulation	RPAS
Subjective scope of application	It only established that it was of application on every natural person or l egal entity.	Legal subjects against which a RPAS can be started are detailed with more precision.
Objective scope of application	Failure to comply with the obligations established in environmental management instruments, concessions, operating authorizations, rules, orders and provisions issued by the competent authority or the OEFA.	Non-compliance of environmental obligations to be controlled, subject matter of the RPAS, are best defined: • Obligations contained in the environmental regulation. • Commitments assumed in the environmental management instruments. • Precautionary or corrective measures or provisions or orders issued by the competent bodies of the OEFA. • Other environmental obligations to be controlled in charge of the OEFA, issued by a subsequent regulation or in function of processes entailing the transference of the competences of the OEFA.
Stages of the proceeding	The proceeding in second instance was not included.	Expressly regulates the proceeding in second instance (Tribunal of Environmental Enforcement).
Deadlines to submit defense cases	Five (5) working days	Fifteen (15) working days
Deadline for submitting the Administrative Penalty Proceeding	One hundred eighty (180) working days from the submission of cases or after the deadline has expired, whatever happens first.	One hundred eighty (180) working days from the beginning of the administrative penalty proceeding (shorter term).
Bodies involved	The Supervision Bureau of the OEFA was not included.	It is established that the Prosecuting Authority (Supervision Bureau) can also actively provide assistance and participate in the administrative penalty proceeding.
Penalties	Refers to the LGS	A fine of up to 10,000 UIT (*) is established as a penalty or warning.
Precautionary measures	It referred to Law No. 27444 – Law on the General Administrative Procedure (LPAG), the SINEFA Law, and the LGA.	The Proceedings for the application of these measures is developed, specific precautionary measures and also supplementary actions for their application are stated.
Corrective Measures	It referred to the LPAG, the SINEFA Law, and the LGA	Corrective measures which can be ordered, supplementary actions and the procedure for its application are established, by way of illustration.
Administrative Remedies	Only reconsideration and appeal remedies are established, and the submission of further evidence may be ordered.	The formalities regarding reconsideration and appeal are developed with greater detail.
Deadline to solve administrative remedies	Is not expressly indicated.	It is established that the formalities for the reconsideration of remedies should be solved in a maximum period of sixty (60) working days and the appeal, in ninety (90) working days.

(*) Under the Second Supplementary Provision amending Law No. 30011, amending Law No. 29325 - Law on the National Environmental Assessment and Enforcement System, the maximum scale of penalties is up to 30,000 UIT (Peruvian Tax Unit.)

Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

In conclusion, the benefits of the guidelines contained in the RPAS are evident. The RPAS clearly defines its scope of application, objective and subjective, the competences of the authorities involved and the different stages thereof. By making more predictable the performance of the Administrative Authority by such criteria as the adjustment of penalties, the company's rights of defense are protected. All this, in turn, implies the reduction of costs in which both Public Administration and the companies would incur, as this is a swift and efficient procedure.

IV. THE RPAS

4.1 Subjects against which an Administrative Penalty Proceeding may be initiated

One of the innovations of the RPAS is that Article 2[29] specifies that natural persons or legal entities, autonomous patrimonies, irregular societies, associative forms of enterprise or other legal subjects developing economic activities subject to the scope of environmental control of the OEFA,[30] are potential subjects against which administrative proceedings to impose environmental penalties can be initiated.

In this context, when verifying non-compliance of environmental obligations, the OEFA has imposed penalties on companies whose activities are directly linked to mining, energy and fisheries sectors. However, the competences of the OEFA also allow this agency to control and/or impose penalties to institutions whose secondary activities fit into any of the above production sectors.

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29 **Regulation for Administrative Penalty Proceedings of the OEFA, approved by Decision of the Board of Directors No. 012-2012-OEFA/CD**
"Article 2 .- On the scope of application
The provisions of this Regulation apply to any natural person or legal entity, autonomous patrimony, irregular societies, associative form of enterprise or other type of legal subjects developing economic activities subject to the scope of environmental control, under the competence of the OEFA (...)."

30 In connection with the subjective scope of application of the RPAS, it is pertinent to stress that although the OEFA has the function of supervising Environmental Enforcement Entities (EFA, by its initials in Spanish), at national, regional and local levels, this does not imply that the OEFA may initiate administrative penalty proceedings against the EFA. On the contrary, based on that function, in the event of non-compliance with environmental functions of the EFA, the OEFA, as the governing body of SINEFA communicates the situation to the competent body of the National Control System which is responsible for determining the respective functional responsibility of the EFA, according to letter b) number 11.2 of Article 11 of Law No. 30011.

Thus, for example, the OEFA imposed penalties to a university for non-compliance of environmental rules linked to the aquaculture activity of scallop culture on a larger-scale;[31] also on another university penalties were imposed for non-compliance of rules related to the activity of their facility: the curing and canning of hydro biological products for direct human consumption.[32]

4.2 Environmental obligations to be controlled in Administrative Penalty Proceedings

In accordance with Article 2 of the RPAS, administrative offenses that are within the competence of the OEFA are as follows:

(i) Non-compliance with the obligations contained in the environmental regulation. For example, non-compliance of maximum permissible limits, rules of regulations on sectoral environmental protection, solid waste rules, among others.

(ii) Non-compliance with commitments assumed in environmental management instruments. For example, non-compliance with an obligation contained in Environmental Impact Studies, Environmental Impact Statements, Environmental Management Plans, Closure Plans or others.

(iii) Non-compliance with precautionary or corrective measures, or with the provisions or orders issued by the competent bodies of the OEFA. For example, when the company fails to forward the information requested via a specific order or does not comply with the provisions set forth in precautionary or corrective measures.

(iv) Non-compliance with other environmental obligations to be controlled by the OEFA.

It should be noted that the Administrative Penalty Proceeding in charge of the OEFA is governed by principles that seek to ensure the full exercise of the rights of the companies involved and, which in turn, contribute to the achievement of the control objectives of the agency.

These principles have been collected in different regulatory instruments governing Peruvian Administrative Law in general, Environmental Law, and Admi-

31 See Directorial Decisions No. 250-2012-OEFA/DFSAI of August 17, 2012 and No. 271-2012-OEFA/DFSAI of August 29, 2012.

32 See Directorial Decision No. 270-2013-OEFA/DFSAI, published in the Official Gazette "El Peruano" on May 31, 2013.

nistrative Penalty Law in particular. Thus, according to Article 3 of the RPAS, all Administrative Penalty Proceedings are governed by the principles of legality, classification, due process, reasonableness, internalization of environmental costs, proportionality, environmental liability, presumption of legality, causality, non-retroactivity, double jeopardy, and prohibition of the *reformatio in peius*.

4.3 Strict environmental administrative liability

In Administrative Law, there are two liability systems: subjective and strict liability. Usually the first one prevails in Administrative Penalty Proceedings, while the second one is applied as an exception in some areas, provided that the rule so provides explicitly.

The legislator decides to apply a strict liability system when he believes that certain activities carried out by individuals involve risks against fundamental rights. This is the case of the liability system in relation to environmental offenses, where the prevention of public interests is more important than private activities that might represent a risk or danger to these interests. In that sense, Parkinson states:

> **"*It was necessary that those who carry out activities with a high damage index be held liable for strict liabilities:*** *accidents caused by the circulation of vehicles, responsibility of professionals, damages caused by processed products, computer equipment, biotechnology, by the peaceful use of nuclear energy* ***and, especially damage to the environment.****"*[33]
> [emphasis added]

On the doctrinal level it has been highlighted that administrative liability has been recognized by the Constitutional Court as subjective and, exceptionally, it is given an objective character.[34] In this regard, in environmental issues, strict administrative liability has been preferred, due to the nature of the legally-protected right -the environment-, and the complexity of the enforceable and punishable matter.

The purpose of the administrative proceedings, in general, is the application of very swift and efficient justice. In view of this, the purpose of strict administrative

33 Besalú Parkinson, Aurora V.S., *Liability for environmental damage*. Buenos Aires: Hammurabi, 2005, p. 56.

34 For more details on this view, we suggest reviewing the article published by Shimabukuro Makikado, Roberto Carlos, "Reflections on the principle of guilt and strict administrative liability." In: *Administrative Law* in the XXI Century. Vol. I, Lima: Adrus D & L Publishers, 2013, pp. 727-748.

liability is the confirmation of the offense made by the authority, and once proven the connection with the company, it is held liable for the verified non-compliance, unless the rupture of the causal link is proven, whether by act of God, force majeure or determining factor by a third party.

Strict environmental administration liability is the result of the equilibrium in weighting the interests protected by the Administrative Authority: on the one hand, the effective protection of the environment and, on the other, the right of defense and due process of the company.

In fact, through this figure, the system seeks to minimize to the minimum non-compliance with environmental liabilities on the part of the subjects to be controlled. They have the obligation to take all necessary steps to comply with current environmental regulations and with their environmental commitments, orders and corrective measures given by the authority, as well as with precautionary measures, and other environmental liabilities to be controlled.

If for any circumstance beyond the sphere of responsibility of the company, it is unable to comply with any of its liabilities, such circumstance must be objectively proven to exempt the accused form administrative liability. The purpose of this in economic terms is that the company may internalize the full costs of their activities, including costs arising from non-compliance with environmental liabilities to be controlled.

For these reasons, it is considered that given the particularity, specialization and importance of the legally-protected right, the strict administrative liability system can assist administrative authorities in prosecuting its objectives efficiently and, in particular, in carrying out an effective and timely protection of the environment and its components.

Following this vein, Article 18 of the SINEFA Law recognizes that administrative environmental liability is strict. This rule expressly establishes that companies are strictly responsible for non-compliance with their obligations derived from environmental management instruments and from environmental rules and orders or provisions issued by the OEFA.

The rule of strict administrative liability is also collected in number 4.3 of Article 4 of the RPAS as follows:

> "*4.3. In application of strict liability, once verified the fact establishing the administrative offense, the company under investigation may be exempted from liability only if it can prove, irrefutably, the rupture of the causal link,*

either by an act of God, force majeure or determining factor by a third party. (...)"

For its part, number 6.2 of the Sixth Rule of the General Rules in relation to the exercise of the power of the OEFA to impose penalties, states the following:

"(...)
6.2. In application of the principle of presumption of legality (presumed innocence), the competent authority of the OEFA must prove the existence of an administrative offense, i.e., verify the factual assumption of the type of offense. *However, the accused company may be exempted from responsibility if it shows that the causal link is broken by an act of God, force majeure or determining factor by a third party. (...).*"

It's worth noting that the RPAS has foreseen that administrative liability is independent of civil or criminal liability that might arise from the acts or omissions which in turn constitute an administrative offense.

Finally, the RPAS explicitly states that where non-compliance is applicable to several subjects as a whole, they are jointly and severally liable for the offenses committed. This facilitates the prosecution action of the State; therefore, the dissuasive effect of the proceedings to impose penalties is enhanced in relation to wrongful environmental conducts.

4.4. Administrative bodies and authorities of the administrative penalty proceedings

There are two administrative bodies in charge of administrative penalty proceedings: the DFSAI,[35] and the Tribunal of Environmental Enforcement.

However, pursuant to the provisions of Article 6 of the RPAS,[36] five authorities are involved in the formalities of administrative penalty proceedings.

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35 The DFSAI, which is the body responsible for handling administrative penalty proceedings in the first instance, consists of three sub-divisions: Prosecution and Research Sub-Division, Enforcement Sub-Division and Penalties and Application of Incentives Sub-Division.

36 **Regulation for Administrative Penalty Proceedings of the OEFA approved by Decision of the Board of Directors No. 012-2012-OEFA/CD**
"Article 6.- On the authorities involved in administrative penalty proceedings.
The authorities involved in administrative penalty proceedings are the following:
a) ***Accusing Authority****: Is the authority that submits the Technical Report and may appear in administrative penalty proceedings to support such Report in the hearing of Oral Report of first instance.*

4.4.1 Accusing Authority

The RPAS, unlike the former rule, established as part of the administrative penalty proceedings an Accusing Authority, in order to separate two roles: the identification of findings in supervisions made to companies from the investigation and solution of administrative penalty proceedings.

In that sense, the Accusing Authority is responsible for preparing the Technical Report, in which the findings of supervisions that qualify as alleged offenses are identified.

Under the provisions of the RPAS, the Accusing Authority is the Supervision Bureau.[37]

4.4.2 Prosecuting Authority

Prosecution work is under the Prosecution and Research Sub-Division of the DFSAI[38] and has the authority to file charges, develop prosecution work and present evidence during the investigation in the first instance.

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b) ***Prosecuting Authority****: Is the authority empowered to file charges, request the issuance of precautionary measures, carry out investigations, perform tests during the investigation in the first instance, and make an appropriate decision proposal.*

c) ***Decision-Making Authority****: is the competent body in charge of imposing penalties and corrective measures and resolve reconsideration resources lodged against its decisions.*

d) ***Tribunal*** *of* ***Environmental Enforcement****: Is the body responsible for resolving the appeal.*

e) ***Chair of the Board of Directors:*** *Is the body responsible for ruling on the issuance of precautionary measures before or after the initiation of an administrative penalty proceeding in accordance with the provisions of the Regulation on the Organization and Functions of the OEFA."*

37 **Regulation for Administrative Penalty Proceedings of the OEFA, approved by Decision of the Board of Directors No. 012-2012-OEFA/CD**
"Third: Authorities of the administrative penalty proceedings
Under the current organizational structure of the OEFA, it is understood that:
a) The Accusing Authority is the Supervision Bureau;
b) The Prosecuting Authority is the appropriate body of the Bureau of Enforcement, Penalty and Application of Incentives; and,
c) The Decision-Making Authority is the Bureau of Enforcement, Penalty and Application of Incentives OEFA ".

38 It should be noted that although the DFSAI is the prosecuting authority and decision instance of administrative penalty proceedings, its three sub-division structure allows a difference between the authority conducting the prosecution stage (Prosecution Sub-Division) and the authority deciding the imposition of the penalty and/or corrective measure (the DFSAI supported by the Enforcement Sub-Division and the Penalties and Application of Incentives Sub-Division); as provided for in letter o) of Article 40 of the Regulations of Organization and Functions of the Agency for Assessment and Environmental Enforcement (OEFA, by

4.4.3 Decision-Making Authority

The Decision-Making Authority is the competent body to resolve administrative penalty proceedings in first instance, file the case if the company's liability was not established, or impose appropriate penalties and corrective measures. Under the provisions of the RPAS, the DFSAI is the Decision-Making Authority.

The DFSAI with the legal and technical support of the Enforcement Sub-Division and the Penalties and Application of Incentives Sub-Division, solves administrative penalty proceedings, files or imposes penalties and/or corrective measures.

4.4.4 Tribunal of Environmental Enforcement

The Tribunal of Environmental Enforcement is the decision divisions of second instance of the OEFA. It consists of Specialized Divisions of jurisdiction and has the function of resolving appeals lodged against decisions issued by the DFSAI, plus complaints of defects in processing and other functions assigned by the regulations on this matter.[39] This Tribunal may confirm, overturn or cancel a decision issued by the DFSAI, in whole or in part.

its Spanish initials,) approved by Supreme Decree No. 022-2009-MINAM, published in the Official Gazette "El Peruano" on December 15, 2009.

39 Internal Rules of the Tribunal of Environmental Enforcement of the Agency for Environmental Assessment and Enforcement approved by Decision of the Board of Directors No. 032-2013-OEFA/ CD

"Article 2 .- The Tribunal of Environmental Enforcement

2.1. The Tribunal of Environmental Enforcement is a decision division of the OEFA, with technical autonomy in the performance of its duties and independent in issuing its decisions and statements.

2.2. The Tribunal of Environmental Enforcement ensures the enforcement of the principle of legality and respect for the right of defense and due process, as well as the correct application of other legal principles that guide the exercise of the power of the Public Administration to impose penalties.

2.3. The Tribunal of Environmental Enforcement consists of Specialized *Divisions for solving issues within the jurisdiction of the OEFA.*

2.4. The number and issues within the competence of the Divisions is determined by the Board of Directors of the OEFA, in view of the existing caseload. "

*"**Article 3 .- Jurisdiction of the Tribunal of Environmental Enforcement***

The Tribunal of Environmental Enforcement has jurisdiction to hear actions of appeals against decisions issued by Divisions of the OEFA, complaints regarding defects in processing and other functions as assigned by the regulation on the matter."

It should be noted that currently the Tribunal of Environmental Enforcement has a Pro Tem Division, which is effective until the implementation of the Specialized Divisions of limited jurisdiction listed in the above-mentioned rule.

4.4.5 Chair of the Board of Directors

The Chair of the Board of Directors is the body responsible for deciding the issuance of precautionary measures before or after the commencement of administrative penalty proceedings.

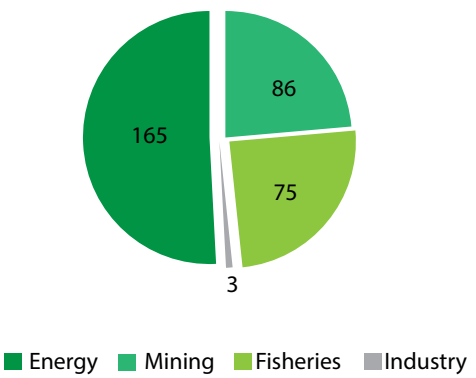
4.5 Formalities in the administrative penalty proceeding

4.5.1 Technical Report (ITA, by its initials in Spanish)

The Accusing Authority (Supervision Bureau) puts into the consideration of the Prosecuting Authority, through the ITA, the alleged administrative offenses, accompanied by evidence obtained in the supervisory activities. The Prosecuting Authority may seek clarification from the ITA.

From the effective date of the RPAS, the Accusing Authority has brought to the attention of the Prosecuting Authority 329 ITA, corresponding to the energy, mining, fisheries and industry sectors, as detailed below:

Chart no. 2 technical report submitted to the bureau of enforcement, penalty and application of incentives, from the effective date of the rpas until november 30, 2013



Sector	Number of cases (*)
Energy	165
Mining	86
Fisheries	75
Industry	3
Total	**329**

(*)The number of cases in which appearance was requested, matches with the total ITA received by the DFSAI, due to the fact that in 100% of cases, the DS requested the appearance of the parties involved.

Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

4.5.2 Decision regarding charges

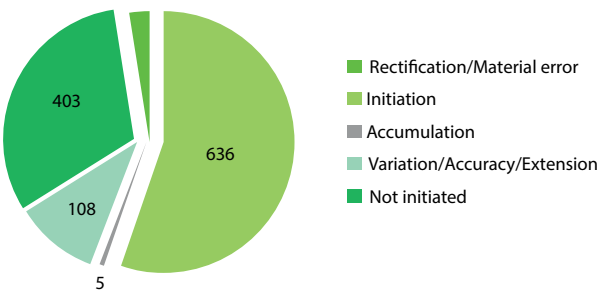
The Prosecuting Authority, after evaluating ITA, may initiate administrative penalty proceedings. To this end, it must issue the corresponding decision of allegation of charges, and notify it to the company.

Such decision shall contain the minimum information necessary to ensure all the company's rights, i.e., a clear description of acts or omissions resulting in administrative offenses, the rules classifying such fact as an offense, the classification of the seriousness of the alleged offense, possible penalties to be imposed, the term the company has to formulate the defense and the evidence underpinning those allegations.

The administrative penalty proceeding should not last more than 180 working days.

From January to November 30, 2013, from a total of 1176 decisions issued by the Prosecuting Authority, 636 correspond to decisions to initiate an administrative penalty proceeding; 403 to decisions in which it was determined that there were no grounds for the commencement of a penalty proceeding; 108 were decisions to modify the allegations of the proceedings initiated; 24 to rectify the data of the allegations reported to companies and 5 have an accumulation of proceedings, as outlined in the following detail:

Chart No. 3. Types of Sub-directorial Decisions issued from January to November 30, 2013



Type	N°
Accumulation	5
Variation/Accuracy/Extension	108
Not initiated	403
Rectification/Material error	24
Initiation	636
Total	**1176**

Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

4.5.3 Right of defense

The company has a maximum period of fifteen working days, after the decision of charges has been notified to present its defense. Also, the Decision-Making Authority, ex officio or at the request of the party, may summon an oral report hearing so the accused party may fully exercise its rights of defense, and the administrative authority can solve, if it is the case, any doubt on the facts or evidence presented in the dossier.

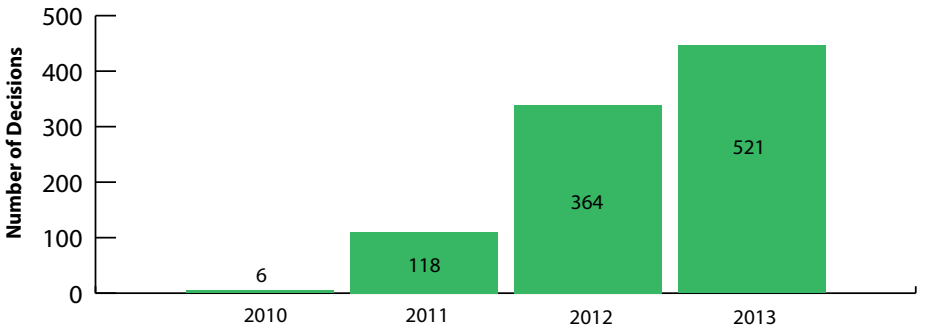
In this step of the proceedings, the Accusing Authority can intervene to support the ITA.

4.5.4 Penalty Decision or Decision for the record

Following the period of prosecution, the Prosecuting Authority must submit to the Decision- Making Authority a proposal for final decision. Once approved the project, the final decision will be issued, with reasons in fact and in law that uphold the existence or non-existence of administrative offense, as well as the adjustment of the penalty and corrective measures to be imposed, if applicable.

In this regard, the Decision-Making Authority, from January 2013 until December 15, 2013, has issued 521 decisions of the Board of Directors, penalty decisions and decisions for the record, showing an increase in production over the previous year, due to improvements implemented in the handling of administrative penalty proceedings, as seen in the chart below.

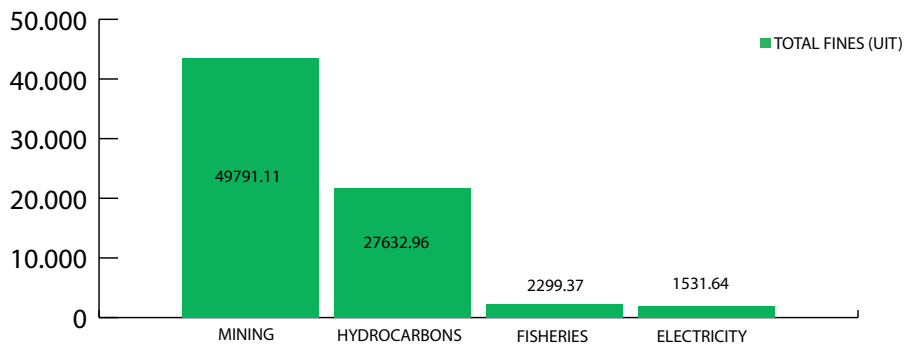
Chart No. 4. Decisions of the Board of Directors for Penalty and Record issued by the Bureau of Enforcement, Penalty and Application of Incentives from the year 2010 to December 15, 2013



Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

Also, through directorial penalty decisions, the OEFA has imposed fines which together amount to 81,255.08 Peruvian Tax Units (UIT, by its initials in Spanish), divided among economic sectors within the scope of jurisdiction of the OEFA, with the highest percentage of fines corresponding to the mining sector, as shown below:

Chart No. 5. Fines imposed by the Agency for Environmental Assessment and Enforcement by sectors, from the year 2010 to December 15, 2013



Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

4.5.5 Appeals

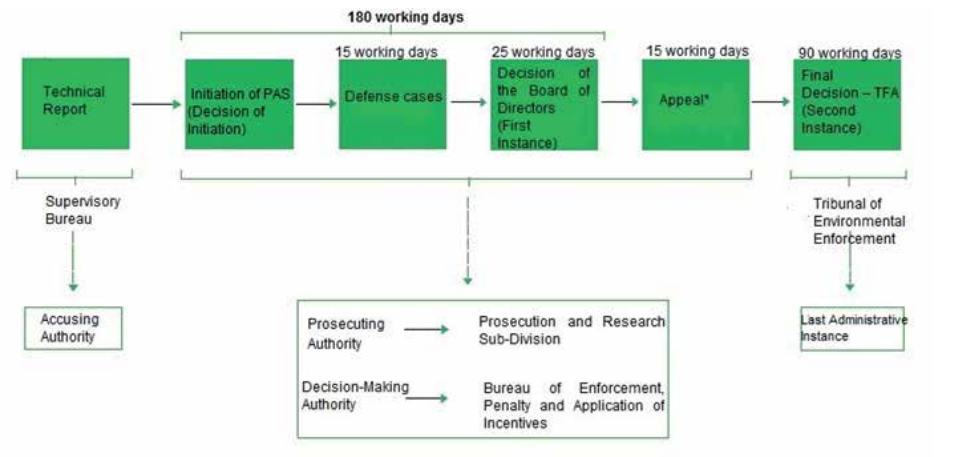
If deemed necessary, the company may exercise its right to submit the penalty decision to reconsideration of the Decision-Making Authority, for which new evidence must be enclosed. In this case, the reconsideration proceeding shall be conducted within a period of sixty (60) working days.

The company can also appeal the first instance decision before the Tribunal of Environmental Enforcement. This authority has a maximum period of ninety (90) working days to resolve. In this stage of the punishment proceeding, the Decision-Making Authority may request its appearance to the review proceeding.

Both the company as the Decision-Making Authority may request the right to speak to the Tribunal of Environmental Enforcement, to support their position. Finally, through the final decision, the said Tribunal shall confirm, revoke or declare invalid, in whole or in part, the decision appealed.

The following graph shows briefly the stages of administrative penalty proceedings:

Chart No. 6. Flow of the administrative penalty proceeding



** The company may file an appeal or reconsideration; in the latter case, the authority has a period of sixty (60) working days to settle the matter.*

Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013).

4.6 Imposition of administrative penalties

As provided for in number 7.1 of the General Rules, the power of the OEFA to impose penalties is materialized with the imposition of administrative penalties which may be monetary (fines) non-monetary (warnings). Administrative penalties, aimed at deterring and punish unlawful conduct are imposed after the offenses committed have been verified in the appropriate administrative penalty proceedings.

Thus, by applying penalties, the Public Administration exercises coercion of citizens, generating two effects: first, the deterrent effect, while attempting to prevent the offender or a third party, to incur again in the punishable conduct; and second, the corrective effect suspending the commission of unlawful conduct and the return of the lost balance to society. [40]

With the penalty, the OEFA can dictate corrective measures –an issue to be developed further on-, in order to eliminate, as far as possible, adverse impacts on the environment.

40 *"In economic terms, we can say that what punishment looks for is that the unlawful activity is less profitable for the offender than compliance with the provisions of the system, that is, it would be more expensive to violate rules than give them effective compliance. Therefore, the administrative authority must provide that commission of the punishable conduct will not be more advantageous to the offender than compliance with the rules infringed or the payment of the penalty.*

The view adopted here is the usual choice analysis that economists follow and which assumes that a person commits an offense if the expected utility exceeds the utility obtained using his time and resources in other activities. Therefore, some people become "criminals" not because their basic motivation differs from other people, but because their benefits and costs differ (...) ". BECKER, Op. cit., p. 390.

*The possibility that one of the parties would commit or not an act -quite apart from whether or not it is socially desirable to do so- will depend in fact on his perception of the likelihood of a monetary or non-monetary penalty. One of the parties would commit an act if and only if the penalty expected is less than the expected benefit. If he decides not to commit an act, it will be said that he was deterred. "SHAVELL, Steven, Criminal Law and the optimal use of non-monetary penalties as a deterrent. Article included in ROEMER, Andrew (compiler), Law and Economics: A Review of the Literature, Fondo de Cultura Económica, Mexico 2000, p. 439." (*Excerpted from GÓMEZ, Hugo; ISLA, Susan and MEJIA, Gianfranco," Notes on the Adjustment of Penalties for Violations of the Consumer Protection Rules." *Law & Society*, No. 34, 2010, p. 136).

Also, the OEFA may impose coercive penalties to the company reluctant to comply with an order of the authority (precautionary or corrective measure).[41] The purpose of this type of punishment it that the company may yield and comply with the provision or order of the Administration, to the extent that it has the nature of a means of compulsory enforcement of administrative acts.

It should be recalled, according to the above, that the power to impose penalties of the OEFA is governed by the principles set forth in Article 3 of the RPAS.

4.6.1 Methodology for calculating the base fine

By order of the Chair of the Board of Directors No. 035-2013- OEFA/PCD[42] the "Methodology for calculating base fines and the application of aggravating and mitigating factors used in adjusting penalties." (hereinafter, the Methodology).[43]

41 **Regulation for the Administrative Penalty Proceedings of the OEFA approved by Decision of the Board of Directors No. 012-2012-OEFA/CD**
"Article 40 .- On the penalty payments
40.1. Penalty payments is a means of compulsory enforcement of the provisions of the decisions imposing precautionary or corrective measures, being independent of these and not having a punitive nature.
40.2. The decision establishing a precautionary or corrective measure should establish as a warning the imposition of a penalty payment, stating the deadline for compliance with the obligation and the amount to be applied in case non-compliance continues."

"***Article 41. Imposition of penalty payments***
41.1. The imposition of penalty payments shall be governed in accordance with the provisions of numbers 21.5 and 21.6 of Article 21 and in numbers 22.4 and 22.5 of Article 2 of the National Environmental Assessment and Enforcement System.
41.2. Failure to comply with a precautionary or corrective measure by the company entails a penalty payment of not less than one (1) Peruvian Tax Units and no more than one hundred (100) Peruvian Tax Units. The penalty shall be paid within five (5) working days, and when it expires a penalty payment will be ordered.
41.3. Should non-compliance continue, a new penalty payment will be imposed, doubling successively and unlimitedly the amount of the last penalty payment imposed, until they meet the precautionary or corrective measure ordered."

42 Published in the Official Gazette "El Peruano" on March 12, 2013.

43 While under the provisions of Supreme Decree No. 007-2012-MINAM, the Methodology applies to activities related to medium- and large scale mining, according to the provisions of Article 4 of the Decision of the Chair of the Board of Directors No. 035-2013-OEFA/PCD, this methodology can additionally be applied to the adjustment of penalties related to the activities that the OEFA supervises, while the methodology applicable to offenses outside the mining sector is not approved.

This methodology establishes objective criteria applicable to the adjustment of penalties that the administrative authority may determine for non-compliance with environmental rules, provided that they are not offenses classified with fixed fines.[44]

The methodology includes the following variables: (i) illicit profit, comprising "*what the company receives, received or planned to receive committing the offense, and what it saves, would save or planned to save committing the offense,"*[45] (ii) a proportion of the environmental damage caused, understood as the "*detriment, loss, adverse impact or current and proven damage, caused to the environment and/or any of its components as consequence of the development of human activities*;"[46] and (iii) the probability of detection, which measured in percentage terms, is "*the possibility that the commission of an offense is detected by the administrative authority*."[47]

Additionally, the aforementioned base fine will be adjusted using the aggravating and mitigating factors,[48] understood as facts or circumstances which, when taken into account are included in the formula for calculating the fine, in order to increase or decrease the amount thereof.

4.7 Corrective measures

The LGA provides that natural persons or legal entities whose activities generate an adverse impact on the environment must take, inexcusably, measures for

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44 **Decision of the Chair of the Board of Directors No. 035-2013-OEFA/PCD, approving the Methodology for calculating base fines and application of aggravating and mitigating factors to be used in the adjustment of penalties**
"Article 2 .- Scope of application of the Methodology
The methodology approved by this Decision provides objective criteria for the adjustment of penalties that the administrative authority may determine for non-compliance of environmental regulations on activities related to the large- and medium scale mining, and in relation to the works of exploitation, beneficiation, transportation and storage of ore concentrates. It does not apply to offenses classified as fixed fines. "

45 "Explanatory handbook explaining the methodology for calculating base fines and the application of aggravating and mitigating factors to be used in adjusting penalties "adopted by Decision of the Chair of the Board of Directors No. 035-2013-OEFA/PCD. Exhibit 1, number 18.

46 Ibid, number 9.

47 bid, number 21

48 Ibid. number 30.

restoration, rehabilitation or repair, as appropriate; and in case consequences are irreversible they must compensate in environmental terms the damages generated, without prejudice to other types of liability that may ensue.[49]

Thus, the exercise of the administrative power to impose penalties does not exhausts its purpose with the imposition of penalties against the commission of an offense, but also involves the establishment of administrative measures, mandatory for companies, in order to eliminate, as far as possible, adverse impacts on the environment.[50]

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49 **Law No. 28611 - General Law on Environment.**
"Article VIII.- On the principle of cost internalization
Any natural person or legal entity, public or private individual must bear the cost of the risks or damages generated on the environment.
The cost of actions of prevention, surveillance, restoration, rehabilitation, repair and eventual compensation, related to the protection of the environment and its components, of adverse impacts of human activities should be taken up by those causing such impacts.
(...)."

"Article IX.- On the principle of environmental responsibility
If the cause of the degradation of the environment and its components, is a natural person or legal entity, public or private individual, he is unavoidably compelled to take measures for the restoration, rehabilitation or repair, as appropriate or, if this were not possible, to compensate on environmental terms for the damage caused, without prejudice to other administrative, civil or criminal responsibilities that may ensue. "
We quote the following international experience:
Spanish Law No. 26/2007, passed on October 23, 2007
"Preamble:
(...)
Environmental responsibility is also, an unlimited responsibility because the content of the obligation to repair (or, where appropriate, to prevent) assumed by the responsible operator is to restore damaged natural resources to their original state, bearing the full costs that the corresponding preventive or remedial actions amount to*. By focusing on the total restoration of natural resources and the services they provide, the environmental value prevails, which is not satisfied with a mere monetary compensation. "*(Bold added.)

50 In this regard, Juan Morón Urbina says: "*A treatment of confrontation against an administrative offense does not only lead to the imposition of this legal consequence provided for by the rule as way of punishment, but also tends to eliminate those effects that the act or omission would have caused on public property or interests, on government property, or minimum damages to third parties. The application of an administrative penalty only corresponds to the first named interest, leaving important aspects latent in the reality that the law must give appropriate solution through supplementary measures.*" Morón, Juan Carlos. "Acts - measures (corrective, provisional and safety measures) and the power to impose penalties. *"* *Administrative Law Journal*, Year 5, No. 9, December 2010, p. 135

The legal mechanisms provided to fulfill this purpose are corrective measures, which shall apply vis-à-vis confirmation of a real harm, and consist of a specific and precise obligation which must be fulfilled by the company. The legal basis for the implementation of corrective measures is in the LGA[51] and the SINEFA Law.[52] In this regard, Article 39 of the RPAS, provides that the DFSAI is the competent body to issue corrective measures in the context of an administrative penalty proceeding.

4.7.1 Guidelines for the implementation of corrective measures

By Decision of the Board of Directors No. 010-2013-OEFA/CD[53] the "Guidelines for the implementation of corrective measures" (hereinafter, Guidelines on Corrective Measures) were approved. These guidelines establish the criteria and mechanisms used to impose corrective measures, the proceedings that the DFSAI must follow and the types of measures according to their purpose.

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51 **Law No. 28611 - General Law on Environment**
"Article 136 .- On the penalties and corrective measures
136.1. Natural persons or legal entities who infringe the provisions of this Act and the supplementary provisions and regulations on the matter, will be subject to, depending on the seriousness of the infringement, penalties or corrective measures.
(...) ".

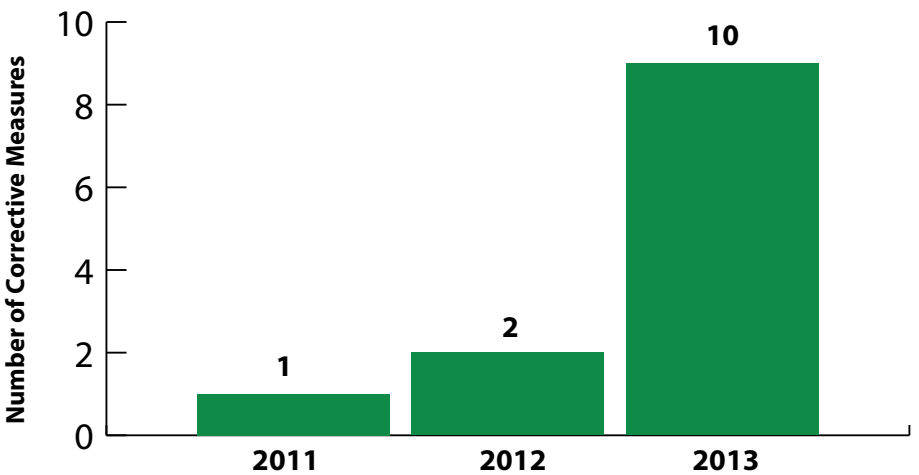
52 **Law No. No. 29325 - Law on the National Environmental Assessment and Enforcement System**
"Article 22 .- Corrective measures
22.1. Corrective actions may be ordered to reverse or decrease, to the extent possible, the adverse effect that the unlawful conduct could have caused to the environment, natural resources and the health of people.
22.2. Measures that may be issued include, by way of illustration, the following:
a) The final confiscation of objects, instruments, appliances or substances used for the commission of the offense.
b) The cessation or restriction of the activity causing the offense.
c) The total temporary or permanent closure, partial or local of the premises or establishment where the activity that generated the alleged infringement was performed.
d) The obligation of the person responsible for the damage to restore, rehabilitate or repair the situation altered, as appropriate, and if this is not possible, the obligation to compensate this damage in environmental and/or economic terms.
e) Other activities deemed necessary to reverse or reduce as far as possible, the adverse effect that the infringing conduct could have caused on the environment, natural resources or health of the people.
f) Other activities deemed necessary to prevent the continuation of the adverse effect that the infringing conduct has caused or may cause on the environment, natural resources or health of the people."

53 Published in the Official Gazette "El Peruano" on March 23, 2013.

Also, in order to prevent the company from paying additional costs, the Guidelines on Corrective Measures provide that the calculation of the fine, when the recovery of the actual damage is considered in the base fine formula and the issuance of a restoration or environmental compensation measure is decided, the DFSAI will not use the entire amount of the restored damage, but only a quarter, since the remaining parts will be covered by the company by bearing the cost of the corrective measure ordered.

It should be noted that, as of the effective date of the RPAS and the Guidelines on Corrective Measures, there was an increase in the number of corrective measures imposed by the DFSAI, as shown below:

Chart No. 7. Corrective measures imposed by the Bureau of Enforcement, Penalty and Application of Incentives from the year 2010 to November 30, 2013.



Source: Bureau of Enforcement, Penalty and Application of Incentives of the OEFA (2013)

It should be mentioned that methodological standards described -to calculate the base fine and the imposition of corrective measures-, aim at, among other things,

to generate predictability on the outcome of penalty proceedings.[54] Indeed, such methodologies allow the company to know in advance the reasoning that is used to calculate monetary penalties as well as the criteria that measure the aggravating and/or mitigating factors of the penalty.

Also, the aforementioned methodological rules promote environmental remediation;[55] as if the offender implemented remedial actions that reduced the damage caused, this will be taken into consideration when determining the fine and the corrective measure to be imposed. In other words, such remediation actions imply that the value of the damage caused considered in the calculation of the fine is smaller and, in turn, this situation will be considered as a mitigation factor of the penalty.

4.7.2 Types of corrective measures

In the Guidelines on Corrective Measures, there are four types of measures that are grouped according to their purpose. However, this classification does not imply that the competent authority may not impose other obligations, if deemed necessary, to prevent, diminish or reverse the deleterious effect that human activities may cause in the environment, natural resources or the health of persons.[56]

(a) Measures of suitability

The purpose of these measures is that the company may adapt its activities to established rules, in order to ensure the mitigation of possible detrimental effects in the environment or the health of persons.[57] For example, in the hypothetical case

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54 Gómez et al, Op. Cit., p. 53.

55 Ibid, p. 56

56 Law No. No. 29325 - Law on the National Environmental Assessment and Enforcement System
"Article 22 .- Corrective Measures
(...)
22.2. Measures that may be issued include, by way of example, the following:
(...)
e) Other activities deemed necessary to reverse or reduce as far as possible, the harmful effect that the infringing conduct could produce in the environment, natural resources or health of the people."

57 Decision of the Board of Directors No. 010-2013-OEFA/CD - Guidelines for the application of corrective measures provided for in letter d) of number 22.2 of Article 22 of Law No. 29325, pp. 26-27.

that the OEFA detects that an oil company has improperly removed its solid waste, storing it in open areas or on soils without waterproofing, it would correspond to the DFSAI, under the appropriate administrative penalty proceeding, to apply a corrective measure of suitability, so that the accused may adjust its behavior to the standards established in the Solid Waste Regulations, approved by Supreme Decree No. 057 2004-PCM.[58]

(b) Measures for the Suspension of Activities

Their purpose is to cease the activity generating the damage, to avoid continuous affectation to the environment. This category includes measures such as the confiscation of property, the suspension or restriction of activities or the temporary or definitive closure of establishments.[59] For example, in case the OEFA notices that a mining company evacuates the water used in its production processes in nearby rivers without conducting chemical tests and treatments designed to meet the maximum permissible limits in force, the DFSAI, under the respective administrative penalty proceeding, may order the accused company, the cessation of its activities, at least until the implementation of the relevant mitigation mechanisms.

(c) Restoration Measures

Their purpose is to reverse the impacts generated by offenses, restoring, rehabilitating or repairing the affected environmental components.[60] The purpose of the measure is to restore things to the situation prior to the commission of the offense.

Due to its importance, the DFSAI has intensified the imposition of such corrective measures in administrative penalty proceedings, in order to recover the physical, chemical and biological characteristics of the environmental legal right that was altered or modified by the offending conduct.

For example, in case that the OEFA becomes aware that a fishing company dumps its domestic and/or industrial wastes, into the ocean, contaminating both the sea and the nearest beaches, the DFSAI, under the respective administrative penalty proceeding, may order the accused company to perform cleanup work so that the affected areas resume their original conditions free from contamination.

58 Published in the Official Gazette "El Peruano" on July 24, 2004.

59 Guidelines for the application of the corrective measures provided for in letter d) of number 22.2 of Article 22 of Law No. 29325, approved by Decision of the Directive Council No. 010-2013-OEFA/CD.

60 Ibid., pp. 28-29.

(d) Compensation measures

These measures have irreversibility as its premise, because environmental components may not return to their primitive state, therefore, it is necessary to compensate, in environmental or economic terms, the damage caused. The compensation includes replacement or substitution of natural resources or affected environmental elements by others with similar characteristics, class, nature and quality.[61]

Assuming that the activities of a company, within the scope of jurisdiction of the OEFA, may cause irreparable disturbances in a small forest, the DFSAI, under the relevant administrative penalty proceeding, may provide that the accused company create a new forest in an adjacent area, in order that the natural functions the original forest had before being affected are met.

4.8 Precautionary Measures

In the RPAS it is established that the OEFA may provide precautionary measures, before or once the administrative penalty proceeding has been initiated, in order to ensure the effectiveness of the final decision.[62] The requirements for issuing precautionary measures are the plausibility of the existence of an administrative offense, and the danger of damage due to the delay in issuing the final decision.

To do this, the Prosecuting Authority, through substantiated Technical Report shall request the Chair of the Directive Council of the OEFA to issue precautionary measures, generic or specific (confiscation of objects, partial or complete closure, among others). Precautionary measures shall be ordered by a decision duly motivated and may additionally provide supplementary actions for its implementation (installation of badges, banners, placement of seals, monitoring systems or mechanisms, etc.)

The condition to order precautionary measures before initiating administrative penalty proceedings is that they should be initiated no later than fifteen (15) working days, from the notification of the precautionary measure, otherwise, this would expire.

4.9 Important criteria used

Some of the most important criteria adopted by the OEFA in the framework of administrative penalty proceedings are described below.

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61 Ibid.

62 Chapter IV of the Regulation for Administrative Penalty Proceedings, approved by Decision of the Board of Directors No. 012-2012-OEFA/CD.

4.9.1 Non-compliance with remediation activities established in the Supplementary Environmental Plan

In this case, the environmental authority punished the company for having breached the Supplementary Environmental Plan (PAC, by its initials in Spanish), as it did not complete the remediation activities in areas contaminated with hydrocarbons, within the deadline approved by the competent authority.[63]

While during the process, the oil company argued that the remediation methodology established in the PAC was, in its discretion, harmful to the ecosystem, the environmental authority considered that this fact did not exempt it from liability for non-compliance with the environmental commitment taken on.

Also, the administrative authority considered that if the company had noticed that the remediation methodology was not adequate to meet the commitment under the PAC, it should have requested its amendment to the Ministry of Energy and Mines prior to the expiration of the schedule. Therefore, the lack of adoption of new measures by the Ministry, proposed after the approved execution period, did not exonerate the oil company from its obligation to take all necessary steps to remedy the areas affected with hydrocarbons due to the implementation of its activities.

4.9.2 Professional qualification of the engineer and the validity of checkpoints during supervision

In this case, the environmental authority punished the holder of the mining property for having exceeded the Maximum Permissible Limits (MPL) for certain parameters identified in several monitoring points.[64]

In its appeal, the mining company questioned the professional qualification of the engineer to exercise his profession, as responsible of the supervision which cau-

63 Decision of the Tribunal of Environmental Enforcement No. 006-2013-OEFA/TFA of January 8, 2013, issued in the administrative penalty proceedings followed under Docket No. 171280. This Decision confirmed the Decision of Board of Directors No. 189-2012-OEFA/DFSAI of July 18, 2012, issued by the Bureau of Enforcement, Penalty and Application of Incentives

64 Decision of the Tribunal of Environmental Enforcement No. 082-2013-OEFA/TFA of March 27, 2013, issued in the administrative penalty proceedings followed under Docket No. 157-09-MA/E. That decision confirmed the Decision of the Board of Directors No. 305-2012-OEFA/DFSAI of September 27, 2012, issued by the Bureau of Enforcement, Penalty and Application of Incentives. It should be noted that, pursuant to the provisions set forth by the decision itself, the Decision of the Tribunal of Environmental Enforcement No. 082-2013-OEFA/TFA was published in the Official Gazette "El Peruano" on April 15, 2013.

sed the penalty proceedings. In this regard, the Tribunal of Environmental Enforcement informed that, when assessing the registration of the company applying for the supervision work, the competent authority had verified the professional qualifications of its workers (including the supervisor), which proved, in principle, that this company had professionally qualified staff and able to perform supervisory works.

Notwithstanding the foregoing, and pursuant to the principle of material truth that governs the administrative system, the environmental authority consulted the Association of Engineers of Peru on the professional qualification of the supervisor, whereby it was confirmed that the supervisor was qualified for the exercise of the engineering profession. In this regard, the Tribunal stressed the importance of verifying the professional qualification of supervisors in performing their activities.

On the other hand, the mining company questioned the fact that the results assessed had been obtained at checkpoints not authorized by the competent authority. But the Tribunal established that, in analyzing the liability of companies for failure to comply with the LMP, the following should be considered: (i) the results obtained from the analysis of the samples taken will be valid even if the monitoring is practiced at a checkpoint not considered in an environmental management instrument; and, (ii) it must be verified that the sample, matter of the analysis, has been taken from a water stream which has the condition of an effluent, that is, that the liquid discharge from mining operations flows or finally goes to the environment or its components.

Accordingly, supervisors are authorized to verify conditions of liquid effluents (water quality) by taking samples not only at checkpoints approved in environmental management instruments but also anywhere deemed appropriate, to ensure compliance with the obligation to be controlled.

4.9.3 Breakdown of the causal link to determine administrative liability

In a recent statement, the DFSAI decided to close the administrative penalty proceedings, having verified the breakdown of the causal link between the offense and the company's performance.[65]

65 Decision of Board of Directors No. 402-2013-OEFA/DFSAI of August 29, 2013, issued in the administrative penalty proceedings followed under Dossier No. 137-09-MA/E. Similar approach was adopted in Directorial Decision No. 325-2013-OEFA/DFSAI of July 16, 2013, issued in the administrative penalty proceedings followed under Dossier No. 001-2013-OEFA/DFSAI/PAS.

The authority considered that under the strict liability system applicable to the failure to comply with obligations arising from environmental management instruments, environmental rules and orders or provisions issued by the OEFA, it is sufficient to prove the causal link between the alleged offender and the performance of the company, without it being necessary to analyze subjective account factors such as intent or guilt.

It also determined that when the company reliably credits that the exclusive cause of the damage or deterioration of the environment is an unavoidable or compelling event, such as an act of God or force majeure or determining factor by a third party, the offending conduct will not be punished in accordance with the provisions set forth in Article 146 of the LGA and number 3 of Article 4 of the RPAS.

In this case, the DFSAI concluded that while it was the duty of the holder of the mining property to carry out prevention and control actions permanently to avoid damage to the environment, the continuity of the remediation works was interrupted by the invasion of the former workers of the mining company. Consequently, the administrative authority decided to hold harmless the holder of the mining property for the unlawful conduct, to the extent that this was caused by a determining factor by a third party.

4.9.4 The actions taken by the OEFA in the fight against illegal mining

The Peruvian mining regulations distinguishes four mining strata: (i) large-scale mining (GM, by its initials in Spanish), (ii) medium-scale mining (MM, by its initials in Spanish),[66] (iii) small-scale mining (PM, by its initials in Spanish) and (iv) artisanal mining (MA, by its initials in Spanish.)[67] The competent authorities

66 Both the GM and the MM group companies on which the government has not imposed, as a requirement, a total number of hectares for the size of their concessions. The difference between the two is basically the following: (i) the GM is characterized for being a highly mechanized mining, operating open-pit world class deposits. Its production capacity exceeds 5,000 Metric Tons per Day (MTD), and in most cases operates by integrating prospecting, mining, concentrating, smelting, refining and shipment operations; and, (ii) the MM operates mainly underground mining units with a production capacity between 350 and 5,000 MTD. It is characterized for having a considerable degree of mechanization and adequate infrastructure, but limits its operations to mining and ore concentration.

67 In connection with the activities carried out by a Small Mining Producer (PPM) or Artisanal Mining Producer (PMA), Article 91 of the TUO of the General Mining Law is clear in indicating that the development of such activities may be carried out by natural persons, a group of natural persons, legal entities made up of natural persons, mining cooperatives or association of cooperatives. The difference between these strata lies mainly in the following: (i) the PPM are commonly engaged in the exploitation and/or direct benefit of minerals, they

to control these activities are the Regional Directorate of Energy and Mines of the corresponding Regional Government - DREM (by its initials in Spanish, in the PM and MA strata) and the OEFA (in the MM and GM strata).

Nonetheless, under the provisions of the SINEFA Law,[68] when the OEFA obtains reasonable and verifiable evidence of non-compliance with the conditions that determine that a certain activity is within the scope of jurisdiction of the Regional Governments and, therefore, its status should correspond to the scope of jurisdiction of the OEFA, it will automatically be authorized to implement the environmental control actions as may be appropriate.

The Law of SINEFA itself recognizes the principle of primacy of reality, so that in case there is a discrepancy between what happens in practice and what flows in documents or formalities, the former should be preferred, this is, what happens in the facts on the ground.[69]

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may possess by any operating authorization, over two thousand (2,000) hectares (including applications for mining concessions, exploratory claims and mining concessions), and/or a production capacity between 25 MTD and 350 MTD; and, (ii) the PMA are usually engaged (as a means of subsistence) in exploitation and/or direct beneficiation of minerals with manual methods or basic equipment. They possess by any operating authorization, up to one thousand (1,000) hectares and/or a lower productive capacity of less than 25 MTD.

68 **Law No. 29325 - Law on the National Environmental Assessment and Enforcement System**
"Article 17.- Administrative offenses and power to impose penalties
Under the scope of jurisdiction of the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) the following conducts constitute administrative offenses:
(...)
Compliance with the foregoing environmental obligations to be controlled is mandatory for all natural persons or legal entities performing activities under the scope of jurisdiction of the OEFA, even when they do not have permits, authorizations or operating authorizations for the exercise thereof. This provision applies to all Environmental Enforcement Entities (EFA, by its initials in Spanish) in respect to their competences, as appropriate.
When the OEFA obtains reasonable and verifiable evidence of compliance of conditions for an activity to be considered within the scope of jurisdiction of regional governments, and therefore its current situation should correspond to the scope of competence of the OEFA, this agency is authorized to implement the environmental control actions that might arise.
(...) ".

69 Judgment of the Constitutional Court dated January 28, 2003, issued in Docket No. 1944-2002-AA/TC, legal basis 3.

Furthermore, the application of the principle of primacy of reality is closely related with the principle of material truth enshrined in number 1.11 of Article IV of the Preliminary

Title of the LPAG,[70] under which the authority must search the true nature of the events investigated to find the material truth in the development of an administrative penalty proceeding.

Indeed, in response to the criteria exposed, the DFSAI has taken on the power to control mining activities that do not meet the PM or MA conditions. In this regard, the Prosecution and Research Sub-Division has initiated administrative penalty proceedings against companies and/or individuals who, acting as a block, have an economic relationship allowing them to develop large- or medium-scale mining, but under the guise of small mining producers or artisanal miners.

V. CONCLUSIONS

It can be seen that environmental control in Peru has evolved in a favorable way. National environmental authorities have expressed their concern to continuously improve legal and regulatory instruments needed to effectively exercise environmental assessment and enforcement powers.

In that sense, there has been an evolution from a primitive system in which the control of obligations related to mining, hydrocarbons and electricity activities were in charge of audit firms registered with the Ministry of Energy and Mines, to the creation of the OEFA, as a specialized technical body in charge of the assessment, supervision, control, monitoring and imposition of penalties on the environmental liabilities of the entities under their scope of competence.

70 **Law No. 27444 - Law on the General Administrative Proceeding**
"Article IV.- Principles of the administrative proceeding
1. The administrative proceeding is based primarily on the following principles, without prejudice to the validity of other general principles of Administrative Law:
(...)
1.11. Principle of material truth.- In the proceeding, the competent administrative authority shall fully verify the facts that serve as grounds for its decisions, and to this end it should take all necessary evidentiary measures authorized by Law, although they have not been proposed by the companies or have agreed to exempt from them.
In the case of trilateral proceedings the administrative authority is authorized to verify by all available means the truth of the offense proposed by the parties, without implying a substitution of their obligation to submit evidence. However, the administrative authority is obliged to exercise this power when its ruling could also involve public interest."

Likewise, regulatory instruments have been issued, specially designed to face issues related to environmental pollution, such as the General Law on Environment, the National Environmental Assessment and Enforcement System and the Regulation for the Administrative Penalty Proceedings.

The OEFA, as the governing body of the National Environmental Assessment and Enforcement System, has demonstrated commitment to the goals for which it was created: the assessment, supervision and control of compliance with environmental regulations at the national level, integrating state and society efforts, in a coordinated and transparent manner, to ensure effective management and environmental protection.

The mission described above is consistent with the new environmental control approach governing the OEFA, based on the search for a balance between the civil and economic rights of citizens, the need to protect the environment. In this context, the OEFA prepared the Regulation for the Administrative Penalty Proceedings whose characteristics show the vocation to process penalty proceedings swiftly and effectively, while ensuring, at the same time, the full exercise of the rights of the citizens.

Therefore, the Regulation for the Administrative Penalty Proceedings contains explanations in relation to the scope of application, subjective and objective, that in a comprehensive way regulates the competences of the authorities, and the formalities of all the players involved in the administrative penalty proceeding. Also, in the Regulation for the Administrative Penalty Proceeding time duration of the penalty proceedings were shortened, but the term companies have to exercise their rights of defense was extended.

Supplementary rules to the Regulation for the Administrative Penalty Proceeding have also been issued, and which contribute to the achievement of the agency's objectives, and at the same time, guarantee the right of defense of the companies. Indeed, methodological rules for calculating penalties and for the imposition of corrective measures aim at facilitating companies predictability over the conduct of the administrative authority, reducing the margin of discretion of the OEFA and favoring the exercise of the right of defense.

In summary, we can conclude from the above, that the Regulation for the Administrative Penalty Proceeding has significantly contributed to the achievement of the objectives of the OEFA regarding management and effective protection of the environment, objectives for which this agency was created.

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FINES CALCULATION METHODOLOGY AS AN INSTRUMENT FOR ENVIRONMENTAL ENFORCEMENT

GABRIELA LÓPEZ MEDRANO
JERICO FIESTAS FLORES
OSCAR CARRILLO VERÁSTEGUI(*)

Summary

This article explains the methodology used by the Agency for the Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) for calculating the fines applicable to comply with the enforceable environmental obligations that have not been classified in fixed fines. For that, the theoretical basis of this document involves the design of methodologies applied by other agencies of environmental enforcement, the methodology components used by the OEFA, as well as their advantages from an economic perspective and its practical application through two hypothetical cases in order to support the importance of this instrument to the environmental enforcement.

I. Introduction. II. Role of Penalties in the Environmental Enforcement. III. International Comparison of Methodologies for Calculating Fines. IV. Methodology used by the OEFA. V. Methodology Advantages. VI. Methodology Application. VII. Conclusions.

I. INTRODUCTION

The determination of penalties constitutes one of the mechanisms mostly used by the Public Administration in order to dissuade the offender from non-compliance with his or her environmental obligations in the future and other companies from incurring similar conducts. In this way, it seeks that economic agents, to a certain extent, internalize costs related to the negative environmental impact produced by the non-compliance with the environmental regulation.

In this sense, it is important to have a methodology to establish clear regulations about how the environmental authority has to calculate fines, which in turn

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will contribute to these to be predictable, reasonable and ensure the right of defense of companies.

In that regard, the amparo of the power established in the Article 6 of Supreme Decree No. 007-2012-MINAM[1], by Decision of the Presidency of Board of Directors No. 035-2013-OEFA / PCD[2], the OEFA approved the Base Fines Calculation Methodology and the Application of Aggravating and Mitigating Factors to be used in the adjustment of penalties (hereinafter, Methodology).

For the OEFA, methodology represents a useful tool, since it strengthens the environmental enforcement system which aims to dissuade economic agents from possible non-compliances with the environmental regulation.

In this context, this article aims to describe the theoretical basis of penalties, the methodologies design used by other environmental enforcement agencies, the Methodology components, as well as its advantages from an economic perspective and the practical application through two hypothetical cases.

II. ROLE OF PENALTIES IN THE ENVIRONMENTAL ENFORCEMENT

In accordance with the provisions in the Regulation for the OEFA Organization and Functions, the Bureau of Enforcement, Penalty and Application of Incentives (DFSAI, by its initials in Spanish) is responsible for leading, coordinating and controlling the process of enforcement, penalty and incentive application resulting from its power. Among its main functions are the investigation about the commission of presumed administrative offenses, as well as the imposition of penalties by non-compliance of obligations arising from environmental management instruments, the environmental rules and orders or provisions made by the OEFA.

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1 **Supreme Decree No. 007-2012-MINAM approving the Classification Chart of Environmental Offenses and the Scale of Fines and Penalties applicable to Large-Scale Mining in respect of Mineral Storage, Transportation, Benefit and Exploitation Labors, published in the Official Gazette *El Peruano* on November 10, 2012**
"*Article 6. – Fine calculation*
The Presidency of Board of Directors of the OEFA shall approve the Methodology to calculate the base fine and the application of aggravating and mitigating factors".

2 Decision of the Presidency of Board of Directors No. 035-2013-OEFA/PCD approving the Methodology to calculate the base fine and the application of aggravating and mitigating factors to be used in the adjustment of penalties, published in the Official Gazette *El Peruano* on March 12, 2013.

In this sense, by impositions of penalties, the DFSAI aims to dissuade both the offender from non-compliance with his or her environmental obligations in the future and other companies from incurring similar conducts. In this way, it seeks to internalize costs related to the negative environmental impact produced by the non-compliance with the environmental regulation.

In fact, the non-compliance with environmental obligations creates a series of negative externalities[3] mainly related to the potential or real impact on the environment. In this context, the ideal penalty allows a cost internalization of actions made by companies enforced by the OEFA.

In that regard, the economic theory[4] argues that ideal penalties schemes can deter illegal conducts by an economic incentives scheme. An ideal penalty is when the social cost of the offense is equated with the private benefit due to the non-compliance with regulation, so the company does not have incentives to violate it[5]. Indeed, a rational conduct by economic agents when deciding to fulfil or fail to their environmental obligations shall include assessing the costs of compliance, related to, for example, technology costs to compliance with the imposed environmental standards; and, on the other hand, the costs of non-compliance mainly related to a monetary penalty. In this way, if the non-compliance with the environmental obligation is more expensive, the company will decide to comply it.

According to the penalty models[6], the ideal fine includes the estimation of damage caused and the effort by the enforcement agency to detect offenses. It, thus, will be higher when the damage caused is bigger and the probability to detect offenses is smaller.

In accordance with these models, such fine can be estimated by the estimation of profits or earning obtained by the non-compliance of environmental obligations, and a component quantifying the economic value of the environmental impact produced.

Besides its dissuasive purpose, ideal fines applied in the framework of the environmental enforcement must to ensure a fair and equitable treatment to compa-

3 Externality is produced when a third agent receives a prejudice or benefit from an economic activity by a producer or consumer unrelated to it.

4 Becker, Gary. "Crime and Punishment: An Economic Approach". *Journal of Political Economy* 76, 1968, pp. 169 – 217.

5 Id. p. 192 & Stigler, George. "The Optimum Enforcement of Laws". *Journal of Political Economy* 78, 1970, pp. 526 – 536.

6 Becker. Op. Cit., p. 193.

nies[7]. For that, there is a need for a consistent and flexible analysis for determining penalties.

Consistency limits the discretion degree of the administrative authority and, consequently, reduces questions by companies which tend to consume resources from the administrative authority, and which may be used to strengthen environmental enforcement works.

On the other hand, benefit and damage quantifying, by an established methodology, helps to reduce the arbitrariness and establish an equitable treatment to offenders; however, these aspects do not consider differences, potentially significant, between the cases analyzed by the DFSAI. For that, in order to ideal penalties scheme is flexible, it is advisable to introduce factors allowing adjustments or gradualness according to specific cases. Among these factors are, for example, the negligence or will degree of the offender, the non-compliance history, the payment capacity, the cooperation or non-cooperation degree with state agencies, and other particulars for each case.

Finally, it is important to specify that in an incomplete information surrounding, where the company does not have information about the efforts (unobservable variable) made by the OEFA for the environmental enforcement, the determination of penalties by a supported, predictable and non-arbitrary methodology, represents a credible sign that this agency comply with the purpose of efficiently deterring offending conducts.

III. INTERNATIONAL COMPARISON OF METHODOLOGIES FOR CALCULATING FINES

The Methodology includes the main elements of the fines applied by other environmental enforcement agencies (see for details Attachment 1). For example, when comparing the methodology design of the OEFA (such as the illicit benefit, the economic value of the damage and the aggravating and mitigating factors) with six environmental agencies[8], it is observed that, although there is not an identical

7 Organization For Economic Co-Operation And Development. *Determination and application of administrative fines for environmental offences: Guidance for Environmental Enforcement Authorities in EECA Countries*. Paris: OECD, 2009, P. 9-11.

8 Information from following agencies was revised: The Ministry of Environment (Canada), Superintendency of Environment (Chile), Ministry of Environment, Housing and Territorial Development (Colombia), Environmental Administrative Tribunal (Costa Rica), Environmental Policies Agencies (United States of America) and the Environmental Agency (United Kingdom).

coincidence in the form of fine calculation, the main components of the OEFA's methodology are concepts considered in all revised methodologies.

The illicit benefit is a common element in most methodologies referred. This component includes the costs avoided, the economic benefit or the savings of operational costs, all these arising from the non-compliance with environmental obligations.

In addition, it has been identified that the economic value of damage is an important supply for the methodologies design used by other agencies; however, in contrast with Methodology, this is only considered as an aggravating factor. It should be noted that in the case of the agency of Costa Rica, the fine calculation will depend on the economic valuation of the damage produced by the enterprise, for which, it firstly identifies the environmental services and properties affected and, then, estimates the valuation of each of them.

In connection with the aggravating factors, some agencies use these elements to approximate the intensity, expanse, dangerousness and reversibility of the environmental damage, among others.

An aggravating factor of the Methodology, which is recurrent in some agencies, is the non-compliance history of the offending enterprise. It allows increasing the penalty for those companies reoffending in the offensive conduct.

Finally, in connection with the mitigating factors of the OEFA's Methodology, it notes that these are also used by most environmental enforcement agencies. Specially, those agencies consider as mitigating the cooperation of the offending enterprise with the environmental enforcement agency, the damage mitigation or the repair of environmental offense on their own initiative.

IV. METHODOLOGY USED BY THE OEFA

The forms established in the Methodology include the base fine and the aggravating and mitigating factors (see Table 1). The base fine includes the illicit benefit (B), considering the actions value that should have been made by the company in order to avoid the non-compliance with its environmental obligations or the incomes gained by the offender due to the non-compliance with these obligations divided between the detection probabilities (p).

Furthermore, the aggravating and mitigating factors are grouped into a factor (F) which multiplies the base fine. These factors aim to complement the base fine and adjust it under the special features of each case. Additionally, they incorporate

elements which are not considered in the illicit benefit or real environmental damage, such as the damage seriousness caused by the offense, the vulnerability of the affected population, among others.

In cases where the economic value of the environmental damage produced can be demonstrated or there is information to find it, it could be included in the base fine. However, the total value of this component (100%) will be incorporated if only the penalty decision does not order corrective measures. Otherwise, when such decision orders corrective measures, only a percentage (25%) of this component must be incorporated, with the purpose of encouraging the adoption of remedial measures for the environmental damage caused.

It should be noted that in cases when the authority estimates the environmental damage, the aggravating factors related to the potential or real damage should not be includes in the form, therefore, the set of factors (F) will be reduced (F*). Each element included in the fine calculation is briefly explained in the following table 1.

Table 1
Summary of forms established in the Methodology

<table>
<tr><th>Rule 1</th><th colspan="2">Rule 2</th></tr>
<tr><td>Fine (M) = ($\frac{BB}{pp}$).[F]</td><td>Fine (M) = ($\frac{B+DB+D}{p \quad p}$).[F*]</td><td>Fine (M) = ($\frac{B+aDB+aD}{p \quad p}$).[F*]</td></tr>
<tr><td rowspan="2">When there is not sufficient information to assess the proven real damage (economic value of the environmental damage), the fine will be determined and, then, the aggravating and mitigating factors (F) will be applied, including the real or potential damage, if any.</td><td>In case the penalty does not include the order of corrective measures.</td><td>In case the penalty includes the order of corrective measures.</td></tr>
<tr><td colspan="2">In cases where there is information to value the proven real damage, such valuation will be included in the base fine. In addition, the aggravating and mitigating factors will be applied, but not including the values directly related to the characterization of the environmental damage.</td></tr>
</table>

Source: Methodology for calculating the base fine and applying the aggravating and mitigating factors to use in the adjustment of penalties, in accordance with the provisions in the Article 6 of the Supreme Decree No. 007-2012-MINAM.

Where:
B = illicit benefit (obtained by the company for the non-compliance with the regulation).
P = Detection probability
F = Addition of the aggravating and mitigating factors.
α = Proportion of the valued damage (25%)
D = Economic value of the environmental damage
F* = Addition of the aggravating and mitigating factors (without values related to the damage quantification).

4.1 Illicit benefit

Illicit benefit is that obtained by or what the offender expects to obtain by the non-compliance of the environmental obligation to be enforced, that is, what the offender receives, would receive or expects to receive by committing an offense, as well as what the offender saves, would save or expects to save by committing the offense. For example, the companies carrying out exploitation mine activities without the proper environmental certification, they would avoid the costs related to obtain it.

The illicit benefit consists of illegal income or avoided cost. The first one concerns economic incomes illegally obtained by the non-compliance with the environmental obligations, and the second is related to savings caused by the non-compliance of the corresponding environmental obligation. Since the illegal income estimate requires, generally, information about the enterprise performance, this value is usually estimated by the avoided cost.

4.2 Detection probability

Detection probability is the possibility that the administrative authority can detect an offense. This component shows the effort of the environmental administrative agency to detect offenses, according to the easy or difficulty to detect it and available resources amount to detect it.

Methodology determines five probability levels. They are classified in very high, high, medium, low and very low. These levels have the following probability percentage: 100%, 75%, 50%, 25% and 10%, respectively. The proper selection of the category will depend on the offense specifically analyzed and the context where the conduct was detected.

For example, a high level of probability is considered high (75%) when the situation of the non-compliance with the environmental regulation is detected during

a special supervision, which means, in a supervision due to the claim by a population or its agents. Specially, the filing of this type of claims easy the detection of an offense, since it provides information to the administrative authority about the existence of a presumed offending conduct. By contrast, if the company carries out activities without environmental certification, the detection of the offense is more difficult, the administrative authority should go, frequently, to the crime scene in order to detect the offense. For these cases, then, a low probability (25%) should be applied.

4.3 Aggravating and mitigating factors

Aggravating and mitigating factors aim to complement the base fine value and adjust it under the specific features of each case. The Methodology has included seven factors which are related to the Law No. 27444 – Law on the General Administrative Procedure[9].

Aggravating and mitigating factors have a qualitative nature and will allow increasing or decreasing the base fine. In addition, there are differences between the values applicable to factors according to a potential damage or a real damage, which cannot be economically valuated. The following factors are:

i) F1: Impact and area of the potential or real damage
ii) F2: caused economic prejudice
iii) F3: Environmental aspects and contamination sources
iv) F4: Repeated offense or repeated non-compliance
v) F5: Voluntary remedy
vi) F6: Adoption of measures necessary to reverse the consequences of the offending conduct.
vii) F7: Internationality in the offender's conduct.

The Factor F1 is only used for potential or real damage and when there is not sufficient information to estimate its economic value. This factor consists of elements aggravating the fine in case of real or potential damage to the environment: (i) impact scale of the activity on the environmental quality, (ii) impact under the geographic area involved, (iii) impact under the reversibility and remedy of the environmental components, (iv) impact on natural resources, (v) natural protected areas or buffer zones, (vi) impact on native or rural communities, and (vii) impact on people health.

9 Published in the Official Gazette *El Peruano* on April 11, 2001.

Regarding factor F2 related to the caused economic prejudice, it establishes that the fine must be aggravated according to the poverty level of the zone where the impact occurred, since poorest populations are more vulnerable to accidents caused by external agents and, therefore, require a greater protection. In this sense, a high rate of poverty shall involve a greater prejudice and, as a result, a higher fine.

In relation to the other factors, they include features not related to the potential or real damage from the offense. For example, if the enterprise is found reoffending, understood as each penalty history by agreed decision or exhausts all available administrative remedies by actions or defaults including the same sanctioned penalty within the past four years, the base fine will be aggravated 20%.

4.4 Environmental Damage

In order for the fine to be sufficiently deterrent, the illicit benefit obtained by the company should not only be considered, but also the economic value of the environmental damage caused by the offense. In this way, the Total Economic Value (TEV) related to the impact on the offending activity in order to estimate such value.

For that, it is necessary to understand that environmental services and rights have a different nature than rights established in a market of perfect competence, since only market does not allow to reach an efficient distribution of resources and, consequently, the maximum benefit of the society.

In fact, this type of rights and services are classified in the economic literature as pure public goods[10] and resources commonly used[11]. The first, generally, satisfy two basic characteristics: non-inclusion and non-rivalry. The non-inclusion refers to the fact that it is impossible or very expensive to exclude the agents of the good and services consumption. The non-rivalry refers to the fact that the good consumption by a specific individual does not reduce the quantity available for others.

Contrary to pure public goods, the resources commonly used are rival goods when the consumption or extraction of a good by an economic agent reduces the consumption or extraction capacity of any other.

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10 Sugden, Robert. "Public goods and Contingent Valuation". In Bateman, Ian. J. and Willis, Kenneth. G (Editors), *Valuing Environmental Preferences: Theory and Practice of the Contingent valuation Method in the US, EU and developing countries.* New York: Oxford University Press, 1999, pp. 131 – 151.

11 Ostrom, Elinos. *The Drama of the Commons*. Washington D.C.: National Academy of Sciences, 2002, pp. 1 – 37.

On consequence of these characteristics is that activities related to environmental goods and services produce negatives externalities, as private agents do not take into account social costs related to the environmental damage for their economic decisions.

Another characteristic of those goods and services is that property rights are not well defined. It is complex to determine the owner of those, so there is not possible to ensure the goods transfer, an intrinsic characteristic of a market.

In addition, the information of agents making activities related to environmental goods and services is imperfect[12], as long as, generally, the individuals do not know the environmental impacts of the private decisions about production and/or consumption.

Among public goods are river water, landscape of a territory, and others. The main problem for this type of goods refers that, when there is impossible to exclude their consumption, not all beneficiaries are likely to pay for the maintenance cost of the good (free riders), so there are few incentives for their maintenance during the time. This justifies the government intervention in this type of goods. On the other hand, among the resources commonly used are the ocean fishes, forest trees, valley animals and others. The problem with these resources is that their overexploitation can destruct the ecosystem sustainability.

In connection with the value, although many of these goods and services do not have a price in the market, it does not mean they have no value for the society, so there is possible to find an approximation to the TEV if all their components and preferences of affected people are considered. In this sense, assigning a monetary value allows that the agent responsible for the negative impact internalizes the costs produced to the society.

The TEV can disintegrate in the Use Value (UV) and the Non-Use Value (NUV). The UV consists those services from future and current use of the good. In the case of a forest, this value is the extraction of wood and non-wood resources, or the landscape for visitors. In respect of the NUV, it consists of the value granted to environmental goods and services by the individuals, whether or not they will benefit from them[13]. In this sense, the NUV of these goods and services is related

12 The information asymmetry refers to the situation where some agents with privileged information can, taking advantage of this situation, set prices, either above or below the equilibrium level to benefit from them.

13 Arrow, Kenneth et al. "Report of the NOAA Panel on Contingent Valuation", Federal Register 58 (10), 1993, pp. 4601-4614.

to its value in order to have a sustainable environment surrounding and its value to conserve the environment as legacy for future generations.

For the TEV estimation, the economic literature provides a series of valuation methods, which are differentiated according to the kind of information used. In this way, these methods can be classified in (i) direct method of the market, (ii) indirect methods of the market or revealed preferences, and (iii) direct methods of a non-market or declared preferences. The first estimate the value of environmental goods and services from the available information on prices and quantities observed in the markets. In this group, there are methods using current and potential expenses related to the project´s impact, such as the change methodology for production and the opportunity cost.

Seconds estimate the value of goods and services from the values of other goods and services related to it. Among the main techniques of revealed preferences, the travel cost and hedonic prices stand out. Their use only allow to estimate the value of environmental goods and services, so they constitute a sub-estimation of the TEV.

The use of the declared preferences methods, however, allow to obtain the value of environmental goods and services or the environmental quality assigned by individuals, through the hypothetical markets created for such purpose. In this group is the method of Contingent Valuation, under which it is built a hypothetical scene consisting of a market where the good to value is provided, the different options are determined, as well as the property rights; and, finally, individuals are asked about their maximum ability to pay (ATP). In order to obtain an improvement in the quality or quantity of the resource.

This method allows to estimate both the use value and the non-use value that can be the component more important for the TEV[14]. In this sense, the declared preferences methods consist more complex mechanisms to value the environmental goods and services or the changes in their qualities. However, the cost of these techniques can be very high. In that regard, the OEFA has used the Benefit Transfer as an effective cost option to value the environmental goods and services involved in an offense.

The technique of Benefits Transfer consists of extra exploitation of values obtained by some valuation methods mentioned above, from the study site to the

14 Carson, Richard T. & Michael Hanemann W. “Contingent Valuation”. In MALER, Karl-Goran and Jeffrey Vincent (editors), *Handbook of Environmental Economics*. Boston: Elsevier, 2005, p. 836.

policy application or the target site. For that, the OEFA makes strict analyses of available studies and shows the feasibility to transfer the values from a study case to a practical case.

This method can be applied in two ways: (i) the value transfer approach and (ii) the functions transfer approach. The first consists of applying the statistical results of the original investigation to the policy context. Under such approach, it is required that there is a great similarity between the study site and the policy site. On the other hand, the second includes the application of a statistical function which links the statistical results of the original investigation to the specific details of the study zone[15].

Without prejudice to the above mentioned, the technique applied by the OEFA will depend on the specific characteristics for each case and the information available to value the economic value of the environmental impact.

V. METHODOLOGY ADVANTAGES

In line with the article "The strengthening of the environmental enforcement"[16], the Methodology aims to comply with the following goals: to produce a higher predictability in the application of penalties, to reduce the administrative discretion, to ensure the practice of the right of defense and to reduce cost overruns, as well as to promote the environmental remedy. Without prejudice to it, from an economic perspective, this Methodology helps to reach the following goals: to contribute to the internalization of negative externalities and strength the penalties scheme by an effective signaling in the market.

5.1 Internalization of negative externalities

In the context of the environmental enforcement, negative externalities are those effects related to the negative impact on the well-being of other economic agents or the society as a whole, produced by the companies by the non-compliance with environmental obligations.

15 Rosenberg, Randall and Loomis, John. "Benefit transfer". In Champ P.; Boyle Kevin and Thomas Brown*, A primer on Nonmarket Valuation*. Dordrecht: Kluwer Academic Publishers, 2003, p. 480.

16 Gómez, Hugo and Granados, Milagros. "El fortalecimiento de la fiscalización ambiental". *Economy and Law Journal*, number 39, Lima: University of Applied Science, 2013, pp. 43-64

According to the economic literature, these externalities consist of a type of market failures, for which the free functionality of the market does not represent a suitable mechanism to efficiently manage environmental services and goods. In fact, without environmental enforcement actions, the offender would consider in his or her production decision only the private costs of his or her economic activity, but not social costs, therefore, his or her production level, with the corresponding contamination generation, would tend to be superior to that socially ideal.

Therefore, the State intervention is necessary to companies internalize the externalities cost related to environmental damages. This is possible through the imposition of penalties in proportion to damages produced by the offender.

In this context, the Methodology design applied by the OEFA includes criteria necessary to the fine calculation reflects negative externalities caused and, consequently, the fine complies with being in proportion to the environmental damage caused.

5.2 Signaling

In a principal scheme (environmental enforcement agency) and agent (company), where none of them has complete information about the efforts (unobservable variable) by each of them to detect the non-compliance and comply with the environmental regulation, respectively, the threat of the enforcement agency to impose a fine to those who violate the environmental obligations can be considered as a sign. As noted, this sign aims to dissuade the offending conduct and correct negative externalities.

For the purpose of the sign is credible and achieves its goal, it is important that the controlling authority has the instruments necessary to detect the offense (suitable equipment, trained personnel, and infrastructure) and the mechanisms to efficiently enforce its compliance (regulation, methodologies and guidelines). In this last group, the Methodology is included as part of the regulatory system issued by the OEFA.

VI. METHODOLOGY APPLICATION

Although the Methodology approved is applicable to certain activities related to large and medium scale mining as provided in the Supreme Decree No. 007-2012-MINAM, according to the Article 4 of the Decision of the Presidency of the Board of Directors No. 035-2013-OEFA/PCD, the Methodology may be applied

to, in a supplementary fashion, the adjustment of penalties related to other activities supervised by the OEFA[17].

Two hypothetical cases of fine calculation will be shown below. As it is mentioned above, the form to use will depend on the existence of the environmental damage and the available information to determine its value.

6.1 Example of environmental damage

In this case, the fine will be determined to a hydrocarbons enterprise located in the Peruvian forest caused by an oil spill (equal to 1,500 barrels), affecting a lake of the area. The event was on June 12, 2012.

In accordance with the docket, it is determined that the main cause of hydrocarbon spill involved the automatic system failure of pump and the total petroleum hydrocarbon concentrations (TPH) were passing the Environmental Quality Standards (EQS). The spill was at Trompeteros district, in the province and department of Loreto, and affected 0.5 hectares, as well as 1,500 families. In addition, the presence of native communities and endangered animals to become extinct, near the spill area was demonstrated.

For illicit benefit calculation, it is considered a fact where the enterprise should have made the investment necessary to the suitable maintenance of the automatic system of pump and, then, avoid the spill. This cost was estimated at s/. 52,981.14 at the time the non-compliance occurred.

In order to use this amount for calculating the fine is necessary to capitalize it for a term of 16 months, from detecting the non-compliance to the fine calculation (June 2012 – November 2013), taking into account the opportunity cost estimated in an study made for the area. Then, to find such value in soles until November 2013, the average exchange rate of the last 12 months is used. This amount is s/. 64,085.27 or 17.32 Peruvian Tax Units (UIT).

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17 **Decision of the Presidency of the Board of Directors No. 035-2013-OEFA/PCD, that approves the Methodology for calculating the base fines and the application of aggravating and mitigating factors to be used in the adjustment of penalties, published in the Official Gazette *El Peruano* on March 12, 2013.**
"*Article 4. – Supplementary Rule*
As long as the Board of Directors of the Agency of Environmental Assessment and Enforcement – OEFA does not approve the methodology applicable to the adjustment of the offending penalties arising from activities not included in the jurisdiction scope of the Supreme Decree No. 007-2012-MINAM, the Methodology approved by this decision shall be applied in a supplementary fashion in the adjustment of penalties proper to such activities".

For estimating the environmental damage, the method of benefit transfer is used, which allows to apply the values obtained in the contingent valuation that estimated the willingness to pay (WTP) at s/. 10.00 monthly per family in order to avoid the environmental damage caused by an occasional hydrocarbon spill at Parinari and Urarinas districts, in the province and department of Loreto[18].

By adjustments necessary to transfer this value to the affected area, a WTP of s/. 13. 2 per family was used. In this way, the actual value of the WTP per family is s/. 4,032.09 to June 2012. This value adjusted by inflation to the date of fine calculation is s/. 4,195.23 per family. Then, taking into account the number of families at Trompeteros district, the environmental damage valuation calculated was s/. 6,292,847.62.

However, taking into account that the penalty decision orders the application of corrective measures leading to the lake recovery, only 25% of the economic valuation of the caused environmental damage was applied (α= 0.25). That amount is S/. 1,573,211.91 or 425.19 (Peruvian Tax Units) UIT.

The detection probability assigned is 25% due to the lake was located in a difficult area to access, so monitoring of enterprise activities required a significant investment of resources by the administrative authority.

In connection with aggravating factors, the fine calculation only estimates those factors directly unrelated to the damage, as long as during the procedure the real damage existence was proved and was possible to economically valuate it. In this sense, it is considered that the real damage occurred in an area with an incident of poverty over 78%; a 60% aggravating factor, therefore, was applied on the base fine. In addition, it was found that the enterprise was a repeating offender of the environmental regulation and, consequently, a 20% aggravating factor was applied it on the base fine. The sum of such aggravating factor was 180%.

After determining each element necessary to the fine calculation, the OEFA sums the illicit benefit and the environmental damage, and divides the result by the detection probability. This value, finally, is multiplied by the sum of the aggravating factors considered. The value of the fine to be imposed, in this case, is 3 186, 07 UIT.

18 Yparraguirre, José. "Valoración económica del daño ambiental ocasionado por derrame de petróleo en la localidad de San José de Saramuro - Loreto". In Glave Manuel and Rodrigo Pizarro (editors). *Economic Valuation of Environmental Services and Biodivercity in Peru*. Lima: INRENA / BIOFOR, 2001. P. 451.

6.2 Example of non-environmental damage

Considering a hypothetical event in which, an electricity generation enterprise violates the Evacuation Plan that committed to made it, the fine applicable will be described. In this example, by continuous supervision dated on May 19, 2009, it was found that the enterprise had only complied with two of five activities stipulated in the mentioned plan.

For calculating the illicit benefit, the OEFA determined that the electricity enterprise had to invest US$ 1,150,000.00, as detailed in the mentioned plan; however, it invested US$ 700, 000.00 only, for the two first activities made.

In this sense, for the cost determination avoided by the company, it was only considered the avoided costs of the activities not carried out by the enterprise, which is US$ 450,000.00. When using the average exchange rate in the last 12 months prior to detect the offense (June 2008 – May 2009), this amount was converted to soles to May 2009. Then, it was capitalized by a term of 54 months, from the non-compliance to the fine calculation date (May 2009 – November 2013), taking into account the opportunity cost for the electricity sector, established in the Electricity Concessions Law. The resultant amount was S/. 2,256,942.35 or 609.99 UIT.

In connection with detection probability, it was considered a mean probability (0.5) due to the offense was found by a continuous supervision, which is scheduled by the authority in his or her yearly enforcement.

On the other hand, it was not established the existence of aggravating and mitigating factors, so this factor was 1 (100%), it means, the fine was not aggravated and mitigated. Finally, the fine value proposal was 1,219.98 UIT.

VII. CONCLUSIONS

One of the main tools for environmental enforcement is penalty use, when they allow to dissuade the commission of environmental offenses through a rational scheme of economic incentives. A penalty is ideal when the social cost including the commission of offense is compared to the private benefit obtained by the non-compliance with the regulation, so the company does not have incentives to violate the environmental obligations. In this sense, rational conduct by economic agents when deciding the compliance or non-compliance with his or her environmental obligations shall involve the assessment of compliance costs and non-compliance costs. In case of the non-compliance of environmental obligation is more expensive, the company shall decide to comply with it.

In this context, the Methodology allows to establish clear rules about how to perform penalties calculation, and it will contribute to obtain predictable and reasonable penalties and which ensure the right of defense of companies.

According to penalties models, the ideal fine includes the estimation of the caused damaged and the effort made by the controlling agency to find offenses. Thus, the ideal fine will be higher when the caused damage is bigger and the probability of detecting offenses is low.

The Methodology design used by the OEFA follows recommendations from the economic literature. In fact, the forms included in the Methodology are the base fine, the detection probability and aggravating and mitigating factors. The base fine consists of the sum of the illicit benefit, related to the value of environmental obligations that should have to be made by the company in order to avoid the non-compliance and the economic value of the damage, whose result is divided by the detection probability. Aggravating and mitigating factors are multiplied to the base fine to complement it and adjust it, under the specific features of each case.

The Methodology has important coincidences with many methodologies used to calculate fines at an international level. In this way, main components involved by this calculation, such as the illicit benefit, the economic value of the damage and the aggravating and mitigating factors, are constant components in all revised methodologies.

It is important to note that the Methodology allows to reach, from an economic perspective, the following goals: to contribute to internalize negative externalities and strength the penalties scheme through an efficient signaling in the market.

Finally, the examples described in this document, show the Methodology application within the framework of processing the administrative penalty procedures in the charge of the DFSAI, as specific features of each case, but always directed to consistent and flexible penalties determination.

Attachment 1

Country	Agency for Environmental Enforcement	Form for fine calculation	Economic valuation of the damage	Factors
Canada – State of Ontario[19]	Ministry of Environment	**Fine = Monetary benefit + ([multi-day component * seriousness] - modifiers)** • Monetary benefit: illicit benefit • Multi-day Component * seriousness: When the offense is for more than 1 day, the regulatory agency is responsible for determining the seriousness component per offending day. • Modifiers: mitigating factors	There is not a damage valuation as part of the fine, but there is a multi-day*seriousness component which depends on the time of the offense, whose components are: • Offending history of the defendant. • Without membership in the Ontario's environmental leader Program • Excess of Maximum permissible limits for toxic substances • Incomplete correction	**Mitigating factors** • Precautionary measures • Damage mitigation

19 Ministry of Environment – Ontario, *Guideline for Implementing Environmental Penalties*. Ontario: Queen's Printer for Ontario, 2012

Chile[20]	Superintendency of Environment (SMA)	Offenses are divided into three big groups: minor, serious and major. The fine is calculated according to: • Importance of the caused damage or caused danger. • Nuhmber of affected people. • Economic benefit obtained. • Offense intention. • Prior conducts and economic capacity of the offender. • Damage occurred in a State-protected wild area. There is not a form proposed by the SMA.	There is not a damage valuation as part of the fine. The damage is considered as part of the seriousness determination of the fine: minor, serious and major.	**Aggravating factors** • Intension • Participation grade • Previous negative conduct • Detriment or susceptibility of a State-protected wild area. • Later negative conduct • Other factors **Mitigating factors** • Economic capacity • Enforcement cooperation • Other factors
Colombia[21]	Ministry of Environment	**Fine = β + [(α*i) *(1+A)+ Ca]*Cs** **β:** Illicit benefit **α :** Time factor A: Aggravating and mitigating situations **Ca:** related Costs **i:** Grade of the environmental impact and/or risk assessment **Cs**: socioeconomic capacity of the offender	There is not a damage valuation as part of the fine, but there is the grade of the environmental impact and/or the risk assessment, for which: • Impact actions • Persistence • Extension • Intensity • Time • Protected rights • Social impact • Remediability / reversibility	**Aggravating factors** • Repeat offense • The offense produces serious environmental damage • Threaten natural resources located in protected areas or declared to be in danger of extinction. • Carry out the action or omission in areas of special ecological importance. • Obstruct actions of the environmental authorities • Non-compliance with precautionary measures. **Mitigating factors** • Confession to the authority • Mitigate on in its own initiative • Offense that does not produce environmental damage

20 Law No. 20417 – creates the Ministry, the Environmental Assessment Service and Superintendency of Environment, published on January 26, 2010.

21 Ministry of Environment, Housing and Land Development, Methodology for fines calculation for non-compliance with the environmental regulation: *Manual Conceptual y Procedimental*, Bogotá; Antioquía University.

Costa Rica[22]	Administrative Environmental Tribunal	Subject to the environmental economic valuation of the assets and/or affected services by the offense	Classic methodologies of the environmental economic valuation is used, according to the following procedure: 1. List of rights and/ or services affected. 2. List of impact actions. 3. Estimation ofh the environmental scale. 4. Application of traditional methods of environmental economic valuation per assets and/or service affected.	There are not aggravating and/or mitigating factors.
United States of America[23]	Environmental Protection Agency	**Fine = β + G+ M+ A** β: Economic benefit of the offending enterprise G: Aggravating factor of the environmental damage caused by offenses M: Multiday component A: Adjustment Factor for aggravating or mitigating.	The seriousness factor of environmental damages consists of: Potential damage: It includes environmental or human damage, potential seriousness of contamination and/ or the assessment of the potential damage. **The deviation scope of the regulation.**	**Aggravating factors** • The lack of good faith to comply with the regulation. • Intension and/or negligence grade. • Non-compliance history. **Mitigating factors** • To make good faith efforts to comply with the regulation. • Payment capacity. • Environmental projects made by the offender.

22 USAID, *Manual de juzgamiento de los delitos ambientales – República de Costa Rica.* Costa Rica, 2010.

23 Environmental Protection Agency, *Rcra Civil Penalty Policy, United States Of America*, 2003.

United Kingdom[24]	Environmental Agency	**Fine = (Deterrent benefit + Financial benefit) – reduction Cost** • Financial benefit: Omitted costs, savings from costs of working and earnings to work with lower costs. • Deterrent: (Starting point by sum of aggravating factors) – mitigation. • Starting point: It depends on the fine seriousness, it can be the financial benefit, remedy costs or the maximum penalty that may have been imposed. - Aggravating factors - Mitigation: Mitigating factors • Reduction cost: Cost of the compliance with the recovery of the environmental impact	There is not a valuation of the damage as part of the fine, it is considered as part of the aggravating factors of the fine.	**Aggravating factors** • Willful misconduct • History • Attitude. • Predictability and risk of environmental damage. **Mitigating factors** • Preventive measures. Cooperation with the Environmental Agency. • Self-report. • Immediate and voluntary repair and recovery.

24 Environment Agency, *Enforcement and Sanctions – Guidance*. United Kingdom, 2010.

Peru[25]	Agency for Environmental Assessment and Enforcement	**Fine = ((B+ αD)/p). [F ^*]** B: Illicit benefit (obtained by the non-compliance with the regulation) α: Estimated damage proportion (25%) D: Estimated damage value p: Detection probability. F* = Sum of aggravating and mitigating factors (1+f2+f3+f4+f5+f6+f7).	Traditional methods for economic valuation of rights and/ or environmental services affected are used for the damage valuation.	Aggravating and Mitigating factors • Impact and scope of the potential or real damage. • Caused economic prejudice. • Environmental points or contamination sources. • Repeating offense or non-compliance. • Voluntary correction. • Adopting measures necessary to reverse the consequences of the offending conduct. • Offender conduct´s intention.

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THE LEGAL LIABILITY OF ENVIRONMENTAL RESTORATION

HUGO R. GÓMEZ APAC (*)

Summary

The author explains the scopes of the legal liability of environmental restoration, emphasizing the principles related, such as the principle of cost internalization and the principle of environmental liability. In addition, he explains the legal liability of restoring the mining and hydrocarbons environmental liabilities and the legal liability of the environmental restoration in emergency cases. Additionally, among other subjects, he distinguishes the environmental administrative restoration from the jurisdictional, noticing that each liability is independent.

I. Introduction. II. Environmental restoration. III. Principles related to the legal liability of environmental restoration. IV. Legal liability of environmental restoration in the environmental certification. V. The legal liability of hydrocarbons and mining environmental liabilities restoration VI. Legal liability of environmental restoration in case of emergencies. VII. Jurisdictional and administrative environmental restoration. VIII. Corrective measures of environmental restoration and compensation. IX. Environmental restoration promotion in activities for the environmental enforcement. X. Example of corrective measure for environmental compensation. XI. Conclusions

I. INTRODUCTION

The purpose of this article[1] is to explain the scopes of the legal liability of environmental restoration, understanding by "restoration" the actions to "restore", "repair", "renovate" or "remedy" before an administrative authority the environmental impacts, contaminated sites or environmental liabilities.

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1 This document constitutes a new updated version of the article published in: AAVV (Jorge Ordoñez et al.) International Congress of Administrative Law. Administrative Law in 21st century – Volume II. Lima: Adrus D&L Editors SAC, 2013, pp. 445 – 466.

The Number 22 of Article 2 of the Political Constitution of Peru recognizes the fundamental right of any citizen to enjoy a balanced and suitable environment for the development of its life[2]. For the ideal practice of this right, the State executes public policies, involving prevention and preservation actions for natural resources, biodiversity and protected natural areas[3]; of planning and land-use planning[4]; environmental management of natural resources[5] and protected natural areas[6]; as-

2 2 **Political Constitution of Peru**
"***Article 2.*** – Everyone has the right:
(…)
22. *To peace, tranquility, enjoy the free time and rest, as well as to* ***enjoy a balance and suitable environment for the development of his or her life****.*
(…) ".
[emphasis added]

3 These policies are the development of following provisions of the Political Constitution of Peru:
"Tile III, Economic System
Chapter II, Environment and Natural Resources
Article 66. *– Natural resources, renewable and non-renewable, are the estate of the Nation. The State is the sovereign for their exploitation.*
By organic law, the conditions of their use and their granting to individuals are established. The concession grants to their title holder a real right, subject to such legal rule.

Article 67. *– The State determines a National Environmental Policy. It promotes the sustainable use of its natural resources.*

Article 68*. – The State has to promote the conservation of biodiversity and protected natural areas."*

4 **Law No. 28611 – General Law on Environment, publish on October 15, 2005**
"*Article 19. – Planning and land-use planning*
19.1 The land-use planning is a process in advance and takes decisions related to future actions in the territory, which include the instruments, criteria and aspects for its environmental planning.
19.2 The environmental land planning is an instrument included in the land planning policy. It is a technique-political process intended to the definition of environmental criteria and indicators conditioning the assignation of land-uses and the organized occupancy of the territory."

5 Law No. 26821 – Organic Law on sustainable exploitation of natural resources, published on June 26, 1997.

6 Law No. 26834 - Law on Protected Natural Areas, published on June 14, 1997, and its Regulation approved by Supreme Decree No. 038-2001-AG, published on June 26, 2001.

sessment of the environmental impact of economic activities[7]; enforcement of environmental obligations of enterprises[8]; and remediation (restoration) of negative environmental impacts.

II. ENVIRONMENTAL RESTORATION

The contents of the fundamental right to a balanced and suitable environment for people development are determined by the right to enjoy that environment and it has to be preserved[9].

In that regard, the Constitutional Court holds that the right to enjoy a balance and suitable environment includes the power of people to enjoy an environment where its elements are interrelated in a natural and harmonious way; and where the human intervention does not involve an important alteration of the interrelation of such elements. On the other hand, the right to preserve a healthy and balanced environment consists of the public powers assume the unavoidable obligation to maintain the environmental goods in suitable conditions for their enjoyment. Such obligation also reaches the individuals and, more importantly, those people whose economic activities happen, directly or indirectly, in the environment[10].

Such Court says that people carrying out economic activities have to preserve the environment, by restoring and compensating the environmental damages created, as explained below:

> "Regarding the existent link between the economic production and the right to a balanced and suitable environment for the development of the life, it is materialized according to the following principles: (…) ***d) the principle of restoration, related to the sanitation and re-***

7 Law No. 27446 – Law on the National Environmental Impact Assessment System, published on April 23, 2001, and its Regulation approved by Supreme Decree No. 019 -2009 – MINAM, published on September 25, 2009.

8 Law No. 29325 – Law on the National Environmental Impact Assessment System, published on March 5, 2009.

9 Canosa Usera, Raúl. *Constitución y Medio Ambiente*. Madrid: Dykinson – Ciudad Argentina Editorial, 200. p. 101. Cited in the legal basis 17 of the Judgment of Plenary Session of the Constitutional Court (Jurisdictional plenary session) on April 1, 2005, entered on Docket No. 0048 – 2004-PI/TC.

10 Legal Basis 17 of the Judgment of the Plenary Session of the Constitutional Court (Jurisdictional plenary session) on April 1, 2005, entered on Docket No. 0048 – 2004 –PI/TC.

> ***covery of the environmental goods damaged; (…) and, g) the principle of compensation, involving the creation of repair mechanisms due to the exploitation of non-renewable resources***."[11]
> [Emphasis added]

In order to reverse the adverse conditions in ecosystems it is necessary to develop a set of planned actions intended to improve the conditions of the deteriorated system and increase its environmental quality, what is known as environmental restoration, which includes many strategies to recover, as long as possible, the damaged system[12].

The environmental restoration actions can be intended to recover the origin conditions of the system, mitigate and compensate the environmental malfunctions or improve its affected conditions of impacts and increase its productive capacity. The choice of the action will depend on the different types of affectations and the scale of the environmental impacts[13].

III. PRINCIPLES RELATED TO THE LEGAL LIABILITY OF ENVIRONMENTAL RESTORATION

Environmental laws recognize two important governing principles, which are closely tied into the legal liability of environmental restoration: the principle of costs internalization and **the principle of environmental liability**.

According to the principle of costs internalization, included in the Article VIII of the Preliminary Title of the General Law on Environment[14] (2005), all natural or legal person, public or private, has to assume the cost of risks or damages produced to the environment. The cost of prevention, surveillance, restoration, recovery, repair and the occasional compensation actions, related to the environment protection and its components against negative impacts caused by human activities, has to be assumed by the originators of such impacts.

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11 Legal basis 18 of the Judgment of the Plenary Session of the Constitutional Court (Jurisdictional plenary session) on April 1, 2005, entered on Docket No. 0048 – 2004 –PI/TC.

12 Carabias, Julia, Arriaga, Vicente And Cervantes Gutiérres, Virginia, *Las políticas públicas de la restauración ambiental en México: Limitantes, avances, rezagos y retos*. Bulletin of the Botanical Society of Mexico, number 80, 2007, p. 86.

13 Id. p. 87.

14 Law No. 28611, published on October 15, 2005.

On the other hand, according to the principle of environmental liability, provided in the Article IX of the Preliminary Title of the General Law on Environment, the originator, natural person or legal person, public or private, of the damaged environment and its components, has to unavoidably adopt the measures to its restoration, rehabilitation or repair, as appropriate, or, when the above mentioned is not possible, to compensate, in environmental terms, the caused damaged, without prejudice of other administrative liabilities, civil or criminal.

Both principles are linked to other principles included in the environmental laws, which are intended to the compliance with the legal liability of environmental restoration. The Framework Law on the National Environmental Management System[15] (2004), thus, recognizes as one of the principles of environmental management the **complementary between the incentive and penalty instruments**, giving priority to, among other duties, the recovery and management of environmental liabilities or environmental damaged zones[16]. This principle is linked with the valuation and internalization of the environmental costs, under the **polluter – pays principle**[17], which means that the polluter shall assume the decontamination costs.

In line with the above mentioned, the Regulation for the Framework Law on National Environmental Management System[18] (2005) establishes that the design, formulation and application of national environmental policies must to ensure the effective application, among others, of the order related to the prevention and control of the environmental contamination. On the basis of this order, the costs of pre-

15 Law No. 28245, published on June 8, 2004.

16 **Law No. 28245 – Framework Law on the National Environmental Management System**
"Article 5. – Principles of the Environmental Management
The environmental management in the country is regulated by the following principles:
(…)
m. Complementary between incentive and penalty instruments, giving priority to the effective protection, efficiency, prevention, continuous improvement of the environmental performance and the recovery and management of the environmental liability or environmental damaged zones;
(…)".

17 **Law No. 28245 – Framework Law on National Environmental Management System**
"Article 5. - Principles of Environmental Management
The environmental management in the country, is regulated by the following principles:
n. Valuation and internalization of environmental costs, under the polluter-pays principle;
(…)".

18 Approved by Supreme Decree No. 008-2005-PCM, published on January 28, 2005.

vention, surveillance, recovery and compensation of the environmental damage are in charge of the damage originator, under the principle of environmental liability[19].

IV. LEGAL LIABILITY OF ENVIRONMENTAL RESTORATION IN THE ENVIRONMENTAL CERTIFICATION

In accordance with the provisions in the National Environmental Impact Assessment System (SEIA, by its initials in Spanish), the environmental certification aims to identify, prevent, supervise, control and correct in advance of the negative environmental impacts caused by human actions shown in projects of public, private or mixed-capital investment, including activities, constructions, works and other business activities and services that may produce significant negative environmental impacts[20].

Among the types of environmental management instruments that show the environmental certification issued by the competent administrative authorities, we have the activities closure plans and the decontamination and treatment of environmental liabilities plans[21].

The environmental restoration should be prevented even before the activities completion. Hence, there is a need for, through the activities closure plans, the owners of all economic activities ensure that negative environmental impacts do not survive at the closure of their activities or facilities, considering such aspect for the

19 **Regulatory of the Law No. 28245 – Framework Law on National Environmental Management System approved by Supreme Decree No. 008 – 2005-PCM**
"***Article 6. – Design and application of environmental policies***
The design, formulation and application of the national environmental policies must to ensure the effective application of the following orders:
(…)
5. Prevention and control of environmental contamination, mainly in the emitter sources. The costs of prevention, surveillance, recovery and compensation of the environmental damage are in charge of the damage originator.
(…)".

20 Article 1 and 2 of the Law No. 27446 – Law on National Environmental Impact Assessment System.

21 Other environmental management instruments, such as the Environmental Impact Assessment Studies (EIA, by its initials in Spanish), can also contain environmental obligations of environmental remediation or restoration.

design and application of proper environmental management instruments in accordance with the legal framework in force[22].

On the other hand, the Articles 30 of the General Law on Environment[23] and 62 of the Regulatory of the Framework Law on National Environmental Management System[24] include all about decontamination and treatment of environmental liabili-

22 **Law No. 28611 – General Law on Environment**
"Article 27. – Activities closure plans. –
The owners of all economic activities have to ensure that negative environmental impacts do not survive at the closure of their activities or facilities, considering such aspect for the design and application of proper environmental management instruments in accordance with the legal framework in force. The National Environmental Authority, in coordination with the sectorial environmental authorities, establishes specific provisions about the closure, withdrawal, post-closure and post-withdrawal of activities and facilities, including the contents of proper plans and conditions that ensure their appropriate application."

23 **Law No. 28611 – General Law on Environment**
"Article 30. – Decontamination and treatment of environmental liabilities plans. –
30.1 The decontamination and treatment of environmental liabilities plans are intended to remedy the environmental impacts caused by one or many past or current projects of investments or activities. The Plan has to consider its funding and liabilities of the owners of contaminant activities, including the compensation for the caused damages, under the principle of environmental liability.
30.2 The entities with environmental powers promote and establish decontamination plans and the recovery of degraded environments. The National Environmental Authority establishes the criteria for elaborating such plans.
30.3 The National Environmental Authorities, in coordination with the Health Authority, can propose to the Executive Branch the establishment and regulation of a system of special rights that can restrict the global emissions at the environmental quality regulation level. The mentioned system shall to take into account:
a) The sources types of existent emissions;
b) The specific contaminants;
c) The instruments and the means of fees assignment;
d) The monitoring measures; and,
e) The enforcement of the system and the appropriate penalties."

24 ***Regulatory of the Framework Law on National Environmental Management System, approved by Supreme Decree No. 008 – 2005-PCM***
"Article 62. – Decontamination and Treatment of Environmental Liabilities Plans. –
The decontamination and treatment of environmental liabilities plans are intended to remedy the environmental impacts caused by one or many past or current projects of investments or activities. The Plan has to consider, for its funding, on the liabilities of the appropriate owners of contaminant activities, including the compensation for the caused damages, under the principle of environmental liability.

ties plans, which aim to remedy the environmental impacts caused by one or many past or current projects of investment or activities. These Plans have to consider, for its funding, on the liabilities of the owners of contaminant activities, including the compensation for the caused damages, under the principle of environmental liability.

V. THE LEGAL LIABILITY OF HYDROCARBONS AND MINING ENVIRONMENTAL LIABILITIES RESTORATION

The legal system of Peru has anticipated the need to correct the environmental liabilities from activities of the mine sector and the hydrocarbons sub-sector, in order to reduce their negative impacts on the population health or the environmental components, such as the water and the earth.

5.1 Environmental Liabilities Restoration of Hydrocarbons

According to the Article 2 of the Law No. 29134 - Law governing the environmental liabilities of the hydrocarbons sub-sector[25], the environmental liabilities of hydrocarbons are those wells and facilities badly abandoned, contaminated soils, effluents, emissions, remains or waste tanks located in any part of the national territory, including the continental shelve, produced as a result of the operations in the hydrocarbons sub-sector, made by enterprises that have ceased their activities in the area where such impacts occurred.

As provided in the Ministerial Decision No. 042 – 2013-MINAM, published on February 19, 2013, the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) has the power to exercise the function of environmental liabilities identification of hydrocarbons, in the framework of the provisions

The entities with environmental powers shall promote and establish decontamination plans and the recovery of degraded environments, which have to get a technical opinion by the competent Health Authority. The National Environmental Authority establishes the criteria for elaborating such plans.

Any action made by the State in order to solve problems linked with other environmental liabilities does not exempt those responsible of liabilities, or those owners of goods or rights about the areas affected by the liabilities, from covering the costs involved in the Closure Plan or the proper Decontamination Plan."

25 Published on November 17, 2007.

in the Law No. 29134 and its Regulatory approved by Supreme Decree No. 004 -2011-EM[26].

ON the other hand, as provided in the Article 4 of the Law No. 29134, from the information provided by the OEFA, the Ministry of Energy and Mines is in charge of determining those responsible for the mentioned environmental liabilities, who have to present a Withdrawal Plan considering actions to execute the appropriate decontamination, restoration or reforestation, or apply the facilities withdrawal or other actions necessary to remedy such liabilities.

According to the provisions in the Law No. 29325 – Law on National Environmental Assessment and Enforcement System, amended by the Law No. 30011, the OEFA has the power to supervise the compliance with obligations contained in the mentioned Withdrawal Plans.

Finally, it should be noted the Article 6 of the Law No. 29134 establishes that the State shall assume the remediation expenses of the environmental liabilities when their immediate mitigation is required, with the payment to be repeated against those responsible for producing such liabilities. On the other hand, when it is not possible to identify those responsible of the environmental liabilities, the legislator has anticipated that the State shall gradually assume their remediation[27].

5.2 Mining Environmental Liabilities Restoration

In accordance with the Article 2 of the Law No. 28271 – Law governing the mining environmental liabilities[28], the mining environmental liabilities are those facilities, effluents, emissions or waste tasks produced by inactive or abandoned mining operations, involving a constant and potential risk for the population health, the surrounding ecosystem and the property.

26 In accordance with the provisions in the Ministerial Decision No. 042 -2013 –MINAM, by Decision of the Board of Directors No. 005 – 2013-OEFA/CD, published on February, 2013, the Environmental Liabilities Identification Plan in the Hydrocarbons Sub-sector 2013 - 2014 is approved. In addition, by Decision of the Board of Directors No. 022 -2013-OEFA/CD, published on May 22, 2013, a Board of Directors for identifying such liabilities was approved, as well as a Methodology to estimate the risk level of the mentioned liabilities.

27 Article 4 of the Law No. 29134 – Law governing the environmental liabilities of the hydrocarbons sub-sector, published on November 17, 2007.

28 Published in July 6, 2004.

In the case of mining environmental liabilities, in both their identification and determination of their responsible, are in charge of the Ministry of Energy and Mines. The Article 3 of the Law No. 28271 establishes that the identification, elaboration and updating of the inventory of mining environmental liabilities will be executed by such entity. However, according to the Article 4 of the mentioned regulation, the Ministry of Energy and Mines has to determine those responsible for such liabilities, and who have to present a Closure Plan for their effective remediation.

The Article 6 of the mentioned regulation declares that those responsible for the mining environmental liabilities remediation have to carry out studies, take actions and works to control, mitigate and eliminate, as possible, the risks and contaminant and harmful effects on the population and ecosystem. In the case of these liabilities, the OEFA also has the power to verify the compliance with the obligations assumed through the appropriate Closure Plans.

Finally, the State assumes the task of remedying the mining environmental liabilities areas that do not have identified[29] responsible or voluntary curators[30]. Additionally, it should remedy the mining environmental liabilities areas in case of a State enterprise is responsible for no less than two thirds of the amount for remediation or, exceptionally, in relation to the due protection of public interest. The determination of public interest situations supporting the actions taken by the State for remedying mining environmental liabilities areas, are based on the analysis of security and health risks, as well as the environment of the damaged area caused by the mining environmental liabilities and their influence zones[31].

29 The company ACTIVOS MINEROS S.A.C. is the state company responsible for executing the environmental remediation studies and projects, the Mining Closure Plans and the activities related, in accordance with the provisions in the Supreme Decree No. 058-2006-EM.

30 In that regard, the Article 12 of the Regulatory of Mining Environmental Liabilities, approved by Supreme Decree No. 059 – 2005 –EM, published on December 8, 2005, establishes that any person or entity, whether or not the owner of mining concessions, should not assume the responsibility for voluntarily remedying the mining environmental liabilities, with inventory or not, located in his or her mining concession, in a third party or free complaint areas, without prejudice to start the appropriate legal actions to execute his or her right to repeat against that responsible for such liabilities created.

31 Article 20 and 21 of the Regulatory of Mining Environmental Liabilities, approved by Supreme Decree No. 059 – 2005-EM.

VI. LEGAL LIABILITY OF ENVIRONMENTAL RESTORATION IN CASE OF EMERGENCIES

In case of a sudden or significant environmental damage, whether by natural cause or human action, the national competent authority (as the case of the Ministry of Environment) issues the proper Environmental Emergency Statement, and establishes special plans of environmental decontamination, remediation or restoration in the framework of such statement[32].

An example is the Environmental Emergency Statement for the Pastaza River Basin, in Andoas and Pastaza districts, province of Datem of Marañón, department of Loreto, executed by Ministerial Order No. 094 – 2013 –MINAM[33], within ninety working days, due to the existence of contaminated sites by hydrocarbons (essentially petroleum).

In accordance with the mentioned Environmental Emergency Statement, Pluspetrol Norte S.A., a company engaged in hydrocarbons exploitation in the mentioned zone (located in the Area 1AB), has the duty to notify the Agency for Environmental Assessment and Enforcement (hereinafter the OEFA) of the restored and hydrocarbons-affected sites, affected sites but non-restored and affected/contaminated sites[34] that have not been identified in their environmental management instrument (Supplementary Environmental Plan), and present the appropriate Decontamination Plans for Soils, and which have to be approved by the Ministry of Energy and Mines. The OEFA duty is to supervise the compliance with the environmental obligations contained in such Plans.

VII. JURISDICTIONAL AND ADMINISTRATIVE ENVIRONMENTAL RESTORATION

The environmental liability can be a civil, criminal or administrative nature. Every liability is independent[35]. In this opportunity, we will focus on civil and administrative liabilities[36].

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32 Article 28 of the Law No. 28611 – General Law on Environment.

33 Published on March 25, 2013, amended by Ministerial Order No. 139 – 2013 –MINAM, published on May 11, 2013.

34 These last sites shall to be remedied by the enterprise responsible for the contaminated site.

35 The Article 138 of the Law No. 28611 – General Law on Environment determines that the administrative liability established in the due process is independent from the civil or criminal liability that could arise from the same facts.

36 Regarding the criminal liability, it should be noted that the proper criminal offenses are classified in Chapters I (Contamination Offenses Articles 304 – 307- F), II (Offenses against

7.1 Civil liability

In connection with the civil liability, the Article 147 of the General Law on Environment establishes that the environmental damage reparation is the restoration of the situation prior to the harmful fact to the environment or its components and its economic compensation. If it is impossible the restoration, the judge shall to foresee the execution of other tasks of remediation or improvement of the environment or its affected elements. The compensation will aim to take actions compensating the affected interests or help comply with the constitutional goals related to the environment and natural resources.

The jurisdictional authority has the power to order the originator to compensate the environmental damage victim. This compensation includes the growing damage, lost profit, moral damage and damage to people.

7.2 Administrative liability

As provided in Articles 135 (Number 135.1)[37] and 136 (Number 136.1)[38] of the General Law on Environment, the administrative liability is a result of the commission of an administrative environmental offense. The administrative authority

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Natural Resources, Article 308 -313) and III (Functional Liability and False Information, Articles 314 – 314-B) of the Title XIII of the Second Book of the Penal Code, in accordance with the amendments executed by the Article 3 of the Law NO. 29263, published on October 2, 2008; the First and Second Articles of the Legislative Decree No. 1102, published on February 29, 2012; the Single Supplementary Provision Amending the Legislative Decree No. 1107, published on April 20, 2012; and the First Supplementary Provision Amending the Law No. 30077, published on August 20, 2013.

37 **Law No. 28611 – General Law on Environment**
"Article 135. – Penalty system
135.1 The non-compliance with the regulation of this Law is penalized by the competent authority based on the Common System of Environmental Control and Enforcement. The authorities can establish supplementary regulation, provided that they do not oppose the Common System.
(…)".

38 **Law No. 28611 – General Law on Environment**
"Article 136. – Penalties and corrective measures
136.1 Natural or legal persons violating the provisions contained in this Law and in the supplementary and regulatory provisions about the matter, they will be worthy, according to the offense seriousness, of penalties or corrective measures.
(…)".

with the power to the environmental enforcement - as the OEFA- is responsible for determining the existence of an administrative offense, imposing the proper penalty and ordering the corresponding corrective measures.

For the specific case of the penalty power of the OEFA, the Article 18 of the Law No. 29325 – Law on National Environmental Assessment and Enforcement System recognizes that the administrative liability is impartial. This regulation states that the companies are objectively responsible for the non-compliance with the obligations from the environmental management instruments, as well as the environmental regulation and the orders or provisions issued by the OEFA.

For the administrative authority, the potential or real environmental damage can be a constitutive element of the fact classified as administrative offense[39].

While the administrative authority with the power to the environmental enforcement is not empowered to order compensations, it has the power to order corrective measures to order the offender to restore the situation altered by the administrative offense to its previous state.

The Number 232.1 of the Article 232 of the Law No. 27444 – Law on General Administrative Procedure establishes that the administrative penalties to the company are compatible with the requirement of restoring the altered situation to its previous state, as well as the compensation by the damages and injuries caused, which will be determined in the appropriate legal process[40].

Therefore, one thing is the environmental reposition, restoration or remediation of the situation altered by the administrative offense, viable before an administrati-

39 In that regard, see the Sixth Rule of the "General Rules for Practicing the Penalty Power of the Agency for Environmental Assessment and Enforcement", published in the web-site of the Agency for the Environmental Assessment and Enforcement – OEFA. The publication of this regulation proposal was approved by Decision of the Board of Directors No. 029 – 2013 –OEFA/CD, published on July 18, 2013. Source: www.oefa.gob.pe (consulted on July 29, 2013).

40 **Law No. 27444 – Law on General Administrative Procedure**
"Article 232. – Liability determination
232.1 The administrative penalties to the company are compatible with the requirement of the reposition of the situation altered by the offense to its previous state, as well as the compensation for caused damages and injuries, which shall be determined in the proper legal process.
(…)".

ve authority through a corrective measure, and a different one is the compensation for the damages and injuries resulting from an environmental damage.

In order to strengthen the repairer effect of the corrective measures to be ordered in a penalty process, the Work Team responsible for reviewing and proposing improvements of provisions contained in the Law No. 27444 – Law on General Administrative Procedure, created by Ministerial Order No. 0155 – 2012-JUS[41], has proposed to amend the Number 232.1 of the Article 232 of the Law on General Administrative Procedure, in accordance with the following text:

> ***"Article 232. – Liability determination***
> *232.1 The administrative penalties to the company are compatible with the corrective measures ordered to order the restoration* ***or reparation*** *of the situation altered by the offense to its previous state,* ***including those goods affected****, as well as the compensation for caused damages injuries, which shall be determined in the proper legal process. The corrective measures have to be reasonable and conform to the intensity, proportionality and the need of protected legal goods, which are intended to be ensured in every concrete case.*
> (…)"
> [emphasis added]

VIII. CORRECTIVE MEASURES OF ENVIRONMENTAL RESTORATION AND COMPENSATION

Without prejudice to the foregoing, the Number 22.1 of the Article 22 of the Law on National Environmental Assessment and Enforcement System establishes that the OEFA shall order the corrective measures necessary to reverse, or reduce as possible, the injurious effect that the offending conduct could have produce to the environment, natural resources and people health.

Specially, the Item d) Number 22.2 of the mentioned Article 22 determines that, among measures that can be ordered, the obligation of the responsible for the damage to restore, renovate or repair the altered situation, as the case, and if it is not possible, the obligation to compensate it in environmental and/or economic terms.

41 Dated on June 14, 2012, amended by Ministerial Orders No. 0234 – 2012-JUS on September 13, 2012, No. 0248 – 2012-JUS on October 17, 2012, No. 0089 – 2013-JUS on March 26, 2013 and No. 0147 -2013-JUS on June 11, 2013.

In this sense, if the administrative offense has produced a negative environmental damage or impact, the OEFA can order the offender to restore, renovate or repair the altered situation. And only if the restoration, renovation or reparation is not possible, the OEFA shall order the offender to compensate in environmental and economic terms.

On March 23, 2013, the OEFA published the *Guidelines for applying the corrective measures provided in Item d) Number 22.2 of the mentioned Article 22 of the Law No. 29325 – Law on National Environmental Assessment and Enforcement System* (hereinafter "**Guidelines**"), approved by Decision of the Board of Directors No. 010 -2013 –OEFA/CD.

In accordance with the Guidelines above mentioned, the restoration measures are those involving the actions of restoration, recovery and repair of the situation altered by the environmental administrative offense. Thus, for example, the reforestation of a forest affected by the environmental offense can be ordered as a restoration measure or a lake clearance partially contaminated by a petroleum spill as a reparation measure.

On the other hand, the "environmental compensation measures" are those actions intended to substitute an environmental good that has suffered serious and irreversible impacts impossible to mitigate, it means, irrecoverable. The compensatory measures are palliative measures to be ordered if it is impossible to apply the "restoration measures". Thus, for example, to order the offender, who entirely contaminated or damaged a lake, to build other lake with similar features in a near area.

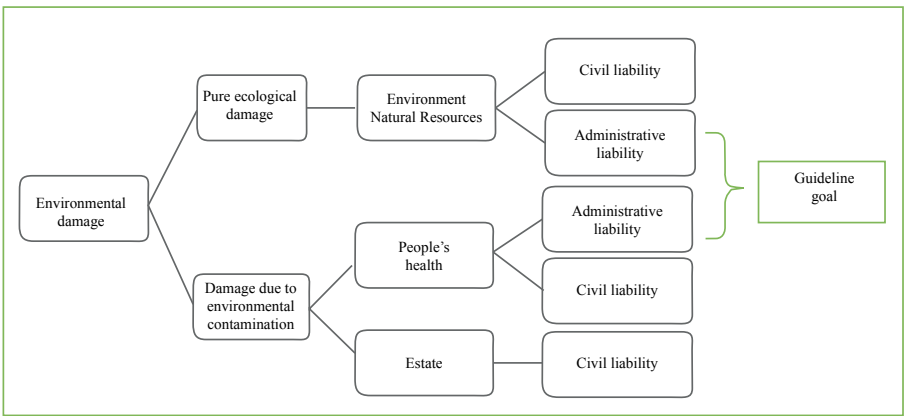
In the Guidelines the below are mentioned as examples of environmental compensation measures:

(i) Compensatory forestation in near lands, and with similar possibilities of development (to the affected zone).
(ii) To implement channels and *acequias* of collection, conduction or water drainage, in near soils, to compensate the alteration of natural courses of water produced in the project surrounding.
(iii) Moving faunal population to other sites, properly conditioned to its survival and development, in order to avoid its extinction, in case of its original habitat has been destroyed.

It should be mentioned that in Guidelines, the pure ecological damage is different from the damage by environmental influences. The first one is the damage to the environment and natural resources. The second one is the impact on people health and private estate as a result of the environmental contamination. While in

both situations are included the civil and administrative liability, in Guidelines it specifies that the administrative liability does not restore or compensate the damages directly related to the rights to private property (estate). As shown below, only the civil liability shall indemnify by damages to private property goods.

Chart 1
Mechanisms for repairing the environmental damage



Elaborated by: OEFA

As mentioned in corrective measures of the environmental restoration, the Guidelines affirm that actions of repair, restoration and rehabilitation of the environmental components and natural resources are possible. For example, incorporating faunal populations in the area where those species have died due to the environmental damage constitutes a restoration measure. Regarding people health, ordering the offender to pay the medical expenses of affected people constitutes a corrective measure of environmental restoration, and in case of the damage has been massive, the corrective measure could be to order the construction of a medical center or funding the health programs.

In case of the contamination had damaged the private property goods, such as, the livestock from a farm or the trout from a fish farming, the owner has to demand, before the Judiciary, under his or her condition of victim, the due Estate indemnity.

Regarding the corrective measures of compensation, the Guidelines, in order to avoid attributing to the OEFA trying to assume jurisdictional functions, mentions that, before an administrative authority, the environmental compensation is the only

available, so, when the Number 22.2 of the Article 22 of the Law on National Environmental Assessment and Enforcement System declares that the person responsible has to compensate the damage in "environmental and /or economic terms", it means only "environmental", such as afforesting a near area to compensate for the other area totally destroyed by the contamination.

It should be mentioned, in case of the compensation for damages to the private property does not proceed in the OEFA jurisdiction, it is feasible to order measures of the environmental compensation for damages to the Natural Estate of the Nation, contained by renewable and non-renewable resources. In addition, depending on the case circumstances, if implementing a corrective measure of environmental compensation includes the funding of temporary or final transfer of indigenous populations from an area to another, the consent, free and informed of these population, will be obtained in advance, in accordance with the regulation of the subject[42].

IX. ENVIRONMENTAL RESTORATION PROMOTION IN ACTIVITIES FOR THE ENVIRONMENTAL ENFORCEMENT

By Decision of the Presidency of the Board of Directors No. 035 – 2013-OEFA/PCD, published on March 12, 2013, the "Methodology for calculating the base fine and applying the aggrading and mitigating factors to use in the adjustment of penalties, as provided in the Article 6 of the Supreme Decree No. 007 – 2012-MINAM" (hereinafter, the **Methodology**) was approved, a document explaining in details the process for calculating the fine to impose in case of an administrative offense has been detected.

The Methodology aims not only to create a greater prediction related to the actions taken by the decision division of the OEFA[43], reduce its discretion[44] and

42 Law No. 29785 – Law on Right of Indigenous Populations to Prior Consultation recognized in the Convention No. 169 of the International Labour Organization, published on September 7, 2011, and its Regulatory, approved by Supreme Decree No. 001 – 2012-MC, published on April 3, 2012.

43 The mentioned Methodology contains forms and tables of values to use for calculating fines. By using the Methodology, the companies know in advance what reasoning will be used by the administrative authority to calculate the base fine, as well as the criteria that will be classified as aggravating or mitigating, and their influence.

44 The use of the Methodology reduces the discretion of the administrative authority by including technical criteria and goals to determine the value of every aggravating or mitigating factors to be used to calculate the fine. While these criteria cannot be calculated with mathematical precision, but a reasonable approximation, which is sufficient for the Penalty Administrative Right.

ensure a better exercise of the right of company defense[45], but also to promote the environmental remediation. Firstly, it constitutes a mitigating factor reducing 10% the base fine[46] when the offender had executed the immediate measures necessary to repair the effects of the conduct qualified as environmental offense[47].

It also promotes the environmental remediation due to this circumstance happens in a reduction of the base fine and the corrective measure cost of the environmental restoration. In fact, if the company, after executing the offense, implements remediation actions reducing the caused damage, such actions will produce a reduction of the base fine and the cost of implementing the corrective measure ordered by the authority.

If the authority imposing the penalty (in the OEFA is the Bureau of Enforcement, Penalty and Application of Incentives) has the available information about the valuation of the environmental damage, it will be calculated based on the facts verified by the field supervisors (from the Supervision Bureau of the OEFA). Therefore, is the offender company quickly implemented actions for the environmental remediation, the damage verified by the supervisor authority will be lower, allowing a smaller base fine.

And in case of, after the supervision executed by the OEFA, the offender company continues executing measures for the environmental remediation, the Bureau of Enforcement, Penalty and Application of Incentives will order a corrective measure less burdensome for such company when the final decision is ordered in the due administrative penalty procedure. The reason is: if the remediation activities had continued, the company will have the sufficient incentives to inform and prove the administrative authority –in the punishment process- on the real situation of the area affected by the offending conduct, in order to the administrative authority

45 The right of defense is warranted due to the Methodology for calculating fines was knowing in advance, the companies, in the submission of rebuttals or administrative resources (reconsideration or appeal), wont only question the alleged existence of the administrative offense accused, but also to offer evidences or arguments related to the adjustment of criteria, in order to the fine to be imposed, if any, will be the lowest possible.

46 The base fine is calculated from the illicit profits of the offense, the probability of the offense detection and, if there is available information, the valuation of the proven damaged. When the base fine is calculated, the aggravating and mitigating factors are applied, which increase or decrease the base fine as a percentage.

47 Item f6 of the Table of Values No. 3 of the Attachment II of the Decision of the Presidency of the Board of Directors No. 035 – 2013 –OEFA/PCD.

considers unnecessary to order a corrective measure for environmental restoration or compensation, or it fails to order it, it will be the less burdensome.

As seen above, the Methodology is intended to produce incentives in the companies to implement actions for the environmental remediation, so the fine to me imposed will be smaller, and a smaller cost for executing the corrective measure for the environmental restoration or compensation to be ordered in the final decision of the punishment procedure.

X. EXAMPLE OF CORRECTIVE MEASURE FOR ENVIRONMENTAL COMPENSATION

In a recent case, resolved in first administrative instance, the Bureau of Enforcement, Penalty and Application of Incentives of the OEFA stated[48] that an enterprise intended to hydrocarbons liquids extraction in an area of the department of Loreto (Peruvian Amazon) had committed, among others, the following environmental administrative offenses:

(a) A small lake[49] (lagoon) affected by petroleum and its surrounding[50]; and,
(b) To cause the unrepairable ecological loss of the ecosystem that had existed in such lake due to drainages and soil removals (Landfarming method) without the appropriate environmental management instrument[51].

48 By Decision of Board of Directors No. 534 – 2013-OEFA/DFSAI dated November 22, 2013, entered on Docket No. 267 -2012-OEFA/DFSAI/PAS. It is important to specify that such decision has been appealed by the punished company, and the Tribunal of Environmental Enforcement, in second and last administrative instance, will confirm, modify, revoke or void the mentioned Decision of Board of Directors.

49 Called Shanshococha, located in the district of Andoas, province of Datem del Marañón, department of Loreto, within the Area 1AB.

50 Conduct classified as an administrative offense in the Article 3 of Supreme Decree No. 015-2006-EM, Regulatory for the Environmental Protection in Hydrocarbons Activities, and penalized by the Number 3.3 of the Decision of Board of Directors No. 028-2003-OS8CD, Classification and Scale of Hydrocarbons Fines and Penalties of the Supervisory Body for Investment in Energy and Mining – OSINERGMIN.

51 Conduct classified as an administrative offense and penalized by the Number 3.4.1 of the Decision of Board of Directors No. 028 -2003-OS/CD, Classification and Scale of Hydrocarbons Fines and Penalties of the OSINERGMIN.

In addition to fines imposed by the above (two) offenses, the administrative authority ordered, as a corrective measure of progressive application, the environmental compensation for the unrepairable loss of the lake. This measure orders to create a new lake or, if any, strengthen or protect a water body or zone within the influence area of the affected site, according to a hydrogeological study that the offending enterprise has to carry out in advance. Such study will determine the scopes of the environmental compensation to be executed by the corrective measure[52].

52 In Decision of Board of Directors No. 534-2013-OEFA/DFSAI are explained the actions to be taken by the offending enterprise in order to comply with the corrective measure for the environmental compensation, as detailed below:

a) Phase of submission to community:

- To submit to the OEFA a program of approach spaces and community participation promotion, involving the surrounding communities of the affected area and, if any, native organizations and site authorities.

  The aim is to explain to involved agents the project to execute, in order to receive and answer questions related to measures for the environmental compensation. The objective is that the affected ecosystem returns to its original state, it means, prior to the impact by petroleum, so it provides the environmental services and equivalent ecological situations for make viable the flora, fauna and biodiversity development of the zone.

  In order to comply with this phase, the enterprise has 3 working days for presenting to the OEFA the proper program for its approval. Such program shall be executed in non-longer than 30 working days, from its approval.

b) Phase of soils diagnosis and recovery:

- To present the diagnosis of the current state of the contaminated soils in the lake and their environment and make a program of soil recovery, within 10 working days, from the completion of the previous phase.
- To implement a program of soil recovery including the clearance of TPH (Total Petroleum Hydrocarbon) and Barium to similar levels of other life systems, using the comparison method with neighboring zones (life ecosystem), within 50 working days, from the approval of the diagnosis and the soils recovery program by the OEFA.

c) Execution Phase:

c.1. Hydrogeological Study Development and Implementation

- To present a proposal of technical study including an activities schedule for executing the hydrogeological study in affected areas, within 30 working days.

- To execute a hydrogeological study of the lake area, where the viability of the environmental compensation is valuated in such zone or, otherwise, other zone where the environmental impact is minimum. This study shall contain, among other points, the origin and availability of water resource and, also, include the seasonality of the Pastaza River (low - rising). It is established 90 working days for the development of the hydrogeological study, from the approval of the technical proposal by the OEFA.
- After the approval of the hydrogeological study by the OEFA, and considering on the results, the offending enterprise shall present a final technical proposal ensuring the viability of the corrective measure ordered, within 90 working days, from the approval of the hydrogeological study results.

In that regard, and if any, it will present a design of features that has to contain the new ecosystem, so it becomes a wetland meeting the features of a lake (lagoon). The features design of the new ecosystem shall contain:

– Background
– Generals: current conditions of fauna and flora (population inventory) and habitat quality of the zone.
– Aim
– Subjects and methods: location and dimensions, abiotic environment, geomorphology and hydrology, biotic environment, phytoplankton, zooplankton, flora, fauna, monitoring (water and soil).
– Management plan, contingence plan
– Recommendations
– Multidisciplinary specialists Team
– Bibliography

c.2. Limnological monitoring and protection measures for maritime ecosystems of adjacent water

- To develop a limnological monitoring program of water bodies adjacent to the zone where the lake was located, which shall include the determination of physical, chemical, hydro-biological and diversity parameters, considering on the seasonality and water system. The monitoring regulatory will be quarterly during the first year, and every six months, from the second year.
- The presentation, to the OEFA, of such monitoring will be within 15 working days after the trimester or every six months, properly.
- According to monitoring, the ideal protection measures should be adopted in order to preserve the adjacent maritime ecosystems.

d) Accreditation of the compliance and the OEFA enforcement:

- The offending enterprise shall inform the Bureau of Enforcement, Penalty and Application of Incentives of the OEFA about the execution results of each phase detailed above, in order to comply with the order made by such authority.
- In all these phases of compliance, it should be taken into account the description of the Project of the Environment Compliance and Management Programs (PAMA) of the offending enterprise, which is the Environmental Management Instrument that has to apply in its concession area for exploration and exploitation of liquid hydrocarbons.

As mentioned in the authority statement[53], the corrective measure for the environmental compensation aims to substitute, as possible, the legal good affected, which is the ecosystem that was existing in the lake zone. So, "*at the fait accompli of drainage and lake disappearance"*, the corrective measure explains in details each action that the offending enterprise has to execute, not been necessary to ask the approval of an environmental management instrument to the proper sectorial authority.

In fact, the Guidelines explains that if the execution of restoration and environmental compensation measures has a significant impact, on the environment, then, it will be necessary the company to obtain an Environmental Management Instrument to execute such measure, an instrument to be approved by the proper sectorial authority. Otherwise, if the measure has a minor impact (for example, if the contaminated area is less than 10 000m^2), such instrument won't be necessary, since it shall be sufficient that the company executes the corrective measure in accordance with the actions and phases established by the OEFA, as in the case of the small lake above mentioned.

XI. CONCLUSIONS

The legal liability of environmental restoration is linked with the principle of cost internalization and the principle of environmental liability. In accordance with these two principles, any natural or legal person, public or private, causing a negative impact (damage or deterioration) on the environment or its components has to adopt the appropriate rehabilitation, remediation or restoration measures and, if it is impossible, the proper compensation measures, it means, those contaminating has to assume the decontamination costs.

Among the types of environmental management instruments including the environmental certification of the National Environmental Impact Assessment System (SEIA, by its initials in Spanish) are the activities closure plans and the plans of decontamination and treatment of environmental liabilities, which include the environmental remediation and restoration measures to be executed by enterprises against negative environmental impacts from activities caused by current or past activities.

The Peruvian legal system has anticipated the necessity to correct the environmental liabilities from activities of the hydrocarbons subsector and mining sector

53 Considering 300 of the Decision of Board of Directors No. 534 -2013-OEFA/DFSAI.

in order to reduce their negative impacts on population health or environmental components, such as water and soil.

When sudden or significant environmental damages, by natural causes or human action, the competent national authority issues the Statement for Environmental Emergency, and establishes the special plans of decontamination, remediation or environmental restoration into the framework of such statement.

The environmental liability can be civil or administrative. The first one, the victim of the environmental damage can demand before the Judiciary to the originator of such damage by the due indemnity for damages and injuries, involving the growing damage, loss of profits, moral damage and damage to people. The second one, the administrative authority empowered to the environmental control (for example, the Agency for Environmental Assessment and Enforcement -OEFA), in addition to impose the penalty as result of the evidence of an administrative offense, shall order a corrective measure intended to order the company to restore (or repair) the situation altered by the offense to its previous state.

In the specific case of the OEFA, the Law on National Environmental Assessment and Enforcement grants the power to order corrective measures of environmental restoration or compensation. The first one are those actions of restoration, rehabilitation or reparation of the situation altered by the environmental administrative offense. Thus, for example, to order the lake clearance partially contaminated. The second one, in contrast, the environmental compensation, aims to substitute an environmental good that has suffered from serious and irreversible impacts, impossible to be mitigated. It might be the case, for example, to order the offender that contaminated or totally damaged a lake to build another with similar features in a near area.

Precisely, in a recent statement by the OEFA (not available in administrative remedy), and in relation to a consistent offending conduct to contaminate a small lake by hydrocarbons and, then, drain it without an environmental instrument, it has been ordered as a corrective measure of environmental compensation, the obligation to reproduce the ecosystem functionality that was existing in such lake.

By the corrective measures of environmental restoration or compensation, the OEFA cannot order the indemnity for damages to private property goods.

If an enterprise that produced an environmental reduction, deterioration or damage, by an administrative offense, quickly implement measures for the environmental remediation, such action will be taken into account by the OEFA in the due punishment procedure, result in a fine reduction, as well as the possibility of not

ordering a corrective measure or, otherwise, a less expensive, evidencing the purpose of such public entity to incentive environmental remediation actions, and, in this way, comply with the legal liability of environmental restoration.

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REMEDIAL MEASURES FOR ENVIRONMENTAL RESTORATION AND COMPENSATION
[Publicity and Application of guidelines approved by the OEFA]

MAURICIO CUADRA MORENO
JERRY ESPINOZA SALVATIERRA

Summary

This article is focused on explaining the context and the national and international legal basis for environmental restoration, as well as the different legal status of penalties and remedial measures, since these ones attempt to reinstate a changed situation. The remedial measure attempts to reinstate to previous state through the environmental restoration and compensation mentioned under the Law No. 28611 – General Law on Environment and Law No. 29325 – Law on National Environmental Assessment and Enforcement System amended by Law No. 30011. The guidelines for application of remedial measures for environmental restoration or compensation are also mentioned, which are used by the OEFA pursuant to the Decision of Board of Directors No. 010-2013-OEFA/CD.

Introduction. II. Context: Balance between economic development and environmental protection duty in the international context. III. Constitutional and legal basis for environmental restoration. IV. Legal status of remedial measures. V. Environmental restoration and compensation in Peru. VI. Remedial measures for environmental restoration and compensation in the LGA and SINEFA Law. VII. Guidelines for the application of remedial measures of environmental restoration and compensation approved by the OEFA. VIII. Conclusions.

I. INTRODUCTION

The protection of the environment has always been a prevailing issue. It is probably the only one concern for human beings until his extinction, this one will likely occur by their incompetence to reduce impacts on the environment caused by their activities.

The States are not indifferent to these problems, since the obligation to guarantee their inhabitants to enjoy a healthy environment for their development fall on them. In this regard, it is necessary that internal legislations regulate the economic activities of private sectors properly by imposing penalties to those conducts which cause damage to the environment, natural resources and health of people.

Although it is appropriate to have penal or administrative penalties, those must dissuade or act as a disincentive to the commission of administrative offenses or penalties against the environment, it is very necessary that the State contributes to invert or reduce the damages or negatives impacts by those which caused them.

The Peruvian State is not exempted from these obligations. For this reason, this article deals with the adjustment regarding the issuance of administrative measures which allow the restoration and compensation of the environment by analyzing its legal status, source and origin and contextualizing the actions that the entity in charge of enforcing the compliance of the environmental obligations in Peru in order to clarify its application.

II. CONTEXT: BALANCE BETWEEN ECONOMIC DEVELOPMENT AND ENVIRONMENTAL PROTECTION DUTY IN THE INTERNATIONAL CONTEXT.

It is not a new issue at all to stand out the concern of the States to protect the environment, it is appropriate to know that the Declaration of the United Nations on the Human Environment (Stockholm, 1972) established a human right to *"conditions to live satisfactorily in an environment whose quality allows humans living with dignity and well-b eing"*. In consideration to this right, this declaration also considers the *"solemn duty to protect and improve the environment for these generations and future ones"*.[1]

In that context, the American States confirmed their commitment concerning the necessity of promoting the sustainable development. Thus, in the framework of an important international summit pointed out that *"[the] social progress and economic prosperity can remain if our nations live in a healthy environment and our ecosystems and natural resources are used carefully and responsibly"*[2].

1 Stockholm Declaration. Declaration of the United Nations Conference on the Human Environment (Stockholm, Sweden, June 5th – 16th, 1972).

2 Declaration Of Principles On Development And Prosperity Of The Americas. On December, 1994 (Miami - USA) the summit of Heads of States and American Governments with the

In this regard, the decisions of the Inter-American Institutions have included the fundamental values of the international community by giving recognition to the importance of the economic development by ensuring the respect of human rights and the protection of the environment. Also, the idea of "sustainable development" adopted in the Rio Declaration on Environment and Development[3] reflects these interests properly, which must be considered by the States when assessing the intervention of the private sectors carrying out economic activities under their jurisdiction by protecting the environment, the natural resources and health of people living in their territories. It is not possible to achieve any of these three objectives: the protection of the environment, the economic development and the respect of human right without considering the other two ones[4].

In this general context, the Inter-American Commission on Human Rights has pointed out that the States must consider certain positive measures in order to protect life and physical integrity of people. For instance, it may be emphasized out that serious environmental pollution may cause a threat to life and health of human beings, in that case may result in the obligation of the State of considering reasonable measures to avoid such risk or the necessary measures to take responsibility when people have been affected[5].

From this obligation comes the necessity for the States to regulate the intervention of the private sectors in their territory and, in a strict sense, the economic activities which carry out and the significant negative impact of these ones on the environment **by imposing penalties and preparing its restoration when opportune.**

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exception of Cuba was held and the first of these characteristics since 1967. This summit agreed a Plan of Action based on a declaration of principles on development and prosperity of the Americas, declaration which expressly included the protection of the environment.

3 The principles 3 and 4 of the Rio Declaration on Environment and Development adopted as part of the Declaration of the United Nations Conference on the Environment and Development (Rio de Janeiro, Brazil, on June 3rd and 14th, 1992).

4 Inter-American Commission on Human Rights. Report on the Condition of Human Rights in Ecuador, OAS/Serial L/V/II.96, doc. 10 rev. 1, on April 24th, 1997.

5 SHELTON, Dinah. "Derechos ambientales y obligaciones en el Sistema Interamericano de Derechos Humanos". En *Anuario de Derechos Humanos de la Universidad de Chile.* En: http://www.anuariocdh.uchile.cl/index.php/ADH/article/viewFile/11486/11847. (Visited on November 16th, 2013).

III. CONSTITUTIONAL AND LEGAL BASIS FOR ENVIRONMENTAL RESTORATION

The Number 22 of the Article 2° of the Political Constitution of Peru considers the fundamental right of every citizen to enjoy a balanced and appropriate environment for the development of life[6]. In that sense, the Peruvian State implements policies to control the intervention of the private sectors carrying out actions which may have a negative impact on the environment so that the citizens exercise this right indeed. This means that the State prevents damage on the environment, both in the previous (*ex ante*) or subsequent (*ex post*) stage upon execution of an economic activity, that is, in the stage of certification or environmental enforcement, respectively.

Within the scope of environmental enforcement (context of this article) in 2008, the creation of the Agency for Assessment and Environmental Enforcement (OEFA)[7] was considered, technical and specialized institution in charge of the enforcement, supervision, control and penalty in environmental matters assigned to the Ministry of Environment.

In order to strengthen and guarantee the effectiveness of the environmental enforcement in the country through the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System (hereinafter, SINEFA Law), recently amended by the Law No. 30011, a functional system is created so that

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6 **Political Constitution of Peru**
"Article 2°.- *Every person has the right to:*
(...)
22. Peace, tranquility, to the benefit for spare time and relaxation, as well as ***to enjoy of a balanced and appropriate environment to the development of his life.***
(...)".
[emphasis added]

7 **Legislative Decree No. 1013 – Legislative Decree which approves the Law on Creation, Organization and Duties of the Ministry of Environment**
"(…)
Second Final Complementary Provision.- Creation of public agencies assigned to the Ministry of Environment
Agency for Assessment and Environmental Enforcement
The Agency for Assessment and Environmental Enforcement – OEFA was created as a public technical specialized agency with legal capacity of internal public right whose budget is assigned to the Ministry of Environment and in charge of the enforcement, supervision, control and penalty in environmental matters, as appropriate.
(…)".

the OEFA may supervise the compliance of the environmental obligations by individuals or legal entities and also verify, as governing body of such system, the compliance of the environmental enforcement duties in charge of different entities of the Public Administration.

The rules previously mentioned establish that the OEFA is empowered to issue remedial measures, in exercise of its enforcing and penalty duty,[8] including the general rules for its application[9] in its article 22°.

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8 **Law No. 29325 - Law on the National Environmental Assessment and Enforcement System**

"Article 11°.- General Duties

11.1. The exercise of the environmental enforcement includes duties of assessment, supervision, enforcement and penalty intended to ensure the compliance of the enforcing environmental obligations established in the environmental legislation, as well as the commitments derived from the instruments of environmental management and the orders or provisions issued by the Agency for Assessment and Environmental Enforcement (OEFA) in keeping with the provisions in the Article 17, according to the follows:

(...)

c) Enforcing and penalty duty:** includes the power to investigate the commission of possible administrative penalty offenses and to impose penalties for the non-compliance of obligations and commitments derived from the instruments of environmental management, environmental rules, environmental commitments of concession contracts and orders or provisions issued by the OEFA in keeping with the provisions in the Article 17. **In addition, it includes the power to issue remedial and precautionary measures.

(...)".

[emphasis added]

9 **Law No. 29325 – Law on the National Environmental Assessment and Enforcement System**

"Article 22°.- Remedial measures

22.1.The necessary remedial measures will be issued to revert or reduce as possible, the damaging effect on the environment, the natural resources and health of people which had been caused by the offending conduct.

22.2. Among the measures that may be issued are included but are not limited to the following:

a) Definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense.

b) Cessation or restriction of the activity which caused the offense.

c) Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.

d) The party responsible for causing the damage must restore, renovate or redress the damaged condition when appropriate and if such is not possible, to compensate it in environmental and/or economic matters.

e) Other ones considered necessary to revert or reduce as possible, the damaging effect on the environment, the natural resources and health of people which had been caused by the offending conduct.

In this regard, the legal status of remedial measures will be dealt with the Administrative Law among other legal institutions, upon the following section, in order to analyze subsequently the guidelines approved by the OEFA for the issuance of those measures intended to restore or compensate the damages caused to the environment.

IV. LEGAL STATUS OF REMEDIAL MEASURES

To understand the purpose of the issuance of a remedial measure; firstly, we must internalize that these measures are issued within the scope of the duty of "supervision" of the Public Administration to ensure the legality or, in other terms, to protect the compliance of the legal system and in turn, to have an effect on the general interest of the citizens[10].

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f) Other ones considered necessary to avoid the continuation of the damaging effect on the environment, the natural resources and health of people which causes or may cause by the offending conduct.

22.3. The remedial measures must be adopted by taking into account the Principle of Reasonableness and properly supported. This rule is governed pursuant to the provisions of the Article 146 of the Law on General Administrative Procedure, as applicable.

22.4. The non-compliance of a remedial measure by the companies results in imposing automatically a coercive fine not less than one (1) UIT or more than one hundred (100) UIT. The coercive fine will be paid within a period of five (5) days when expired and whose coercive collection will be issued.

22.5. In case the non-compliance continues, a new coercive fine will be imposed by doubling both in succession and without limits, the amount of the last imposed coercive fine until the issued measure is fulfilled.

10 *"The sources of the regulatory power of the state are in the Constitution, laws and regulations and tending to protect the essential rights entirely; therefore, their limits are included in the regulations, that is, respect for the regulations. It is necessary an approach from the origin of the regulatory power of the state in France, its European evolution in Germany, merits studying the idea of the master ANDRE DE LAUBADERE who considers the regulatory power of the state, an intervention of the Administration to which he is referred as administrative police exercised by some administrative authorities. He says that its objective is to impose limitations to the freedoms of individuals in order to ensure the public interest. Such limitations appear from the laws which are regulated, for instance, the individual freedom, freedom of worship, freedom of the press, etc., but within the scope of each of these ones, there is an administrative power constituted by the regulatory power of the state, according to his opinion. He concludes by saying that the regulatory power of the state is defined for its purpose which is to ensure the public integrity, security or public health, that is, the absence of disturbances and without risk of accidents or diseases".*
CERVANTES, Dante. *Manual de Derecho Administrativo.* 6to ed. Lima: Rodhas, 2000, p.132

Concerning this matter of the drafting of the Article III of the Preliminary Title of the Law No. 27444 – Law on the General Administrative Procedure (hereinafter, LPAG), it may be concluded that the intervention of the Public Administration must have as directive the protection of the general interest (public) and to ensure, in general, the respect of the constitutional and legal system[11].

In effect, the remedial measures expect that the situations of illegality in which the citizens have been involved and which caused a pernicious effect on society are reverted, so that it may return to the factual situation prior to the commission of illegality. Along the same lines, the Article 232° of the LPAG points out that the reinstatement of the situation changed by this one to its previous condition is a measure compatible with the administrative penalty act[12].

As may be seen, although the remedial measures impose a charge to the company, whose conduct caused a situation of illegality, a similar situation occurs with the administrative penalties, these ones have a different status to those penalties since their effect is to look for the reinstatement of a changed situation. This distinction is not always clear at all, without prejudice to that.

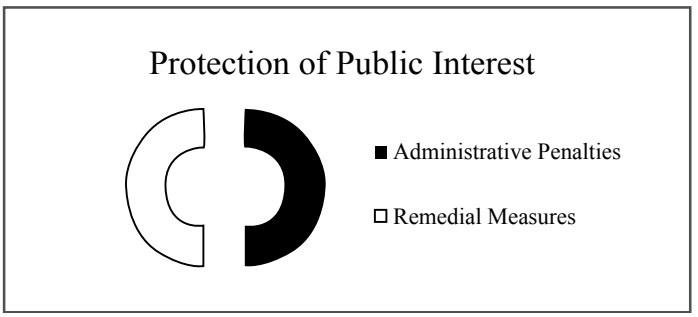
In order to figure out this situation, it is important to point out that an administrative penalty aims to impose a charge or sanction on the companies for falling into an attitude which transgresses the legality. This sanction is immediately imposed and does not directly have an effect on the public interest. For instance, a pecuniary penalty imposed to a certain company, affects it directly and particularly; nevertheless, seen from a wide spectrum, also acts as a disincentive to it by committing an illegal act which causes effects on society.

In this context, through an administrative penalty, a disincentive may be obtained so that the private sectors do not commit illegal acts which potentially may

11 **Law No. 27444 – Law on the General Administrative Procedure**
"Article III.- Purpose
The purpose of this law is to establish an applicable legal system so that the intervention of the Public Administration can be used for the protection of the general interest by guaranteeing the rights and interests of the companies subject to the constitutional and legal system in general".

12 **Law No. 27444 –Law on the General Administrative Procedure**
"Article 232°.- Determination of the responsibility
232.1. The administrative penalties to be imposed to the company are compatible with the request of the reinstatement of the situation changed by this one to its previous condition, as well as the compensation for damages caused by this one, which will be determined in the corresponding legal proceeding. (...)".

affect or have an effect on society; however, the purpose of this penalty is not to reinstate a changed situation, as in the case of remedial measures. In that sense, it is valid to say that the application of the power to impose penalties of the Administration is not enough to protect the public interest. In that point, the importance of the remedial measures lies, since the circle of protection of the public interest is closed through them by assuring the companies to have disincentives for the commission of offending conducts which will potentially have an effect on society (effects of the administrative penalty) and by reverting the direct consequences of the commission of such conducts.



Source: Own Elaboration

Within that sequence of ideas, it may be indicated that the imposition of remedial measures, the same as any provision and order of the Public Administration must be issued by fulfilling parameters of reasonableness; on the contrary, its purpose may be distorted.

For instance, it may be the case that a remedial measure is not related to the effect caused by the commission of an offense, in this case, the public interest may not be protected since it may issue a measure that may not put the damaged legal right in the same situation in which this was previously of the commission of the offense.

Also, it may be the case that within the scope of the issuance of a remedial measure, this measure does not only revert to the condition of things to a situation prior to the commission of the offense but also, to give additional benefits to the society that this one did not have before. In this case, the issued remedial measure may have a compensatory characteristic, exceeding the powers conferred to the Public Administration, since this is an inherent power of the judicial proceedings in accordance with the Article 232° of the LPAG previously mentioned.

In this context and based on the foregoing arguments, the following question then arises: what happens when it is not possible to revert to the effects of the offending conduct to the previous moment of its commission? In this case, the remedial measure which was issued should give benefits which are equivalent and proportioned considering the previous situation. It must clear that through this type of "compensatory" remedial measures, the purpose is not to compensate those ones affected by the commission of the offense but, to put them into a situation equivalent to which these ones were prior to the effects that were caused by the offending conduct.

Likewise, if through a "compensatory" remedial measure benefits are provided resulting disproportionate when considering the previous situation in which a damaged legal right was before, the remedial measure may have a compensatory characteristic once again, the Public Administration is not authorized to dispose of this power in Peru.

To a considerable extent, in accordance with the Article IV of the Preliminary Title of the LPAG – it is clear that for the issuance of a remedial measure is indispensable to maintain due proportion among the means to be used and the public purposes to be protected in order that these ones answer to the strictly necessary to fulfill its purposes[13].

V. ENVIRONMENTAL RESTORATION AND COMPENSATION IN PERU

The "reinstatement to the previous condition" detailed in the previous section is a wide concept and to this effect, this one must be specified in its scopes. Thus, a sector of the national doctrine has referred to the remedial measures under study "measures of reinstatement", indicating that among them the orders of shutdown of premises are without license, cessation order of a fraudulent publicity, the confisca-

13 **Law No. 27444 – Law on the General Administrative Procedure**
"Article IV.- Principles of administrative procedure
The administrative procedure is basically based on the following principles, without prejudice to the validity of other general principles of the Administrative Law:
(…)
1.4. Principle of reasonableness. - *The decisions of the administrative authority when creating obligations, qualifying offenses, imposing penalties or establishing restrictions to the companies, those ones must be adapted within the limits of the power attributed and maintaining due proportion among the means to be used and the public purposes to be protected in order to answer to the strictly necessary to fulfill of its purposes.*
(...)".

tion of goods and the **environmental restoration**[14]. Notwithstanding the analysis above, there are situations in which it is impossible to establish a remedial measure resulting in reinstating a situation exactly to its previous condition, for this reason it may be considered among the "measures of reinstatement" the issuance of measures of **environmental compensation.**

To understand the scopes of restoration and environmental compensation, it is appropriate to have a concept of "environmental damage" as a natural and immediate source of restoration and compensation.

The Article 142° of the Law No. 28611 – General Law on Environment (hereinafter, the LGA) points out that it may be referred to as environmental damage, every material loss the environment and/or some of its components suffer, which can be caused by contravening or not legal disposition and causing negative potential or current effects[15]. Thus, through the mentioned damage the environment or its components are damaged, that is, such damage is materialized in physical, chemical and biological elements of natural or anthropogenic origin which, in individual or associated way, define the environment in which life is developed[16].

It is important to note that the environmental damage may gradually start. This is the case of the contaminants which are thrown to the environment and only cause diseases in exposed populations throughout the time.

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14 Morón, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Lima: Gaceta Jurídica S.A., 2008, p. 676.

15 **Law No. 28611 – General Law on Environment**
"Article 142°.- Responsibility for environmental damages
(...)
142.2. Environmental damage is referred to every material loss that the environment and/or some of its components suffer, which can be caused by contravening or not legal disposition and causing negative potential or current effects".

16 **Law No. 28611 – General Law on Environment**
"Article 2°.- Scope
(...)
2.3. It will be considered for the effects of this Law, every reference made to the 'environment' or 'its components', including physical, chemical and biological elements of natural anthropogenic origin which, in individual or associated way, define the environment in which life is developed, these are the factors which ensure individual and collective health of people and the preservation of natural resources, biodiversity and cultural heritage associated to them, among others."

Also, such article mentions that the cause of the environmental damage may not always be attributed to human action. In effect, it may be the case of a flood destroying a community and its areas of shepherding, case in which the damage to the environment was unrealized; therefore, this one must be faced since any human action took part of it.

Similar to the Peruvian case, the legislation of the United Kingdom has established that the environmental damage starts through (i) damages to the species and natural protected habitats, that is, any damage causing significant adverse effects, probably affecting or maintaining the favorable condition of preservation of such habitats or species; (ii) the damage to water, that is, any damage causing significant adverse effects in the ecological, chemical or quantitative state or in the ecological potential of the water; (iii) the damage to soil, that is, any pollution of the soil that implies a significant risk to cause adverse effects for human health due to direct or indirect insertion of substances, compounds, organisms or microorganisms in the soil or subsoil[17].

For another sector of the doctrine, the environmental damage may be classified in two types: (i) **the pure ecological damage**, referred to damage to the environment and natural resources. In this type, the environmental legal rights are only violated; and (ii) **damage for environmental influence**, mainly referred to health of people which is affected as a consequence of environmental pollution[18].

After determining the scopes of environmental damage for the Peruvian legislation, it is important to define the concept of **environmental restoration**. In that

17 ENVIRONMENTAL PROTECTION. "The environmental damage (Prevention and Remediation) Regulations 2009". Statutory Instruments. <http://www.legislation.gov.uk/uksi/2009/153/introduction/made> (Visited on December 15th, 2013).

18 GONZÁLEZ, José Juan. *La responsabilidad por el daño ambiental en América Latina.* México D. F.: Programa de las Naciones Unidas para el Medio Ambiente. 2003. p. 26. SANDS, Philippe, *Principles of International Environmental Law.* 2ª ed. Cambridge: Cambridge University Press, p. 876. LOZANO, Blanca. *Derecho Ambiental Administrativo.* Madrid: Dykinson, 2009, p. 92.

It is important to note that this classification has been adhered by the Agency for Assessment and Environmental Enforcement – OEFA to its Guidelines for the Application of Remedial Measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System approved by Decision of Board of Directors No. 010-2013-OEFA/CD, published on March 22nd, 2013.

regard, the International Society for Ecological Restoration (SER) in its working paper *Principles of SER International on ecological restoration* has pointed out that the ecological restoration is the process of helping the restoration of an ecosystem which has been deteriorated, damaged or destroyed[19].

Concerning this matter, the Constitutional Tribunal has pointed out that the principle of restoration which is referred to sanitation and recovery of the environmental damaged goods[20] must be considered, among others, in order to verify the existing relationship between the economic production and the right to a balanced and appropriate environment to the development of life.

Along the same lines, in the Article IX of the Preliminary Title of the LGA it is determined that the party responsible for causing environmental deterioration is inexcusably compelled to adopt measures of restoration[21].

It is important to remember that the environmental restoration may be even prevented before a company stops executing its activities, as the case of the Shutdown Planning of Activities[22] aiming the negative environmental impacts of significant nature do not continue existing at the moment of the shutdown of activities or establishments of a company.

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19 GRUPO DE TRABAJO SOBRE CIENCIA Y POLÍTICAS, *Principios de SER International sobre la restauración ecológica.* (Version 2: October, 2004).

20 Legal basis 18 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from April 1st, 2005, attributed to the File No. 0048-2004-PI/TC.

21 **Law No. 28611 – General Law on Environment**
"Article IX.- Principle of environmental responsibility
The party responsible for causing the deterioration of the environment and its components, either an individual or legal, public or private entity, is inexcusably compelled to adopt the measures for its restoration, rehabilitation or reparation as appropriate or when the foregoing was not possible, to compensate damages which were caused without prejudice to other administrative, civil or criminal responsibilities that might exist in environmental terms".

22 **Law No. 28611 – General Law on Environment**
"Article 27°.- Shutdown planning of activities
The holders of all the economic activities must guarantee that negative environmental impacts of significant nature do not continue existing at the moment of the shutdown of activities or establishments by considering such aspect when planning and applying the instruments of environmental management as appropriate in accordance with the legal

In that sequence of ideas and to this point, it is valid to state regarding the environmental restoration, the following:

(i) It is the direct consequence of the configuration of an environmental damage;
(ii) It is an indispensable element to assess when carrying out a consideration between the economic production and the right to a balanced environment;
(iii) It must be forewarned before the execution of an economic activity;
(iv) Its application is mostly developed for Shutdown Planning and;
(v) Its compliance is compulsory for the party responsible for causing the environmental damage.

On its part, the same as the restoration, the environmental compensation has directly been adhered in the LGA under the **principle of environmental responsibility** which means when it is not possible to restore, rehabilitate or repair the environmental damage which was caused, in environmental terms, must be compensated without prejudice to other administrative, civil or criminal responsibilities that might exist. Also, in the Article 26° of the mentioned Law is pointed out that in the Environmental Compliance and Management Programs (PAMA) must be considered, when necessary, a possible Compensation Plan[23].

As may be seen, the measures of compensation are applicable when the environmental damage which causes damage to the right is irrecoverable by inserting positive benefits for this one and counteracting the negative situation which was

framework in force. The National Environmental Authority, in coordination with the sectorial environmental authorities, establishes specific provisions on the shutdown, discontinuation, post-shutdown and post-discontinuation of activities or establishments including the content of the corresponding plans and conditions which guarantee its appropriate application."

23 **Law No. 28611 - General Law on Environment**
"Article 26°.- Environment Compliance and Management Programs
26.1. The competent environmental authority can establish and approve Environmental Compliance and Management Programs – PAMA in order to facilitate the compliance of an economic activity to new environmental obligations which ensure due compliance in deadlines to be established for the corresponding rules, through objectives of explicit environmental performance, goals and a timetable of the progress of compliance, as well as the measures of prevention, control, mitigation, recovery and possible compensation as appropriate. The supporting reports to define the deadlines and measures of compliance, the follow-up reports and progress in the compliance of the PAMA are public and must be at any interested party's disposal. (…)"

caused from the adjustment of lawlessness by the company[24]. Therefore, the measures of compensation aim to replace a negative situation for a positive action as an element of equal value or function[25].

In this context, the scopes of remedial measures the OEFA may impose will be addressed in the following sections to then analyze in detail, the Guidelines for their application which were approved by Decision of Board of Directors No. 010-2013-OEFA/CD.

VI. REMEDIAL MEASURES OF ENVIRONMENTAL RESTORATION AND COMPENSATION IN THE LGA AND SINEFA LAW

In accordance with the Numbers 136.2 and 136.4 of the Article 136° of the LGA[26], constitute "coercive penalties", the warning, fine, temporary or definitive

24 CONESA, Vicente. *Guía Metodológica para la Evaluación del Impacto Ambiental.* Madrid: Madrid Ediciones. Mundi-Prensa, 2000, p. 306.

25 SECRETARÍA GENERAL DEL SENADO REPUBLICANO DE COLOMBIA. Sentencia C-632/11 de la Corte Constitucional de Colombia On: http://www.secretariasenado.gov.co/senado/basedoc/c-632_1911.htm. (Visited on November 17th, 2013)

26 **Law No. 28611 - General Law on Environment, amended by the Law No. 30011**
"Article 136°.- Penalties and remedial measures
(...)
136.2. *Coercive measures are:*
a. Warning.
b. Fine not more than 30,000 Peruvian tax units which will be in force at the date of the payment.
c. Temporary or definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense.
d. Cessation or restriction of the activity which caused the offense.
e. Suspension or cancellation of the permission, license, concession or any other authorization according to the case.
f. Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.

(...).
136.4. *Remedial measures are:*
a. Courses of compulsory environmental training, whose cost is covered by the offender and whose attendance and approval is an indispensable requirement.
b. Adoption of mitigation measures of the risk or damage.

confiscation of the objects used for the commission of the offense, the cessation of the activity which caused the offense, the suspension or cancellation and partial or total shutdown of the establishments where the activity which caused the offense was carried out. On the other hand, for the mentioned Law, remedial measures are the courses of compulsory environmental training, the adoption of mitigation measures of the risk or damage, the imposition of compensatory obligations and the processes of compliance pursuant to the instruments of environmental management.

On the other hand, the Number 22.2 of the Article 22° of the SINEFA Law[27] considers as remedial measures, the following ones: definitive confiscation of the objects used for the commission of the offense; cessation or restriction of the activities; temporary or definitive shutdown of the establishments where the activity which has caused the possible offense was carried out and the obligation of the party responsible for causing the damage to restore, rehabilitate or repair the changed situation; and if the foregoing is not possible, the obligation is to compensate it in environmental or economic terms.

In this context, through the Guidelines for the Application of Remedial Measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No.

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c. Imposition of compensatory obligations based on the National, Regional, and Local or Sectorial environmental Policy according to the case.
d. Processes of adaptation pursuant to the instruments of environmental management proposed by the competent authority".

27 **Law No. 29325 – Law on the National Environmental Assessment and Enforcement System**
"Article 22°.- Remedial measures
(...)
22.2. Among the measures to be issued are included but are not limited to the following:
a) Definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense.
b) Cessation or restriction of the activity which caused the offense.
c) Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the alleged offense is carried out.
d) The obligation of the party responsible for causing the damage to restore, rehabilitate or repair the changed situation according to the case; and if such is not possible, the obligation to compensate it in environmental or economic terms.
e) Others which are considered necessary to revert or reduce as possible the damaging effect the offending conduct had caused to the environment, the natural resources or health of people.
f) Others which are considered necessary to avoid the continuation of the damaging effect the offending conduct causes or may cause to the environment, the natural resources or health of people. (…)"

29325 approved by Decision of Board of Directors No. 010-2013-OEFA/CD, an important conceptual delimitation is carried out regarding the remedial measures the entity may provide in accordance with the LGA and in the SINEFA Law.

In effect, as emphasized in the Guidelines, a group of administrative measures the LGA considers as "coercive penalties" are specified in the SINEFA Law as "remedial measures" (specifically, the confiscation, the cessation of the activity and the shutdown of the establishments). Thus, in the Number 22 of the Guidelines is established that the administrative authority must consider that the SINEFA Law, which is subsequent to that of the LGA and for the criterion of specialty, its application is preferential for the OEFA. Also, the Guidelines point out that it may be considered that the measures of confiscation, cessation of activities and shutdown of the establishments are remedial (and are not exactly penalty), since these ones do not aim to penalize the offending company but, to return things to the previous condition or mitigate the damaging effects of the damage.

It is important to note that, according to the Regulations of the Administrative Penalty Procedure of the OEFA approved by Decision of Board of Directors No. 012-2012-OEFA/CD, the insertion of administrative appeals suspends the execution of penalties, but not the remedial measures[28] which, in such context is more beneficial to consider the assumptions previously explained as remedial measures.

VII. GUIDELINES FOR APPLICATION OF REMEDIAL MEASURES OF ENVIRONMENTAL RESTORATION AND COMPENSATION APPROVED BY THE OEFA

Although in the previous paragraphs have been pointed out that the OEFA can issue a group of remedial measures of different nature upon the provisions in the legal system in force (measures of compliance, cessation, among others, etc). This article is aiming to present those remedial measures of environmental restoration and compensation, specifically.

The Guidelines for application of remedial measures specified in the Item d) of the Number 22.2 of the mentioned Article 22° of the Law No. 29325 – Law on

28 **Regulations of the Administrative Penalty Procedure of the Agency for Assessment and Environmental Enforcement – OEFA, approved by Decision of Board of Directors No. 012-2012-OEFA/CD**
"Article 24°. - Contestation of administrative acts (…)
24.5. Having appeal granted, only contestation of the imposed penalty has suspensive effect. (…)".

the National Environmental Assessment and Enforcement System (hereinafter, the Guidelines) were approved by the OEFA through Decision of Board of Directors No. 010-2013-OEFA/CD[29].

The Number 22.1 of the Article 22° of the SINEFA Law establishes that the OEFA can issue administrative measures (remedial) considered necessary to revert or reduce as possible, the damaging effect the offending conduct had caused in the environment, the natural resources and health of people.

The Item d) of the Number 22.2 of the mentioned Article 22° establishes that among the measures which may be issued are: the obligation of the party responsible for causing the damage to restore, rehabilitate or repair the changed situation according to the case and, if such is not possible, the obligation is to compensate it in environmental and/or economic terms.

In this regard, the Guidelines approved by the OEFA constitute an important legal instrument allowing the operators of the rules to clarify the legal status and application of remedial measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325, that is, those administrative measures imposed at the end of an administrative penalty procedure in order to restore or compensate the damage or negative impact on the environment.

As explained above, the measures of restoration attempt to rehabilitate, repair or restore the changed situation and adopted in those cases where environmental impacts are reversible. On its part, the measures of environmental compensation are applicable when it is not possible to adopt a measure of restoration, so that its purpose is to replace an environmental good which has suffered serious, irreversible impacts and impossible to be mitigated. In any of the cases, the execution of remedial measures must cause a more burdensome situation for the environment (See the Number 49 of the Guidelines).

In this regard, if the offense committed by the company causes an environmental damage, the OEFA can issue the offender to restore, rehabilitate or repair the changed situation. Only if the restoration, rehabilitation or recovery is not possible, the OEFA will ask the offender for the compensation in environmental or economic terms[30].

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29 Published in the official gazette El Peruano on March 23rd, 2013.

30 GÓMEZ, Hugo. "El deber jurídico de restauración ambiental". En DANÓS, Jorge et ál. (Coordinadores). *Derecho Administrativo en el Siglo XXI. Volumen II.* Lima: Adrus Editores, 2013, p. 459.

The Guidelines are referred to specific notes regarding each of these remedial measures; some of them are of specific interest to emphasize below:

a) In relation to the measures of environmental restoration

- These are oriented to repair the damage caused to the environment, the natural resources and health of people.

- These are not referred to the patrimonial compensation, for instance, it is not necessary the recovery of animals or vegetables of individual property, therefore if someone considers that his possessions have been damaged, this one can initiate the corresponding compensatory action by jurisdictional process.

- Examples of remedial measures of environmental restoration the OEFA may issue:

  (i) In the case a waste fishmeal plant spills its effluents to a canal by saturating this one with waste, its title holder must clean it and then, to adopt measures to reforest the riverbanks which were damaged as a result of this discharge.

  (ii) A hydroelectric power station was built on the top of the basin of a river above 900 meters above sea level. This basin is characterized by its high potential production of river shrimp. The negative impacts were at all levels, from noise pollution and dust produced by explosions carried out for the construction, alteration of the coastal zone for construction of quarries to obtain material for the dam, decrease of water level in the river, slaughter focused on shrimps through the drying of river, reduction of the availability and sizes of river shrimps due to division of the river with a barrier structure preventing the migration of this specie to the increase of illegal extraction of shrimps.

  Since it is impossible to create a new route of migration for river shrimps, the forestation of the riverbanks with native vegetation is determined as a measure of restoration and to develop a management and repopulation program of this specie.

b) In relation to measures of environmental compensation

- Considering the legal status of these compensatory measures, these are oriented to compensate the damage which was caused to the environment

or the natural resources. These measures are palliative and applicable in those situations in which it is not possible to use measures of restoration.

– The application of this measure requires previous analysis of feasibility on what is to be restored.

– These measures of compensation include the replacement or substitution of the natural resources or elements of the environment damaged by others of similar characteristics, type, nature and quality (Number 42 of the Guidelines).

– Examples of remedial measures of environmental compensation the OEFA may issue:

Remedial measures for environmental restoration and compensation

(i) Before a spillage of mining tailings which have damaged the water used for irrigation of certain agricultural plots, the reforestation may be issued as compensatory measure in neighboring lands, since the level of implication of the primitive area does not allow any reforestation.

(ii) Due to a spillage of hydrocarbon and the inhabitability of certain habitats, the displacement of faunal and vegetative populations to other places prepared appropriately for their survival and development is established as a measure of compensation in order to prevent their extinction.

It is important to indicate that the Guidelines point out that the administrative authority (particularly, the Directorate of Enforcement, Penalty and Implementation of Incentives of the OEFA) must support the adoption of one or other administrative measure by analyzing the principles of reasonableness and proportionality.

Also, the Guidelines strengthen the provisions of the Article 40° and 41° of the Regulation of the Administrative Penalty Procedure of the OEFA[31], since the com-

31 **Regulation of the Administrative Penalty Procedure of the Agency for Assessment and Environmental Enforcement – OEFA**
"Article 40°.- Coercive fines
(...)

pliance of remedial measures is compulsory; therefore, its non-observance results in the imposition of coercive fine.

Finally, it is clear that after analyzing comparatively other instrument approved by the OEFA (Methodology for the calculation of base fines and the application of the aggravating and mitigating factors to be used in the adjustment of penalties in accordance with provisions set forth in the Article 6° of the Supreme Decree No. 007-2012-MINAM[32]), it is clear that the imposition of a remedial measure, for instance, has an impact on the reduction of a base fine. It is clear that the State promotes the environmental restoration before the imposition of penalties, considering that the nature of the remedial measure, this one has an effect directly on mitigating the damage of the environment, the natural resources and health of people.

VIII. CONCLUSIONS

The legal system anticipates a series of obligations and commitments by the States in order to regulate effectively the intervention of the private sectors in their territory and, in the strict sense, the economic activities which are carried out and may have a negative impact on the environment, penalizing and establishing its restoration when opportune.

The legal duty of the environmental restoration is constitutional supporting in accordance with the provisions set forth in the Number 22 of the Article 2° of the Political Constitution of Peru. On this basis, in the Peruvian legal system in force is specified that the administrative authority responsible for the environmental en-

40.2. The order which issues precautionary or remedial measure must establish as warning, the imposition of a coercive fine by indicating the deadline for the compliance of the obligation and the amount to be applied in case the non-compliance continues".

"Article 41°.- Imposition of coercive fines

(...)

41.2. The compliance of a precautionary or remedial measure by the company results in a coercive fine not less than one (1) Peruvian tax unit and not more than one hundred (100) Peruvian tax units. This coercive fine must be paid within a deadline of five (5) working days, when expired; the coercive payment will be issued.

41.3. In case the non-compliance continues, a new coercive fine will be imposed by doubling successively and indefinitely the amount of the last imposed coercive fine until such non-compliance is fulfilled with the issued precautionary or remedial measure".

32 Approved by Decision of Board of Directors No. 035-2013-OEFA/PCD, published in the Official Gazette El Peruano on March 12th, 2013.

forcement carries out administrative measures which enable to remedy negative impacts on the environment.

The application of the power to impose penalties of the Administration is not enough to protect the public interest for which it is important the regulations of coercive measures. Through these ones, we attain to protect the public interest clearly, since we do not only attain the companies have disincentives for the commission of offending conducts which will affect the society potentially (effects of the administrative penalty) but also, the direct consequences of the commission of such conducts are reverted.

Concerning remedial measures specified in the Law No. 28611 – General Law on Environment and the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System, the administrative authority must consider that the Law No. 29325, which is subsequent to that of the Law No. 28611and for the criterion of specialty its application, is preferential.

In this regard, the measures of confiscation, cessation of activities and shutdown of the establishments are remedial (and are not exactly penalty), since such measures do not attempt to penalize the offending company but, to return things to the previous condition or mitigate the damaging effects of the damage.

The Agency for Assessment and Environmental Enforcement - OEFA has published the Guidelines for the Application of Remedial Measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325, approved by Decision of Board of Directors No. 010-2013-OEFA/CD.

Such Guidelines constitute an important legal instrument allowing the operators of the rules clarify the legal status and application of remedial measures specified in the rules previously mentioned, as well as to guarantee predictability when the regulatory bodies of the OEFA take part.

Regarding the explanation made throughout this article, particularly, the review of the examples of environmental restoration and compensation, it is clear that the issuance of remedial measures requires distinguishing its purpose and status. Also, it is required for its issuance to analyze the principles of reasonableness and proportionality inevitably linked to a pseudo-scientific work by the administrative authority which must justify its decision technically.

Upon the application of remedial measures of environmental restoration and compensation, it may be seen that the State prioritizes the restoration of the environment damaged negatively more than the imposition of penalties.

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THE ENVIRONMENTAL OFFENDERS REGISTER (RINA) AS A TOOL OF ENVIRONMENTAL ENFORCEMENT

MARIO HUAPAYA NAVA
ERNESTO SOTO CHÁVEZ

"All policies that use information as a tool are premised on the assumption that people respond to information. Therefore, to understand this policy tool, one has to understand the way in which information influences behavior"
The tools of government (*)
Janet A. Weiss

Summary

The authors of this article analyze the Environmental Offenders Register – RINA, these ones emphasize that it is a tool implemented by the OEFA, as part of a change in the approach of the environmental enforcement where the respect to the environmental rules and commitments is promoted through transparency and circulation of information.

I. Introduction. II. RINA as an expression of public policy as part of the new approach of enforcement. III. RINA from a Contemporary Administrative Law perspective: administrative or legal register? IV. RINA from an Economic Analysis perspective. V. Content, implementation and operation of RINA. VI. Conclusions.

(*)Weiss, Janet A. "Public Information". En Salamon, Lester M. *The tools of government. A guide of the new governance,* Oxford University Press, 2002, p. 218.

I. INTRODUCTION

Pursuant to the provisions and development of the Law No. 28611 – General Law on the Environment[1] (hereinafter, LGA), the Agency for Assessment and Environmental Enforcement (hereinafter, the OEFA) approved the Decision of Board of Directors No. 016-2012-OEFA/CD, which provides the implementation of the Regulation of the Environmental Offenders Register (hereinafter, Regulation), in which the repeating offenders who are qualified as such will be registered by the OEFA.

The Environmental Offenders Register (hereinafter, RINA) constitutes a tool of the group of public mechanisms and policies implemented by the OEFA as part of a change in the approach of the environmental enforcement, where one of the main objectives consists of promoting the respect to the environmental rules and commitments through transparency and circulation of information.

Along the same lines, the implementation of the Administrative Acts Registry is also included, the Good Environmental Practices Registry (in process), in general, all the efforts of training, institutional agreements, public reports and publications of the OEFA in the exercise of its duties to be more and more informed from the citizen's right to the environmental justice.

In the same perspective, the OEFA has planned together with the Methodology for the Calculation of Base Fines and Application of Aggravating and Mitigating Factors[2], to act as a disincentive to the commission of environmental offenses, through the RINA:

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1 **Law No. 28611 – General Law on Environment**

"Article 139°.- The Good Practices and Environmental Offenders Register

139.1. The National Environmental Council – CONAM which implements within the National Environmental Information System, a Register (…) of those who have not fulfilled their environmental obligations and whose responsibility has been determined by the competent authority.

(…)

139.3. An environmental offender is that who is exercising or having exercised any economic or service activity causing environmental impacts repeatedly for non-compliance of the environmental rules or obligations such offender was committed in his instruments of environmental management".

2 Approved by Decision of Board of Directors No. 035-2013-OEFA/PCD.

(i) By aggravating penalties for those who repeat an offense when failing to comply with the environmental rules; therefore, acting as a disincentive to new damaging conducts from the same offender and;

(ii) By acting as a disincentive to new potential offenders by exemplifying negatively the situation of the offenders already included in the RINA.

In both cases, the information aggravates the "cost" for the companies which commit environmental offenses.

In this regard, this article analyzes the scopes, the support and the main characteristics and effects of the RINA from an economic and legal perspective, as well as its application by the OEFA.

II. RINA AS AN EXPRESSION OF PUBLIC POLICY AS PART OF A NEW APPROACH OF ENFORCEMENT

The implementation of the RINA is included within the new approach of environmental enforcement proposed by the OEFA which aiming to align the delicate balance between the exercises of individual freedoms with the protection of the environment. One of the objectives of this new approach is to attain more transparency and diffusion of the environmental enforcement actions.

In order to attain such objective, registers of all kind included as tools of public policy, are means of expression of the professed transparency or open governments where the citizen exercises his right, without restrictions, to access to the information as a consequence of the exercise of *ius imperium*, understanding that this information allows the citizens participate in public matters and make appropriate decisions for the exercise of their other rights.

It is extensively stated that the right to access to the information in transparency or open governments, for instance, through administrative registers as the RINA, contributes to the exercise of the fundamental rights[3], as well as to enjoy a balanced and sound environment or the freedom when deciding or not to contract with a company registered as environmental repeating offender.

3 FREYRE, Milagros y Rachel JIHYUN NAM, "El Acceso a la Información Pública, un Derecho para ejercer otros Derechos", *Gestión Pública y Desarrollo* No. 73. Lima, año 6, número 73, 2013, pp. A5 – A8.

In Peru, when establishing administrative registers is extended in practice; particularly, the registers of offenders are already a constant. The Register of Penalties of the Supervisory Body for Investment in Energy and Mining (OSINERGMIN) is another case, which the same as the RINA provides information used as background for the imposition of new penalties; the Register of Offenses and Penalties of the National Institute for the defense of Competition and the Protection of Intellectual Property (INDECOPI), which publishes the penalties imposed to companies or suppliers in order to guide the consumers when making their decisions of consumption; the Register of Disqualified Companies to contract with the Supervising Agency of the Government Procurement (OSCE), which includes suppliers, participants, bidders or sanctioned contractors with disqualification by the Government Procurement Court; the Register of the Ministry of Labor and Employment Promotion (MTPE), which includes the results of work inspections concluding with an order which states non-compliances in labor matters and the Register of Penalties imposed by the Supervising Agency for Private Investment in Telecommunications (OSIPTEL), among others.

As may be seen, the use of administrative registers is a public policy issued in the Peruvian Public Administration, inspired on the transparency ensuring to guide the citizenry in order to comply with the environmental regulatory framework and to maximize the disincentive of the commission of environmental offenses.

In that context, the RINA and other mechanisms of transparency of the OEFA makes more sense when considering the fundamental right and duty that all citizens have to contribute to an effective environmental management and to protect the environment, as stated in the Article 1° of the LGA.

In that context, the elements of the RINA will be reviewed from the perspective of the administrative registries in general and from its economic implication.

III. RINA FROM A CONTEMPORARY ADMINISTRATIVE LAW PERSPECTIVE: ADMINISTRATIVE OR LEGAL REGISTER?

The registers implemented by the State can be legal or administrative. Although both share the characteristic as regards to the systematization of the information for its circulation, the powers of the effects these ones might cause is which differentiate them.

Regarding legal registers, these are characterized when conferring legal effects to the acts, agreements or simple data adhered to them. In this regard, the legal re-

gisters confer or enable the exercise of rights to the company from the moment of the record. In such cases, the record in the register serves as an authentic operating authorization[4], as noted above:

> *"Other (...) types of registry records appear which constitute authorizing administrative decisions, since the investment of the relative prohibition is not carried out with the request filed by the interested party, but with the exercise of the administrative power"*[5].

The following are examples of legal registers, the Register of Real Property where mortgages are registered and administered by the National Superintendent of Public Registers[6], the Registry of Trademarks and Patents of the INDECOPI or the Registry of Added Value Enterprises of the Ministry of Transport and Communications. In such cases, the record in the registry grants certain rights and publicizes them, that is to say at last resort, a means of legal certainty.

On its part, the administrative registries are only operational, since they are used for public entities to register and/or publicize **information related to the exercise of their powers**. That is to say, these ones **do not** grant real binding effects to the information added by them, even these ones do not **constitute or enable the exercise of rights**, but are used for the public entities so that these ones may exercise their powers and accomplish their objectives.

The information of these registries, rather than for the companies, is useful for the Public Administration to develop its powers related to the typical activities of limitation (referred before as regulatory power of the state), activity for development and **guarantee** of providing public services, among others.

4 Certain sector of the doctrine supports that it is not really the case of autonomous operating authorizations, but related to others such as license or authorization. In that regard, see ARROYO, Luis y Luis ORTEGA, *Libre empresa y títulos habilitantes.* Madrid: Centro de Estudios Políticos Constitucionales, 2004, p. 417.

5 Ibidem. p. 415.

6 Certain doctrinaire sector considers that the record in the Public Registries do not include rights, but only opposability before third parties acting in good faith. In any case, the mortgages are included upon their record in the register and not by signing the mortgage contract; in that case the record may be only declaratory. For further explanation of this issue, revise: FORNO, Hugo. "El contrato con efectos reales". *Ius et Veritas.* Lima, número 7, 1993, pp. 77-87.

For instance, the Registry of Easements of the Ministry of Energy and Mines is used for this entity to exercise actions of control on the companies which ask for the imposition of easements as part of the execution of certain projects. Also, the Statistical Registry of Exporters and Sectors which carry out activities of exportation of services was created by the Law No. 29646 – Law on Development for Foreign Trade of Services, *"in order to monitor its evolution and updating"*; so that, the National Institute of Statistics and Information Technology (INEI) can monitor information, in this case related to exportations.

In that context, it is worth considering if the RINA grants any legal effect to the information included in it, in which case this one may be qualified as legal register, or if this is used as basis so that the public entities exercise their powers in which case this may be qualified as administrative register.

As it may be detailed below, the information according to the Article 6° of the Regulation of the RINA which must be publicized is the information related strictly to identify the offender and the environmental offense which was committed. Such information is used for the OEFA so that this one may qualify assumptions of "reoccurrence" as part of administrative penalty procedures, that is, in the exercise of its powers[7] to impose penalties and enforcement.

Considering these characteristics, the information of the RINA is basically useful so that the OEFA exercises its powers to impose penalties and enforcement, and accomplishing its objectives to prevent or act as a disincentive to the commission of environmental offenses; the RINA is qualified as administrative register.

It is important to note that the record in the register does not grant the condition of repeat offender. Such condition is granted by the order of the corresponding body of the OEFA to be subsequently added to the RINA in order to publicize it.

IV. RINA FROM AN ECONOMIC ANALYSIS PERSPECTIVE

4.1 Objective of the RINA: Act as a disincentive to the commission of administrative offenses

From the perspective of the theory of justice, the punishment is the proportional payment by the commission of offenses and infringements, respectively within

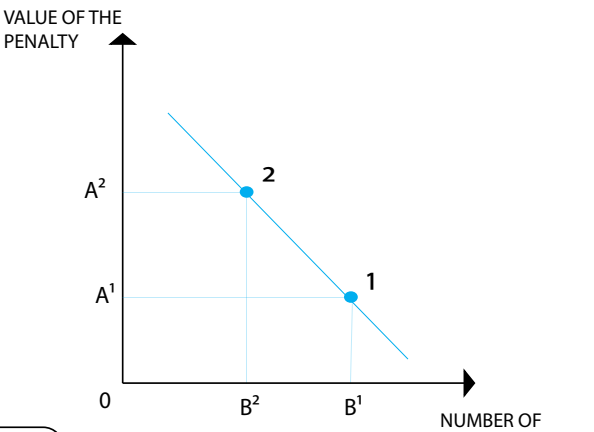
7 In accordance with the Article 7° of the RINA, before the first reoccurrence the offender is registered in the RINA. Once added to the register, the OEFA will come to the RINA in order to verify the second or next reoccurrence of the offender, depending on this, the imposed fine will be increased since the reoccurrence is an aggravating factor of the fine.

the scope of Criminal Law, penalty and Administrative Law, if it deals with an inflicted sanction for violating the legal system.

However, the penalty is not only used to infringe sanctions established by the commission of illegal acts but also, to act as a disincentive to the commission of offenses through the imposition of fines (pecuniary penalties) or penalties of other nature (non-pecuniary penalties).

In this regard, the Explanatory Manual of the Methodology for the Calculation of Fines of the OEFA[8], points out that *"the first and main objective (disincentive) is that the penalties which are imposed, dissuade the offender to commit the same conduct again (specific disincentive) and at the same time, to dissuade the rest of companies to commit a similar conduct (general disincentive)"*. Such relation between the "cost" of the penalty[9] and the commission of offenses is illustrated in the following graph:

Graph 1



Point 1 = $f(A^1,B^1)$

Point 2 = $f(A^2,B^2)$

Source: Own elaboration

8 Approved by Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD, published in the Official Gazette El Peruano on March 12th, 2013.

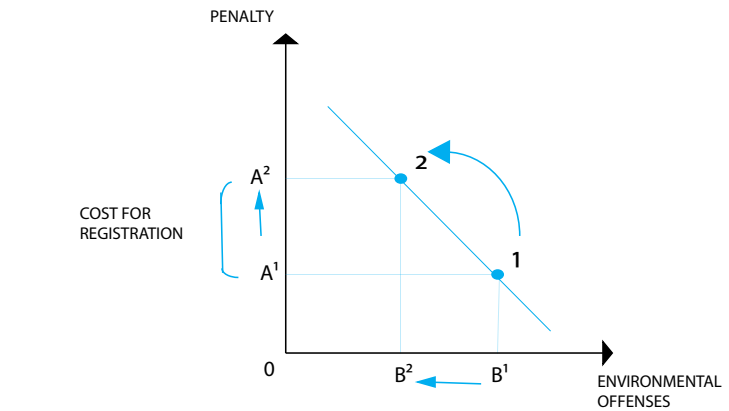
9 In order to emphasize the effects of the cost of the penalty, the example given does not consider the factor "probability of detection".

As may be seen, the penalties which are imposed are indirectly proportional to those environmental offenses, so that if the penalty increases by crossing from the point A1 to the point A2, the number of environmental offenses decreases by crossing from the point 1 to the point 2.

Likewise, the implementation of the RINA is also a mechanism, the same as the penalty, aiming to act as a disincentive to the commission of offenses in order to publicize the identity of those repeating offenders. Thus, the Statement of Reasons of the RINA[10] points out that its purpose is *"to promote the transparency and diffusion of the information related to repeating offenders of the environmental rules"*. The objective is the same but the mechanism is different.

Seen from an economic perspective, the Register is another "cost" assumed by those people who repeat an offense in the commission of offenses raising the price of the total cost for committing administrative offenses, since for the "cost" of the offense, the "cost" of the register is added. The effect results in the major disincentive for committing environmental offenses; this situation is illustrated in the graph below:

Graph 2



Source: Own elaboration

10 The Statement of Reasons of a legal rule is not regulatory, but this is a very important element to carry out activities of regulatory interpretation. The Constitutional Tribunal has considered this value by pointing out that *"in order to clarify the sense of the rule, it is useful to recur to the Statement of Reasons"*. In that regard, see the legal basis 20 of the judgment attributed to the File No. 00019-2008-PI/TC.

As may be seen, because of the RINA, the total cost of the offense increases by crossing from the point A1 which does not consider the cost for registration to the point A2 which considers the cost for registration, for this reason the number of environmental offenses tends to increase. That is to say, when a penalty which was imposed to a person is greater than his first penalty, this one will have incentives not to commit new offenses.

Thus, the number of environmental offenses will decrease by crossing from the point B1 to the point B2, since as pointed out above, the "cost for registration" in addition to the cost of the penalty, generates a considerable disincentive in the commission of the environmental offenses.

4.2 Characteristics of the RINA: free and public access

Likewise, in order to accomplish the purpose of the Register which is to act as a disincentive to the commission of offenses, the access to the information included in it must be public and free, as specified in the Article 4° of the Regulation of the RINA.

In legal terms, it is necessary to explain these characteristics because there is a right of access to the public information whose content guarantees everybody to access to it without need to have any basis and for free[11]. However, there is an economic basis which supports these characteristics of the RINA and the legal interpretation does not explain it.

The public nature results in disseminating the information to the society and at any interested party's disposal, provided that the information is not secret, reserved or confidential according to the Law No. 27806 – Law on Transparency and Access to the Public Information[12].

11 The payment carried out for the cost of reproduction of the information is not qualified as consideration.

12 Published in the Official Gazette El Peruano on August 3rd, 2002. The Articles 15°, 15°- A and 15°-B of the Law No. 27806 – Law on Transparency and Access to the Public Information establish the assumptions of confidential, reserved and secret information, respectively.

After revision of the Article 6°of the Regulation of the RINA[13], it may be verified that the information included in it, is strictly related to identify the person and the environmental offense which was committed. As a consequence, the content of the RINA is not qualified as confidential, reserved or secret information, allowing its circulation in a certain way.

The public nature of information of the Register is based on *"to the extent that the circulation of the information is necessary to satisfy the business (...), at least it is required any means of circulation"*[14]. In that context, in the case of the RINA to prevent damages to the environment by acting as a disincentive to the commission of offending conducts, is necessary to circulate the information of those who violate the environmental rules repeatedly. The effect of the RINA helps to improve the conduct of the offenders and the other people, as expressed previously.

On the other hand, the free nature of information of the Register entails that such information is provided without negotiating any payment. At first, there is a cost for the information, as any resource, based on its production, as explained by

13 **Decision of Board of Directors No. 016-2012-OEFA/CD- Approve Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement – OEFA**
"Article 6°.- Content of the RINA
6.1. The RINA must include, as least, the following information:
a) Name, business name or company name of the environmental repeating offender.
b) National Identity Document number or Unique Taxpayer Registry number (RUC) of the environmental repeating offender and name of his legal representative of the period in which the facts occurred.
c) Economic Sector to which it belongs.
d) Number and date of the order which imposed or confirmed the penalty and the qualification of environmental repeating offender for each offending conduct, as well as the information of the corresponding administrative file.
e Offending act and substantive rule which was infringed.
f) Place and date of verification of the offending conduct.
g) Type of penalty and amount in case of fine.
h) Issued remedial measures, according to the case.
(…)".

14 EPSTEIN, Richard. "El ocultamiento, uso y divulgación de la información". *Themis,* Lima, 2000, número 44, pp. 7- 8.

the hypothesis of the "Tragedy of the Commons"[15], the resources sharing for free are unsustainable in the long-term.

However, the free nature of the information included in the RINA is, on one hand, based on the necessity of providing access to relevant information for the society; on the other hand, on its characteristic of non- rivalry.

Indeed, as the objective is to act as a disincentive to the commission of environmental offenses, the free access to the information of the RINA facilitates the accomplishment of this objective in a more effective way but, if the consideration intercedes, in that case, the effect of the disincentive may be reduced due to the small number of people who may access to the information of the Register.

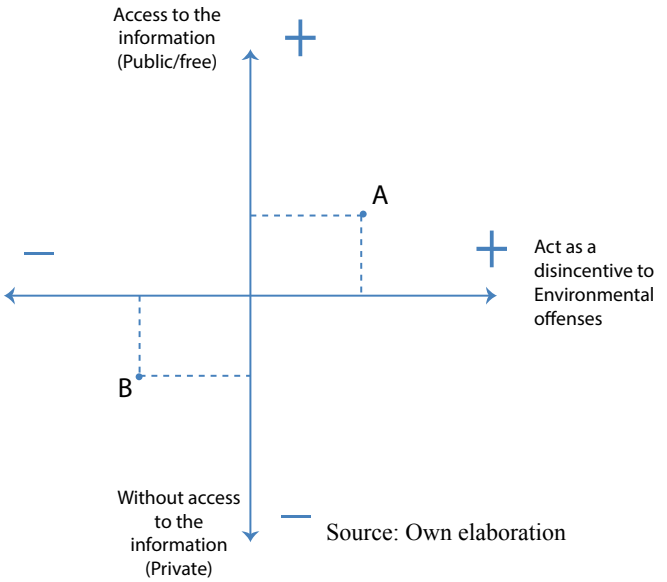
The free access to the information of the RINA is also based on its private good condition, that is, in the possibility of several people to access to such information without restrictions for each other, this situation makes difficult to create a market around this type of information, since it is very expensive to establish mechanisms of control in order to attain that only those people who pay for the information use it exclusively[16].

Therefore, the free and public access to the information of the Register, instead of the expensive and reserved access, may contribute to a more effective way to accomplish the objectives of the RINA, this situation is illustrated in the graph below:

15 The "Tragedy of the Commons" is a metaphor popularized by the Biologist Garret Hardin who explains how the free and common use of the limited resources finally results in its extinction. The metaphor is based on a group of shepherds who used the same pasture. One of them thought if he added one more sheep to those he grazed; it would not affect the common pasture. Each of the other shepherds also thought they may win one more sheep without damaging the grass. However, the common use caused such deterioration, although it was individually imperceptible that caused the extinction of the pasture and all, animals and shepherds died because of hunger.

16 A mechanism may consist of preparing contracts which include clauses of confidentiality with each of the people who access to the information of the Register after payment.

Graph 3



Source: Own elaboration

As we can see, the free and public information on the identification of environmental offenses has a positive effect when causing a greater impact on the disincentive to repeat an offense in environmental offenses; this situation is illustrated with the point A.

On the contrary, if the information is reserved and expensive, the access to the information for the repeating offenders is reduced, a situation which reduces the disincentive of the commission of environmental offenses as illustrated with the Point B.

In sum, the design of the RINA considers that the most efficient alternative to accomplish its objectives is to provide free and public access to the information contained in the Register.

V. CONTENT, IMPLEMENTATION AND OPERATION OF RINA

Having analyzed the scopes and basis on the design of the RINA, which is an expression of a transparency public policy and the new approach of environmental enforcement, from an economic and legal perspective, it is important to analyze its content, implementation and operation.

The Regulation of the RINA, where all its operation rules rest on, has eight articles, two Final Complementary Provisions and one single Temporary Complementary Provision. The rule has set a deadline of implementation for 120 working days expired on June 25th, 2013.

As every administrative Register, the fundamental content of this one is constituted by the conditions of inclusion of companies, as well as its permanent and exit specific conditions. These are the issues which distinguish the Regulation of the RINA; those ones will be analyzed below.

For the first one, the identification and conditions of inclusion of companies in the RINA, the application of the "*Guidelines which establish criteria to qualify as repeat offenders to the environmental offenders within the scope of powers of the OEFA"*[17] *is required.*

It is necessary to say that the Number 139.3 of the Article 139° of the LGA[18] considers as environmental offender that one who is exercising or having exercised any (service) or economic activity which causes environmental impacts repeatedly to have infringed the environmental rules or the obligations to which this offender is committed in its instruments of environmental management.

17 Approved by Decision of Presidency of Board of Directors No. 020-2013-OEFA/PCD.

18 **Law No. 28611 – General Law on Environment**
"Article 139°.- The Environmental Offenders and Good Practices Register
(...)
139.3. An environmental Offender is that one who is exercising or having exercised any service or economic activity causes environmental impacts repeatedly for non-compliance of the environmental rules or obligations to which this one is committed in its instruments of environmental management.
(…)".

Therefore, in the Number 139.5 of the same Article[19] is established that the authority of environmental enforcement will determine the procedure of record, the special formality in cases of seriousness of environmental damage or reoccurrence of the offending party, as well as the grounds, requirements and proceedings for the execution of the corresponding register.

Related to the authority in charge, the Item e) of the Article 40° of the Regulation of Organization and Roles of the Agency for Assessment and Environmental Enforcement – OEFA approved by Supreme Decree No. 022-2009-MINAM[20], establishes that the role of the Directorate for Enforcement, Penalty and Implementation of Incentives (hereinafter, the DFSAI) is to set out and administer the Environmental Penalties and Offenders Register. This role is proved and specified in the Number 3.3 of the Article 3° and the Article 5° of the Regulation of the RINA[21], which specifies that among the roles of such Directorate, is to issue orders to qualify the companies as repeat offenders apart from publicizing and updating the Register.

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19 **Law No. 28611 – General Law on Environment**
"Article 139°.- The Environmental Offenders and Good Practices Register
(...)
139.5. The CONAM determines the procedure of record, the special formality corresponding to those cases of seriousness of environmental damage or reoccurrence by the offending party, as well as the grounds, requirements and proceedings for the execution of the register, through Regulation".

20 Published in the Official Gazette El Peruano on November 15th, 2009.

21 **Decision of Board of Directors No. 016-2012-OEFA/CD – Approve Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement – OEFA**
"Article 3°.- Scope for application of the rule
(...)
3.3. The qualification of reoccurrence must be determined in the decision issued by the Directorate for Enforcement, Penalty and Implementation of Incentives – DFSAI in its quality of Decision-making Authority of the OEFA".

Decision of Board of Directors No. 016-2012-OEFA/CD – Approve Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement – OEFA

" ***Article 5°.- Competent Authority to write a note in the RINA***
The DFSAI is the competent authority for the publication and updating of the RINA. To that end, this line body of the OEFA will designate the responsible for such duty".

Regarding the procedure for the Environmental Offenses Register, the Number 4.2 of the Article 4° of the Regulation of the RINA[22], establishes that the DFSAI as the authority in charge will have a deadline of fifteen working days to add the company in this Register from the order which qualifies it as repeat offender has been consensual, in other words, after having the deadline expired without having lodged any administrative appeal by the company, either remedy of appeal or appeal for reconsideration within the deadline of 15 days pursuant to the provisions of the Article 207° of the Law No. 27444 – Law on the General Administrative Procedure (hereinafter, LPAG)[23].

In the same article is established that the deadline of fifteen working days is also applicable once the administrative procedure exhausts all available administrative remedies with the decision of the higher authority, that is, that the Environmental Enforcement Tribunal confirms the qualification of repeat offender and therefore, this one exhaust all available administrative remedies.

It is important to emphasize that the extremity of the administrative decision is conflicting when establishing the inclusion in the Register, particularly if the qualification of repeat offender is erroneous; that one represents a violation to the right, image or trademark of the company, since this one would have to bear the burden to be registered in the RINA improperly.

On the other hand, it is possible a contestation by contentious administrative process so that the decision is analyzed by the Judiciary. However, the fact of lod-

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22 **Decision of Board of Directors No. 016-2012-OEFA/CD – Approve Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement – OEFA**
"Article 4°.- Record of information in the RINA
(...)
4.2. The information of environmental repeating offenders must be registered in the RINA within fifteen (15) working days after: (i) having been consensual the Decision of the DFSAI or (ii) exhausts all available administrative remedies with the order of the Environmental Enforcement Tribunal".

23 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 207°.- Administrative Appeals
207.1. The administrative appeals are:
a) Appeal for reconsideration
b) Remedy of appeal
c) Revision of appeal
207.2. The term to lodge appeals is fifteen (15) final days and these ones must be resolved within the deadline of thirty (30) days".

ging the claim does not suspend the act which is carried out and that register of the company in the RINA establishes, since the suspensive effect to file the claim is not specified, therefore, the enforceability of the decision of the Administration remains undamaged.

The administrative act of register in the RINA may remain firm if the Judiciary dismisses the opinion of the complainant, but if this one was protected, the act should be annulled, leaving the decision of the Environmental Enforcement Tribunal ineffective, the same may occur if a legal decision for suspension was obtained for a precautionary measure of the penalty act, that is why the same decision was qualified as repeating.

Likewise, regarding the amendments or corrections of the decisions by the Public Administration, the Article 8° of the Regulation of the RINA considers the possibility that the content of the RINA is rectified, excluded, clarified or amended[24] at the request of the interested party.

To this end, a deadline of 15 working days has been established after receipt to assess and determine on the request of the interested party.

From this perspective, it is important to consider that this request, set out without prejudice to the ordinary administrative appeals, has administrative request nature set out in exercise of the right to request specified in the Article 106° of the LPAG[25], which empowers to file requests of general and particular interest, contradict administrative acts, ask for information, file inquiries and requests for pardon.

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24 **Decision of Board of Directors No. 016-2012-OEFA/CD – Approve Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement – OEFA**
"Article 8°.- Rectification, exclusion, clarification or amendment of the information included in the RINA
8.1. The information reported in the RINA will be rectified, excluded, clarified or amended by law or at the request of the interested party. The requests will be filed before the DFSAI of the OEFA and attended within a maximum deadline of (15) working days after receipt.
8.2. The term of the environmental repeating offender in the RINA will be excluded when there is a judgment issued by a court authority leaving the decision of the Environmental Enforcement Court ineffective or when the administrative act imposed by the penalty has been subject to suspension through a precautionary measure issued by court authority".

25 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 106°.- Right of administrative request
106.1. Any company may promote in writing, individually or collectively, the start of an administrative procedure before all and any of the entities by exercising the right of request considered in the Article 2 sub-paragraph 20)of the State Political Constitution.

Regarding the same matter, it is important to state, even if this one has not expressly been adhered to the RINA, the amendments or corrections may be impelled by Legal alternative dispute resolution of the Public Administration. In such cases and if it deals only with a factual error, for instance, in the name of the company, this one may be under responsibility of the DFSAI by rectification of factual error in accordance with the Article 201° of the LPAG[26].

On the other hand, if the error to be corrected is from other nature such as, for instance, in the (substantial) qualification of the quality of repeat offender of the company; therefore, the Environmental Enforcement Tribunal is responsible for declaring the nullity of the administrative act of the Register since the higher authority is the body which issued the act, in accordance with the Number 11.2 of the Article 11°[27] and Number 202.2 of the Article 202°[28] of the LPAG.

106.2. The right of administrative petition includes the powers of filing requests at the company's particular interest, to carry out requests in general interest of the group, and contradict administrative acts, the powers to ask for information, file inquiries and file requests for pardon.

106.3. This right involves the obligation to give the interested party a response in writing within the legal term".

26 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 201°.-Rectification of errors

201.1. The arithmetical or factual error in the administrative acts may be rectified with retrospective effect by law or at the request of the companies at any time, provided that the substantial of its content and the sense of the decision are not modified.

201.2. The rectification adopts forms and methods of communication or publication corresponding to the original act".

27 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 201°.- Competent instance to declare the nullity

11.1. The companies set out the nullity of the administrative acts in which they are concerned by the administrative appeals specified in the Title III Chapter II of this Law.

11.2. The nullity will be well-known and declared by the superior authority which issued the act. If this is an act issued by an authority which is not subject to hierarchical subordination, the nullity will be declared by decision of the same authority".

28 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 202°.- Nullity by law

(...)

202.2. The nullity by law can be only declared by the senior public employee who issued the act that was invalid. If this is an act issued by an authority which is not subject to a hierarchical subordination, the nullity will be declared by decision of the same government employee.

Once the companies are registered for a firm or consensual administrative act, the following matter to be resolved is the deadline of term of these companies in the Register.

In that regard, the deadline will be determined gradually and progressively if this is a first reoccurrence and provided that the punishable party has paid the imposed fine and entirely complied with the issued administrative measures, its term will be only of thirty working days.

On the other hand, if this is a second reoccurrence, the information of the company will be still registered in the RINA for a period of four years. The expected effect is that the consecutive reoccurrences merit better responses by the administrative authority.

It is clear that the decision of establishing certain term periods, as in most similar cases, is a decision free of the administrative authority, in this case of the OEFA, adopted with criteria of reasonableness, considering as a reference, even, the LPAG.

Thus, the Statement of Reasons of the RINA indicates that the period of four years for the consecutive reoccurrences is a reasonable period if the seriousness of the offending conduct is considered, which entails a second reoccurrence, that is, the same conduct classified as offense carried out more than twice. Consequently, the authority strengthens the disincentive when repeating an offense in the same offense, both to the offender and the other companies.

It is important to emphasize that the mentioned period of four years coincides with the period specified in similar regulations[29] and the period of expiration which the authority has to determine the existence of administrative offenses in accordance with the Number 233.1 of the Article 233° of the LPAG[30].

Apart from declaring the nullity, the authority will be able to resolve on the merits of the case if this one has enough elements for it. In this case, this extremity will be only object for reconsideration. When it is not possible to be pronounced on the merits of the case, the reinstatement of the proceeding will be established when the defect was carried out".

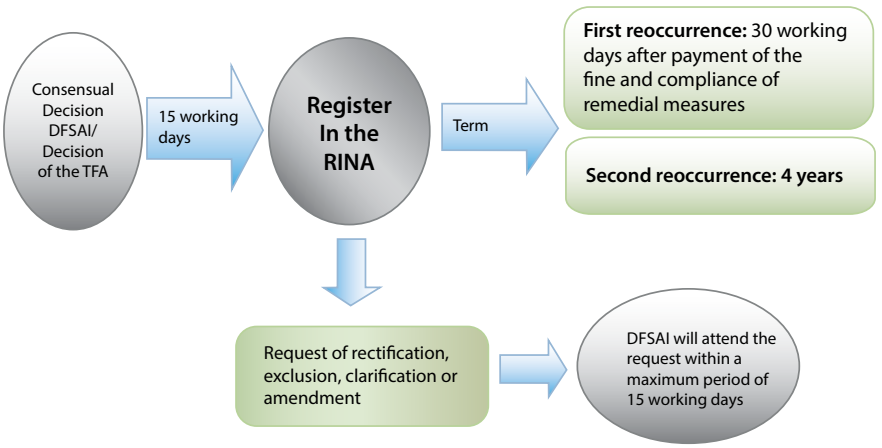
29 In terms of protection to the consumer, there is the Registry of Offenses and Penalties to the Code of Protection and Defense to the consumer, which has a term period of four (4) years for any type of offense, without necessarily referring to the reoccurrence in accordance with the Article 5° of the Regulation of the Registry of Offenses and Penalties to the Code of Protection and Defense to the consumer approved by Supreme Decree No. 029-2011-PCM.

30 ***"Article 233°.- Statute of limitations***
233.1. The power of the authority to determine the existence of administrative offenses is limited in the period established by the special laws, without prejudice to the calculation

As a result, the decision of maintaining the information of the company in the RINA for a long period (second reoccurrence) does not violate the right to the statute of limitations, that is, with the passage of time this one prevents the authority to initiate a penalty proceeding against it. Understanding that this period also makes sense, since as second repeat offender may repeat a third and fourth reoccurrence and its condition of being registered is very useful for the OEFA to identify it.

The procedure for the register of the repeat offenders in the RINA, as explained in the previous paragraphs is represented in the following flow chart:

Graph 4



Source: Own elaboration

It is important to emphasize that the content the RINA organizes is related to information referred to the name, business name or company name of the offender, the economic sector which it b elongs to, the offense, the substantive rule which was infringed, type of penalty, amount of the fine which was imposed, the remedial measures which were issued, among others.

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of the expiration related to the other obligations derived from the effects of the commission of the offense. In case this one is not determined, such power of the authority will expire after four (4) years.
(...)".

In addition, the interested company will be also able to ask for the register in the RINA on the existence of a contentious administrative process brought against the order of the Environmental Enforcement Tribunal which in last instance confirmed the offense, as well as the remedial actions, the correction of the offending conduct, the compliance of remedial measures and other similar information.

VI. CONCLUSIONS

The RINA constitutes a tool of the group of public mechanisms and policies implemented by the OEFA as part of a change in the approach of environmental enforcement, through which the respect to the rules and environmental commitments are promoted by transparency and circulation of information.

For instance, the right to access to the information through administrative registers as the RINA contributes to the exercise of fundamental rights such as: to enjoy a balanced and healthy environment or the freedom to decide not to contract with a company registered as environmental repeating offender.

The legal registers grant or entail the exercise of rights to the company from the moment of its registration; since the register is a means of legal certainty in last instance. These registers are intended to the private sectors in order to provide certainty to their legal relations.

The administrative registers do not grant real legal effects to the information added by these ones, but are used for the public entities in order to register and publicize information related to the exercise of their powers and accomplish their objectives. These ones are intended to provide information to the Public Administration for the improvement of its typical activities of limitation, development of guarantee of providing public services, among others.

The RINA is qualified as an administrative register, since this is useful so that the OEFA exercises its penalty and enforcement powers and accomplishes its objectives to prevent or act as a disincentive to the commission of environmental offenses.

The RINA is a mechanism, the same as the imposition of penalties, aiming to act as a disincentive to commission of offending conducts in order to publicize the identification of those environmental repeating offenders.

While a rational economic agent receives a penalty greater than the initial penalty, this one will have incentives to commit fewer offenses in a cost-benefit analysis. Therefore, the commission of environmental offenses will reduce due to

"cost for registration", in addition to the cost of the penalty; a major disincentive is generated to the commission of environmental offenses.

The free and public information of the RINA on the identification of the environmental offenders has a positive effect when producing a major impact on the disincentive which may repeat an offense in environmental offenses.

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APPLICATION OF REOCCURRENCE ON ENVIRONMENTAL OFFENSES

ZAIRA OCAMPOS CANO
ERICK GARCÍA CERRÓN (*)

Summary

This article analyzes the application of reoccurrence on environmental offenses by the OEFA which are based on the improvement of the power to impose penalties, in environmental matters, by the Public Administration. To the same extent, their scopes and elements adjusted to it are developed.

Introduction. II. Reoccurrence in the Peruvian legal system. III. Reoccurrence on environmental offenses. IV. Application of reoccurrence by some administrative regulatory bodies. V. Conclusions.

I. INTRODUCTION

The improvement of the power to impose penalties by the Public Administration, in environmental matters, constitutes a manifestation of the importance that the protection of the environment has gained in order to maintain an appropriate social order. This fact has entailed the State to exercise its power of limitation facing any activity that may be harmful, that is, dangerous or vulnerable to deteriorate the environment when increasing its position to a level of public policy. For this purpose, it may be appealed to the imposition of penalties or asked for the compliance of the responsibilities established by the rule in force.

Along the same lines, the Agency for Assessment and Environmental Enforcement (OEFA) in view of the penalty and enforcement duties conferred by Legislative Decree No. 1013 - Legislative Decree which approves the Law on Creation, Organization and Duties of the Ministry of Environment[1], Law No. 29325 – Law

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1 Published in the Official Gazette El Peruano on May 14th, 2008.

on the National Environmental Assessment and Enforcement System[2] (hereinafter, SINEFA Law) approved the Decision of Board of Directors No. 020-2013-OEFA/PCD, rule in which the "Guidelines which lay down the criteria to qualify as repeat offenders the environmental offenders within its scope of powers" were established (hereinafter, Guidelines)[3].

According to its Statement of Reasons, the objective of the mentioned Guidelines is to establish the criteria, so that the Directorate for Enforcement, Penalty and Implementation of Incentives and the Environmental Enforcement Tribunal of the OEFA qualify as repeat offenders the environmental offenders detected as a result of the administrative penalty procedures these ones determine; these ones are considered for the purpose of the adjustment of the environmental penalties and the incorporation of the repeating offenders in the Environmental Offenders Register (RINA).

In this regard, this article aims to carry out a technical analysis of the mentioned rule in order to delve into the criteria established by the OEFA so as to delimit the reoccurrence as an aggravating circumstance of the offenses in environmental matters, as well as its characteristics, elements and effects.

II. REOCCURRENCE IN THE PERUVIAN LEGAL SYSTEM

2.1. Reoccurrence as a legal institution of the Criminal Law

The reoccurrence as a legal institution is based on the Criminal Law. In the Peruvian case, references may be found in the Criminal Law 1924, which specified in its Article 111° "repeat offender" was that who, after having suffered in part or

2 Published in the Official Gazette El Peruano on February 22nd, 2013.

3 The Item (i) of the Article 34° of the Regulation of the Administrative Penalty Procedure of the OEFA approved by Decision of Board of Directors No. 012-2012-OEFA/CD, determines that the reoccurrence is considered as a special aggravating circumstance in the administrative penalty procedures of the OEFA, according to the case. Also, the Number 3.2 of the Article 3° of the Regulation of the Environmental Offenders Register of the OEFA, approved by Decision of Board of Directors No. 016-2012-OEFA/CD, established that the Chairman of Board of Directors of the OEFA will issue guidelines which establish criteria to qualify as repeat offenders the environmental offenders within the scope of powers of the OEFA. In such context, through Order No. 015-2013-OEFA/PCD published in the Official Gazette El Peruano on February 2nd, 2013, the Presidency of Board of Directors of the OEFA established the publication of the proposal of such guidelines in its institutional website for ten working days in order to accept comments, suggestions and observations from the citizenry in general.

all a penalty involving personal restraint, this one incurred in other offense also suppressed with penalty involving personal restraint before passing five years. In these cases, a penalty was imposed to this one, not lesser than the maximum penalty which was imposed to the offense.

For a long time, the reoccurrence was considered an appropriate measure to control the criminal trends in our society. This criterion dealt with a long-standing criminal vision which advocated applying the so-called criminal Law of the author. However, over the years, the reoccurrence was no longer valid and even became banned from the Criminal Code in force (1991), whereas this one had been considered by its Review Commission as a figure which distorted the principle *non bis in idem* (no one can be prosecuted twice for the same fact). For the Review Commission, the rigidity of the sentences imposed in the name of the reoccurrence did not have any dissuasive effect.

Nevertheless, the reoccurrence may return to our legal system as part of the measures of emergence implemented by the Peruvian Government for the terrorism offense. Finally, this reoccurrence was reintroduced for all punishments through an amendment to the Criminal Code carried out by the Congress of the Republic[4].

The re-entry of this reoccurrence in our legal system was not peaceful; on the contrary, both the Decree Law No. 25475[5], promulgated by the Executive Branch as the Law No. 28726[6] and issued by the Congress of the Republic, were object of

4 It is important to point out that this one still maintains the same descriptive basis of its configuration: *"That one, after having served part or all a sentence, incurs in a new intentional offense within a period of time no more than five years, his condition is of a repeat offender*, in spite of the amendments carried out since the reoccurrence was included in the Criminal Code in 2006 by Law No. 28726 until the last amendment carried out to such Article 46° -B by Law No. 30076,*"*.

5 **Decree Law No. 25475 – Establish the penalty for terrorism offenses and procedures for the investigation, preliminary investigation and trial, published in the Official Gazette El Peruano on May 6th, 1992**
"Article 9°.- Reoccurrence
Repeat offenders will be suppressed with a penalty involving personal restraint not lesser than thirty years. For the purposes of this Decree Law against terrorism, a repeat offender is the delinquent who having suffered penalty involving personal restraint, imposed for national or foreign judgment, incurs in the commission of a new offense before passing ten years of the preceding sentence".

6 Law No. 28726 – Law which inserts and amends rules included in the Articles 46°, 48°, 55°, 440° and 444° of the Criminal Code and the Article 135° of the Criminal Procedure Code.

unconstitutional procedures. However, these facts provided the opportunity so that the Constitutional Tribunal pronounced on the constitutionality of the reoccurrence and its relation with the principles *non bis in idem*, culpability and proportionality, among others.

In accordance with the criteria set forth by the Constitutional Tribunal, the reoccurrence constitutes a specific circumstance in which there is a person to who is attributed the commission of an offense and provides a space for the appreciation of previous conducts, in order to determine the adjustment of his offense. Therefore, this one points out that *"(...) the reoccurrence deals with the problems of legal provisions that entail more punitive power because the person has been previously sentenced or served punishment for other offense"*[7].

Regarding its relation to the principle *non bis in idem*, the Constitutional Tribunal concludes, whereas the repeating criminal act was not object to impose a double punishment, but only one, only aggravated as a consequence of a criminal record related to the same punishment. In that sense, the mere appreciation for the purposes of adjusting the penalty does not constitute *non bis in idem,* since the first offense is not imposed twice not either the second one which is imposed once[8].

Regarding the violation to the principle of culpability, the Constitutional Tribunal points out that this principle cannot be evaluated separately, but in a group with other conducts that are part of the criminal records of the accused in order to analyze the reprehensible level proportionally according to his actions, which enables to determine that the reoccurrence as a generic aggravation is constitutional[9].

In relation to the grievance of the principle of proportionality, the Constitutional Tribunal details that the application of the reoccurrence must coincide with a proportional violation to the fact which was committed, that is why its importance may be determined for the adjustment of social harmfulness which was caused. In

7 ZAFARONI, Eugenio. *Derecho Penal: Parte General.* Buenos Aires: Ediar, 2002, p. 1057. Cited on the legal basis 44 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from August 9th, 2006, attributed to the File No. 003-2005-PI/TC.

8 Legal basis 24 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from January 19th, 2007, attributed to the File No. 0014-2006-PI/TC.

9 Legal basis 39 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from January 19th, 2007, attributed to the File No. 0014-2006-PI/TC.

that extent, the reoccurrence is constitutionally legitimate while its imposition does not violate "the prohibition of excess" which includes such principle[10].

Therefore, having the critics resolved in constitutional matters, the notion of reoccurrence must move from the Criminal Law to the administrative penalty matters, resulting in a reevaluation of the scopes of this figure, its legal status, and characteristics of the repeating offense, scopes of the penalty imposed once the reoccurrence is identified, the most appropriate mechanism to administer the information on the repeat offenders or the value given within the calculation of the fine.

2.2. Reoccurrence in the Administrative Penalty Law

The doctrine is unanimous when considering as valid the application of the general principles of the Criminal Law in the Administrative Penalty Law. In that sense, the professors García de Enterría and Fernández, who quote the Spanish Constitutional Tribunal, affirm that:

> *"The inspiring principles of the criminal order are applicable to the Penalty Law* ***with certain characteristics,*** *since both are manifestations of punitive system of the State (...) to the extent that the same legal right may be protected by criminal or administrative techniques"*[11].
> *[emphasis added].*

As a practical consequence, most of the principles and guarantees which are claimed on the Criminal Law, which are the result of a secular elaboration and development, are also applicable to the offenses and administrative penalties[12] with characteristics. Therefore, these ones must be adjusted within the limits and scopes of the power to impose penalties in order that these ones are fully compatible with the objectives to be achieved.

To that extent, the previous criteria of the Criminal Law as the adjustment of reasons of justification, clauses of culpability exclusion, the rules on action resulting

10 Legal basis 46 and 47 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from January 19th, 2007, attributed to the File No. 0014-2006-PI/TC.

11 GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. *Curso de Derecho Administrativo.* Lima: Palestra Editores, 2011, p. 1069.

12 GÓMEZ, Manuel e Íñigo SANZ. *Derecho Administrativo Sancionador: Parte General.* Segunda edición. Navarra: Editorial Aranzadi, 2010, p. 110.

in several criminal offenses or mitigating circumstances, all of them figures of the Criminal Law have been useful to adjust aspects not specified in the administrative rules.

Likewise, the institution of the reoccurrence has also moved from its origin of criminology to the provisions on control and imposition of penalties in administrative matters which are established in our legal system as one of the criteria of the principle of integrative reasonableness and at the same time, the special principles of the power to impose penalties of the Public Administration. Thus, the reoccurrence has been adjusted through the Item c) of the Article 230°.3 of the Law No. 27444 – Law on the General Administrative Procedure (hereinafter, LPAG)[13], specified as a criterion for the adjustment of the penalties "the repetition or continuation in the commission of the offense".

The application of the reoccurrence is closely associated with other provisions of the Article 230° of the LPAG. In accordance with the Number 230.7[14] of the related article, to determine the reoccurrence is necessary that an offense is previously adjusted and imposed through a decision that exhausts all available administrative remedies.

In relation to the details on the period for the application of the reoccurrence, the entities with power to impose penalties must be referred to the Number 230.7 of the Article 230° of the LPAG previously mentioned, which does not establish any restriction for the period in which this one may be adjusted and the possibility to designate this one by regulation. Examples of the application of this reoccurrence will be analyzed in the corresponding section to the application of the reoccurrence in the administrative penalty procedures of some Peruvian regulatory agencies.

III. REOCCURRENCE ON ENVIRONMENTAL OFFENSES

The intervention of the State in matter of adjustment of the environment and exploitation of the natural resources is basically developed in two stages: the first

13 Law No. 27444 – Law on the General Administrative Procedure published in the Official Gazette El Peruano on April 11th, 2001.

14 **Law on the General Administrative Procedure**
"Article 230°. - Principles of the administrative penalty power (…)
7. Continuation of offenses. - To determine the origin of the imposition of penalties for offenses in which the company incurs constantly, it is required that at least thirty (30) working days have passed from the date of the imposition of the last penalty and to prove to have asked the company to prove to have dissolved the penalty within this period. (...)".

stage resides in the management and certification (stage *ex ante*), in which is carried out the assessment and approval of the instruments of environmental management that the legal and voluntary commitments include, and the second one, referred to as the enforcement (stage *ex post*); which is carried out in order to give predictability in its decisions and legal certainty to the investors.

This administrative intervention is based on the duty of the State to provide instruments for the protection of natural and human environment, whose guarantee is not firstly ensured for the simple market mechanisms[15] Because of that, it is indispensable to have a regulatory structure, from its perspective, compatible with the objectives and challenges which consider the protection of the environment, nationwide and worldwide.

In this regard, in accordance with the guidelines of the Constitutional Tribunal on the obligations of the State in environmental matters, the approval of environmental rules of penalty status constitutes a manifestation of the State obligation to impose duties and obligations oriented to preserve a balanced and appropriate environment for the development of life, which objectifies its positive dimension[16].

Within the scope of such State obligation, rules have been issued such as the SINEFA Law, the Regulation of Administrative Penalty Procedure – Decision of Board of Directors No. 012-2012-OEFA/CD and the Guidelines for the qualification of repeat offenders – Decision of Presidency of Board of Directors No. 020-2013-OEFA/PCD, among other rules oriented to protect the compliance of the environmental legislation and to exercise the power to impose penalties before the grievance the environment may suffer as a consequence of the execution of certain economic activities. As Morón says:

> *"(...) when the law allows a public authority the application of administrative penalties, this one confers it a distinctly discretionary power which is summarized within the margin of subjective assessment in order to classify the conduct which was committed, to determine the necessary evidences, the appraisal of the aggravating and mitigating circumstances on the penalty and the selection of the penalty to be imposed, within the catalog of penalties established by the rules"*[17].

15 DROMI, Roberto. *Derecho Administrativo: Tomo II.* Lima: Gaceta Jurídica, 2005, p. 263.

16 Legal basis 14 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from March 14th, 2011, attributed to the File No. 0004-2011-PI/TC.

17 MORÓN, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Novena edición. Lima: Gaceta Jurídica, 2011, p. 699.

With the Guidelines, the OEFA aims to prevent the administrative measures at its disposal, far from being arbitrary, are characterized by their predictability and compliance to the facts which were committed, as a result, this will entail to achieve the balance between the protection of public interests and the guarantee of the rights of the companies.

3.1 Definition and effects of the reoccurrence on environmental offenses

As stated by the Guidelines, the reoccurrence is adjusted when a new offense is committed and whose factual assumption of the offense is the same as the previous offense.

Related to this definition, the nature of the reoccurrence will be analyzed as an aggravation of the penalty and its effect.

a) Reoccurrence as an aggravating factor of environmental offenses

The principle of proportionality, as a general principle of the right, is constituted as a useful control instrument for the discretion of the Public Administration, which constitutes a relation among the means which were used and the purpose to be achieved. As regards to the control of the power to impose penalties is referred, entails a necessary correlation between the offense which was committed and the penalty to be imposed. For this reason, the Administration must consider the particular circumstances of each case. Regarding the principle of proportionality, Alejandro Nieto, says:

> *"(...) the principle works in two plans: the regulatory plan, in such a way that the general provisions must know if the penalties assigned to the offenses are proportional to these ones; and the applicable plan, in such a way that the particular penalties to be imposed are equally proportional to the concrete offenses which were attributed"*[18].

Also, the Constitutional Tribunal has pointed out regarding the mentioned principle:

> *"The administrative penalty power is oriented under the following principles: legality, classification, due proceeding, reasonableness, classification, non-retroactivity, causality, proportionality. The principle of proportionality is*

18 NIETO, Alejandro. *Derecho Administrativo Sancionador.* Madrid: Editorial Tecnos S.A., 2005, p. 351.

specified in the Article 200° of the Political Constitution (last paragraph) and constitutes a relation among the means which were used and the purpose to be achieved. A correlation must be between the offense which was committed and the penalty to be imposed. (...)"[19].

The principle of proportionality is repeated throughout the LPAG. When adjusting the administrative penalty power, is clear that the penalties to be imposed must be proportional to the compliance qualified as offense. Also, the rule establishes the order of priority of the criteria the authority must analyze in order to adjust the penalty. This may be referred to the seriousness of the damage to the public interest and/or the protected legal right, the economic damage which was caused, the repetition and/or continuation in the commission of the offense, the circumstances of the commission of the offense, the benefit which was illegally obtained and the existence or not of the intention in the conduct of the offender[20].

As we can see, the repetition and/or continuation in the commission of the offense have been considered as a criterion in accordance with regulations, in order to adjust the penalty. In that regard, it is clear that the doctrine has pointed out several bases to consider the reoccurrence as an aggravating criterion for the adjustment of penalties, the most accepted one is that based on the major warning to who al-

19 Legal basis 13 of the Judgment of the Constitutional Tribunal from April 14th, 2007, attributed to the File No. 1767-2007-AA/TC.

20 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 230°.- Principles of the administrative penalty power
The penalty power of all the entities is in addition governed by the following special principles: (...)

3. Reasonableness. - The authorities must anticipate that the commission of the offending conduct is not more favorable for the offender than fulfilling the rules which were infringed or to accept the penalty. However, the penalties to be imposed must be proportional to the compliance qualified as an offense, while observing the following criteria which are noted in order of priority for the purpose of adjustment:

a) The seriousness of the damage to the public interest and/or protected legal right;

b) The economic damage which was caused;

c) The repetition and/or continuation in the commission of the offense:

d) The circumstances of the commission of the offense;

e) The benefit which was illegally obtained and;

f) The existence or not of intention in the conduct of the offender.

(…)".

ready knows it upon his own experience, the sense of legal prohibitions, as well as the reasons of special prevention for that subject who has demonstrated dangerous inclination to violate the legal system[21].

This criterion of adjustment is justified in the LPAG, as established by our Criminal Law. In that sense, the Constitutional Tribunal has indicated the follows:

> *"(...) the Reoccurrence constitutes a specific circumstance in which a person is to who is attributed the commission of an offense and the possibility for the appraisal of his previous conducts, in order to determine the adjustment of the penalties. Therefore, it may be pointed out that: (...) the reoccurrence deals with the problems of the legal provisions which entail more punitive power because the person has previously been prosecuted or suffered punishment for other person. The reoccurrence is a factual situation consisting in the commission of an offense at a time when the party has previously experienced a penalty for the commission of a previous one"*[22].

In a certain way, it may be verified that the reoccurrence qualified as an aggravating criterion to adjust the penalty by the Law on the General Administrative Procedure, has also been adhered to the Regulation of the Administrative Penalty Procedure of the OEFA[23] and in the Guidelines subject of this analysis. The aim is to aggravate the penalty for the offender who continues violating the environmental rules.

b) Effect of the reoccurrence on environmental offenses

The Guidelines requires for the application of the reoccurrence as an aggravation circumstance, the factual assumption of infringement of the new offense must coincide with the assumption of the previous one. It may be understood for factual assumption to the conduct hypothesis, if this one occurs there will be a consequence. Thus, it is required that the fact which was penalized is compatible with the conduct which was described as a type of penalty rule within the scope of the Administrative Penalty Law.

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21 SÁNCHEZ TERÁN, Juan Manuel. *Los criterios de graduación de las sanciones administrativas en el orden social.* Valladolid: Lex Nova, 2007, p. 324.

22 Legal basis 17 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from January 19th, 2007, attributed to the File No. 0014-2006-PI/TC.

23 The Item (i) of the Article 34° of the Regulation of the Administrative Penalty Procedure of the OEFA, approved by Decision of Board of Directors No. 012-2012-OEFA/CD.

The Criminal Doctrine classifies the reoccurrence in two types:

(i) General Reoccurrence: In the event that the delinquent, after having served the sentence part or all, falls back into the commission of a new different offense once again to that one committed for the first time, that is, the offenses which are subsequently committed are not from the same type than the first offense. Thus, the reaffirmation resides in the repetition of a variety or diversification of facts or offenses.

(ii) Specific reoccurrence: It is related to the commission of the same offense, that is, the new offense which was previously committed is identical to the first one. Some authors add that may be an analogous offense or one of equal or similar nature.

As regards to the application of the specific reoccurrence in criminal matters, the Constitutional Tribunal has indicated the follows:

> *"If the scopes of the rule hypothesis are considered, it is clear that the reoccurrence consists of a qualification of the criminal conduct, in addition to the qualification already specified for the penalty. That is to say, before the possible commission of an offense, the Deciding Authority analyzes, firstly, if the conduct may be subsumed in the elements which define the penalty; if such subsumption occurs, the conduct is qualified with the nomen iuris related to the offense (first qualification). Secondly, the Deciding Authority analyzes the conduct again in order to establish if this one qualifies or not as a reoccurrence depending on the existence of criminal records of the accused for committing the same offense before (second qualification). Once the commission of the offense and its repeating nature is confirmed, the designation of the penalties is carried out: a penalty for the commission per se of the offense and the aggravation of such penalty as a consequence of having identified the repeating nature of the person"*[24].

24 Legal basis 18 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from January 19th, 2007, attributed to the File No. 0014-2006-PI/TC.

Likewise, in the legal basis 47 of the Judgment of the Plenary Session of the Constitutional Tribunal (Plenary Session) from August 9th, 2006, attributed to the File No. 003-2005-PI/TC, is indicated: *"This Tribunal endorses the first proposal, while appealing to a systematic interpretative method for location: the mechanism which was analyzed is not included in a general system applicable to every type of offenses, as the case of the mechanisms included in the Preliminary Title of the Criminal Code, but in a rule which has a specific matter of process, a Decree Law which deals with the offense of terrorism. In that sense, it will be*

On its part, the LPAG only considers as a criterion for the adjustment of penalties: *"The repetition and/or continuation in the commission of the offense",* by concluding that it deals with the commission of the same offense, or one of the same nature[25]. In that context, the OEFA has considered in its Guidelines, the application as an aggravation circumstance of the specific reoccurrence, that is, when the new offense which was committed is identical or similar to that from which the subject was punished before.

It is clear that the reoccurrence as an aggravating criterion of the penalty does not violate the principle of the *non bis in idem,* which constitutes a guarantee in favor of the company which will not be penalized twice (material dimension) for the same fact, even this one will not be object of two different procedures (procedural dimension)[26].

In a certain way, as indicated previously, the judgment of the Constitutional Tribunal No. 0014-2006-PI/TC declares that the reoccurrence will provide the possibility of aggravating the punishment for the commission of an offense in case of existing criminal records of its previous commission, if the first offense which was committed does not receive an additional punishment nor an aggravation, but it may be simply taken into account the effects of adjusting the punishment which will be attributed to a different criminal act.

On its part, the repeating act is not either an object of a double imposition of penalty, but only one, such one provided for the mechanism which establishes its offense, although this one was aggravated as a consequence of the existence of criminal records related to the same offense. Upon this logic, the Constitutional Tribunal upholds that there is no duplication of punishment, on the contrary, the second offense; in addition to assess the offense which was committed aggravates it in view of the criminal record for having committed an offense before.

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clear that the reoccurrence was committed when there is identification among the criminal typologies of the first and second offense which was committed. Therefore, and considering the scopes of the Article 9 of the Decree Law 25475, the figure of the reoccurrence consists of the new commission of the offense of terrorism which was committed within the ten first years of compliance of the penalty involving personal restraint imposed for the previous commission of the same offense."

25 Madrid Superior Court of Justice, in the Judgment 13/2006 from January 9th, 2006 indicates *"It is clear that the offense, both in Criminal Law and in Administrative Penalty Law, is the abstract description of the conduct – act or omission – imposed by the rule".*

26 MORÓN, Juan Carlos. Óp. Cit., p. 728.

3.2 Elements of the reoccurrence on environmental offenses

a) Consensual Decision or exhausting all available administrative remedies

The necessity of the previous decision of penalties has constituted sufficient firmness according to the Guidelines; this one is referred to the sense of administrative firmness. It is formally required that the penalty which was previously imposed must be in view of a final decision in administrative proceedings.

The Number 216.1 of the Article 216° of the LPAG points out that the lodging of any appeal will not suspend the execution of the act which was contested, unless otherwise expressly specified by law or if so, the suspension by law or upon request of parties provided in accordance with the Number 216.2 of the Article 216° of the Law previously mentioned[27].

In the case of the penalty procedure, there are special provisions. For instance, the Number 237.2 of the Article 237° of the LPAG[28] points out that the decision will be enforcing when all available administrative remedies are concluded. Related to this point, Morón says that the sense of the rule is that the penalty decisions which do not conclude all available administrative remedies will not be enforcing while the decision of the appeal has not been attributed, since in its case which would be lodged against these ones or the period has passed for its lodging without such deci-

27 Law No. 27444 – Law on the General Administrative Penalty procedure
"Article 216°.- Suspension of the execution
216.1. The lodging of any appeal, except the cases in which a legal rule establishes the opposite, this one will not suspend the execution of the act which was contested.
216.2. Notwithstanding the previous number, the authority which is responsible for resolving the appeal will suspend by law or upon request of the parties, the execution of the act which was appealed when some of the following circumstances concur:
a) When the execution may cause damages of impossible or difficult reparation.
b) When it may be objectively determined the existence of a process of important annulment.
(...)".

28 **Law No. 27444 – Law on the General Administrative Penalty procedure**
"Article 237°.- Decision
(...)
237.2. The decision will be enforcing when all available administrative remedies are concluded. The Administration would adopt the necessary precautionary measures to guarantee its effectiveness, while this one is not enforcing."

sion has been carried out[29]. In that extent, it may be considered that the assumptions which exhaust all available administrative remedies are in the Number 218.2 of the Article 218° of the Law on the General Administrative Procedure[30].

As stated previously, we must understand that the penalty decision constitutes sufficient firmness in administrative proceedings with notice of decision of the appeal for reconsideration or recourse to appeal, in case the appeals are not lodged, the sufficient firmness is constituted once the terms have passed to lodge administrative appeals[31].

b) Term

For reasons of legal certainty, the OEFA determined a four-year term in which an offender may be qualified as a repeat offender when considering as a criterion,

29 MORÓN, Juan Carlos. Óp. Cit., p. 752.

30 **Law No. 27444 – Law on the General Administrative Penalty procedure**
"Article 218°.- Exhaustion all available administrative remedies
(...)
218.2. The acts which exhaust all available administrative remedies are:
a) The act in which the contestation does not legally proceed before an authority or body hierarchically superior in all available administrative remedies or when negative administrative silence is carried out, unless the interested party decides to lodge an appeal for reconsideration, in that case the decision to be expired or the administrative silence carried through such appeal which was contested to exhaust all available administrative remedies; or
b) The act which was issued or the administrative silence carried out through the lodging of an appeal in those cases in which the act of an authority or body which is subject to a hierarchical subordination is contested; or
c) The act which was issued or the administrative silence carried through the lodging of an appeal of judicial review, only in those cases to which the Article 210 of this Law is referred to; or
d) The act which declares the nullity by law or revokes other administrative acts in those cases to which the Article 202 and 203 of this Law are referred to; or
e) The administrative acts of Tribunals or Administrative Councils which are governed by special laws".

31 Gómez, Manuel and Íñigo Sanz say that *"In the case of the consensual and firm act, it is the decision of the individual (precisely <not acting>) which has determined that the penalty which was imposed exhausts all available administrative remedies, since the higher authority was not empowered for a possible modification of the penalty in an appeal before a higher authority". See:* GÓMEZ y SANZ. Óp. Cit., p. 896.

the statute of limitations[32] of the power to impose penalties of the Public Administration.

As indicated above, the LPAG does not establish any restriction for the term in which the reoccurrence may be determined. In that sense, this can be limited by regulation[33], since this one deals with a matter of discretional decision of the Administration[34].

As mentioned above, when exercising the discretionary powers, the Public Administration cannot decide and act arbitrarily but to determine, without restrictions, the opportunity or convenience of the administrative action by applying the principle of proportionality; in certain way, the OEFA when establishing the term to determine the reoccurrence, its decision was based on the legal rights protected by this one which are related to the environment[35].

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32 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 233°.- Statute of limitations
233.1. The power of the authority to determine the existence of administrative penalties expires in the term the special laws establish, without prejudice to the calculation of the expiration related to the other obligations which are derived from the effects of the commission of the offense. In case this one had not been determined, such power of the authority will expire in four (4) years.
(...)".

33 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 230°.- Principles of the administrative penalty power
The power to impose penalties of all the entities are in addition governed by the following special principles:
(...)
4. Classification.- (...) The regulatory provisions of development may specify or adjust those provisions oriented to identify the conducts or determine penalties without establishing new punishable conducts to those legally provided, unless the cases in which the law enables to classify by regulation.
(...)".

34 SANTAMARÍA and PAREJO support that *"We are facing a discretional power if the legislator has regulated the administrative activity through rules in which its factual assumption is partially undetermined, undefined, inadequate, etc., when the Right does not establish the adequate parameters of its intervention, but this one must establish them.* See: SANTAMARÍA, Juan A. and Luciano PAREJO. *Derecho Administrativo. La jurisprudencia del Tribunal Supremo.* Madrid: Ramón Areces, 1989, p. 129.

35 In a certain way, the OEFA adheres it to the Source which organizes and answers the comments, observations and suggestions received by the entity for the prepublication period: <http://www.oefa.gob.pe/wp-content/uploads/2013/03/Lineamientos-criterios-calificarreincidentes.pdf> (Visited on November 12th, 2013)

It is clear that the duty of the environmental administrative power is justified on the necessity of protecting, guarding, preserving a balanced and appropriate environment for human development[36]. In that regard, the Constitutional Tribunal has indicated that the essential content of the mentioned fundamental right is adjusted by: i) the right to enjoy a balanced and appropriate environment, and, ii) the right to the preservation of a healthy and balanced environment, which entails unavoidable obligations for the public authorities to maintain the environmental goods in the appropriate conditions to take advantage of them[37].

In a certain way, if we consider that the offender has repeated his conduct of violation of the environmental rules, it is necessary that such intervention is properly analyzed at the moment of imposing the new penalty; for which it is reasonable that the term to determine the reoccurrence coincides with that from the statute of limitations of the power to impose penalties in order to prevent that the course of time consolidates an indifference related to the previous conduct of the environmental offender[38].

The four-year term must be considered upon notice of the first penalty. It is clear that in accordance with the principle of presumption of innocence, the notice

36 In accordance with the Number 22 of the Article 2° of the Political Constitution of Peru, every person has the fundamental right to *"enjoy a balanced and appropriate environment to the development of his life"*.

37 Legal basis 4 of the Judgment of the Constitutional Tribunal from February 19th, 2009, attributed to the File No. 03343-2007-PA/TC.

38 In that context, Peña Chacón supports that *"The environmental right is transversal as part of the third-generation human rights. That is to say that its values, principles and rules included in both international instruments and the internal legislation of different States, manage to encourage and absorb the entire legal system of each of them.*

These distinctive characteristics are very important as regards to the descriptive matter, since the effects of pollution are revealed slowly by giving advantage to who or whom commit an environmental damage, since the course of time will allow them to become insolvent, absent or disappear individually or legally.

Hence the importance of reinterpreting the institute of statute of limitations in accordance with the same principles of the emerging environmental right in order to prevent at all costs that the course of time turns into an ally of the environmental degrader and therefore, a denial of justice may be legally consolidated, a situation which is clearly irrational, disproportionate and therefore, unconstitutional." See: PEÑA, Mario, "Daño Ambiental y Prescripción". <http://huespedes.cica.es/aliens/gimadus/19/06_mario_penia_chacon.html>
(Visited on November 12th, 2013)

of the penalty corresponds to that from the Board of Directors Decision which imposes the penalty and not to the Sub Board of Directors Decision when starting the administrative penalty procedure[39].

Additionally, it is important to note that the penalty decision, in the strict sense, is that issued by the first instance, that is, the Directorate for Enforcement, Penalty and Implementation of Incentives of the OEFA. The decisions which are issued in the appeals for reconsideration or recourse to appeal are not enforcing decisions; since a penalty is not imposed on them but these ones are acts of review in administrative proceedings.

3.3 Effects of the reoccurrence on environmental offenses

a) Aggravate the penalty

To verify the requirements in order to adjust the reoccurrence in the exercise of the power to impose penalties, this one will result in the aggravation of the penalty as indicated previously.

For instance, the table 3 of the exhibit 2 of the Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD, which approves the *"Methodology for the calculation of base fines and the application of the aggravating and mitigating factors to be used in the adjustment of penalties"*[40], considers as one of the criteria to adjust the penalty, the repetition and/or continuation in the commission of the offense.

b) Incorporation to the Environmental Offenders Register (RINA)

The qualification of the previous criminal records as a reoccurrence will be derived in the incorporation of the repeating offender in the RINA[41], the purpose of

39 For the calculation of such term, it does not matter if penalty is complied with or not.

40 Published in the Official Gazette El Peruano on March 12th, 2013 (special supplement).

41 **Regulation of the Environmental Offenders Register of the Agency for Assessment and Environmental Enforcement approved by Order No. 016-2012-OEFA/CD**
"Article 6°.- Content of the RINA
6.1. The RINA must have, at least, the following information:
a) Name, business name or company name of the environmental repeating offender.
b) Number of National Identity Document or number of Unique Taxpayer Registry (RUC) of the environmental repeating offender and name of its legal representative of the period in which the facts occurred.

this register is to promote the transparency and diffusion of the information related to the penalties imposed by the OEFA, aspects that will be developed in detail in the corresponding section of this publication.

IV. APPLICATION OF REOCCURRENCE BY SOME ADMINISTRATIVE REGULATORY BODIES

The following chart aims to show the main characteristics of the criteria established by seven State institutions with administrative penalty power, including the OEFA, according to the administrative penalty procedures approved by such public agencies.

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c) Economic sector to which it belongs.

d) Number and date of the order which imposed or confirmed the penalty and the qualification of repeat offender of the environmental offender for each offending conduct, as well as the information of the corresponding administrative file.

(...)".

Chart No. 1
Comparative chart of the application of the reoccurrence by some administrative regulatory bodies

Reoccurrence	Nature of fact	Term	Previous penalty
OSINERGMIN (2009)[42]	Commit the same offense once again.	2,76 cm	Consensual or final Decision.
OSITRAN[43]	When repeating the same acts which caused the previous offense.	Equal or less than two years.	Final penalty decision or final judgment.
OSIPTEL[44]	Repeated offense.	Term of two years from the date the letter of start of the administrative penalty procedure was notified to the Enterprise.	Previous Decision which might be final in administrative proceedings or final judgment.
SUNASS[45]	Commission of the same offense.	In the course of two years.	---

42 Article 6° of the Decision of Board of Directors of OSINERGMIN No. 233-2009-OS-CD – Regulation of the Administrative Penalty Procedure published in the Official Gazette El Peruano on December 11th, 2009.

43 Article 60° of the Decision of Board of Directors No. 023-2003-CD-OSITRAN – Regulation of Offenses and Penalties published in the Official Gazette El Peruano on December 24th, 2003.

44 Article 5° of the Decision of Board of Directors No. 087-2013-CD-OSIPTEL – Regulation of Enforcement, Offenses and Penalties published in the Official Gazette El Peruano on July 4th, 2013.

45 Item (vii) of the Article 34° of the Decision of Board of Directors No. 003-2007-SUNASS-CD – General Regulation of Supervision, Enforcement and Penalty of the EPS published in the Official Gazette El Peruano on January 18th, 2007.

INDECOPI[46]	The reoccurrence or reaffirmation in the commission of an act of unfair competition.	---	Final Decision[47].
SBS[48]	Commission of the same offense.	Within the term of three (3) calendar months to have been imposed the offense.	Final Decision.
OEFA	New offense whose factual assumption of the offense is the same as that from the previous offense.	Four (4) years related to previous offenses.	Consensual Decision or that one which exhausts all available administrative remedies, unless its effectiveness is suspended as ordered by the Court.

Source: Own elaboration

It is possible to verify that the institutions considered in this analysis coincide when indicating the specific reoccurrence as an aggravating criterion, that is, that one referred to the commission of an offense of the same characteristic. Also, these ones agree with the formal requirement, so that the criminal records are considered in a final decision in administrative proceedings.

Related to the term, as the Number 4 of the Article 230° of the LPAG indicates: *"The regulatory provisions of development may specify or adjust those ones oriented to identify the conducts or to determine penalties",* it is possible to verify

46 Item h) of the Article 53° of Legislative Decree No. 1044 – Law on the Repression of Unfair Competition published in the Official Gazette El Peruano on June 26th, 2008 and in force from July 26th, 2008.

47 The special rule does not specify it, but this one may be imposed in accordance with the Number 7 of the Article 230° of the Law No. 27444.

48 Article 8° of the Order SBS No. 5389-2013 – Regulation of Offenses and Penalties subject of Prevention of Money Laundering and Terrorism Funding applicable to the Enterprises that make use of casino games and/or slot machines published in the Official Gazette El Peruano on September 14th, 2013.

that terms from three months to two years have been approved. Consequently, the OEFA has separated itself from the other agencies when establishing four years to determine the reoccurrence in the environmental offenses, and as indicated previously, this one is justified in the legal rights which was assigned to protect.

V. CONCLUSIONS

The reoccurrence has moved from its origin in the Criminal Law to the scope of the Administrative Penalty Law. In that context, this one has been established as an aggravating factor for the adjustment of the penalties based on the major warning to who knows the legal prohibitions commits an offense once again, as well as for the purposes of special preventions, since the subject has demonstrated dangerous predisposition to violate the legal system.

Considering that the environmental penalty power is justified in the necessity of preserving a balanced and appropriate environment for human development, it was necessary for the OEFA to have guidelines which allow to complement the provisions that the Law on General Administrative Procedure had established regarding reoccurrence, in order to take into account the necessary rules of procedure for the right application of the corresponding aggravation criterion of penalties.

The OEFA has considered in its penalty criteria, the same as other regulatory agencies, the application as an aggravation circumstance of the specific reoccurrence, that is, when the new offense which was committed is identical or similar to that for which the subject was punished before. In addition, it is required that the penalty previously imposed is imposed in view of a final decision in administrative proceedings.

In accordance with the principle of proportionality, the OEFA while establishing the term to determine the reoccurrence in the environmental offenses took under consideration the importance of the legal rights this one protects by considering the similar term to the statute of limitations of the power to impose penalties, that is, four years.

The application of the reoccurrence attempts to send a message to the companies, this one is, that the repetition of an offense will not be only considered as one more offense within its record of environmental non-compliance, but also, this one may constitute an excuse to justify a more major fine and subsequently, its incorporation in the RINA; this legal situation which expects to act as a disincentive to the commission of new environmental offenses.

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GENERAL RULES FOR THE EXERCISE OF THE POWER TO IMPOSE PENALTIES OF THE AGENCY FOR ASSESSMENT AND ENVIRONMENTAL ENFORCEMENT – OEFA

HUMBERTO ZÚÑIGA SCHRODER

Summary

This article explains the General Rules through which the OEFA exercises its power to impose penalties. It deals with the classification of offenses, as well as the precautionary, preventive, remedial measures and particular orders. Finally, the objective responsibility and the system of penalties of the Agency for Assessment and Environmental Enforcement (OEFA) are analyzed.

Introduction. II. Analysis. III. Conclusions.

I. INTRODUCTION

One of the most important aspects in the context of intervention of the Public Administration resides in the exercise of its power to impose penalties, broadly speaking; this is understood as the responsibility of the administrative authority to impose penalties to third parties through a special procedure[1]. In that context, this article will

1 As Morón said, *"the activity to impose penalties has a unique objective: To exercise the penalty cause of action of the administrative public authority through a special procedure where the company has enough guarantees for the exercise of its defense"*. MORÓN. Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Lima: Gaceta Jurídica, 2009, p. 679. Also, he emphasizes in this point as Danós said: *"(...) the power to impose penalties of the Public Administration is mainly justified for pragmatic reasons, since it is necessary to recognize the Administration coercive powers in the order to protect the compliance of the legal rules"*. DANÓS, Jorge. "Notas acerca de la Potestad Sancionadora de la Administración Pública". *Ius et Veritas,* Año 5, No. 10, July 1995, p. 150. Finally, in accordance with the Number 13 of the "Guidelines for the application of the remedial measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System", approved by Decision of Board of Directors No. 010-2013-OEFA/CD, dated March 22nd, 2013: *"The imposition of penalties to the companies attempts to generate a negative incentive, in the sense of leading them to fulfill or comply with the obligations which have been legally conferred to these ones. In a certain way, we attempt to act as a disincentive to those protected legal rights which are threatened, as well as its concrete damage. Thus, the application of an administrative penalty has as purpose to punish the offender in order to prevent a new similar penalty in the future (special prevention), but also this one may constitute a general preventive measure by giving warning to the other individuals about the effects that may cause the non-compliance of its legal obligations (general prevention)"*.

be focused on the study of such responsibility by the Agency for Assessment and Environmental Enforcement (OEFA), and the legal instruments through which this one exercises such power.

Based on this premise, this study is divided in two parts. In the first one, some general concepts will be addressed related to the characteristics and responsibilities of the OEFA, as well as in the mechanisms through which this one exercises such power to impose penalties. On the other hand, the second one will be focused on the study of the so-called General Rules for the Exercise of the Power to impose penalties, approved by the Board of Directors of the OEFA in the month of September in 2013. Such rules establish criteria and guidelines to regulate the exercise of such power.

II. ANALYSIS

2.1 Regarding the OEFA

In general terms, the OEFA may be defined as a *"specialized technical public agency with legal capacity of internal public law with budget assigned to the Ministry of Environment and in charge of the enforcement, supervision, control and the penalty in environmental matters as appropriate"*[2]. In that sense, the mentioned agency consists of the governing body of the National Environmental Assessment and Enforcement System (SINEFA), created by Law No. 29325 and whose text was published in the Official Gazette El Peruano on March 5th, 2009.

One of the primary duties of the OEFA is to verify the compliance of the environmental legislation for all individuals and legal entities and supervise that the duties of assessment, supervision, enforcement, control, power to impose penalties and application of incentives in environmental matters carried out under the responsibility of the different State entities, are carried out in a dependent, impartial, flexible and effective way as legally specified in the National Environmental Policy[3]. It is important to point out that, for the right exercise of its duties, the OEFA has regulatory responsibilities depicted in the Number 2 of the Article 11° of the Law No. 29325 according to text amended by the Law No. 30011 – mechanism which establishes the follows:

General Rules for the Exercise of the Power to impose penalties of the OEFA

2 Second Complementary Provision of the Legislative Decree No. 1013 - Legislative Decree which approves the Law on Creation, Organization and Duties of Ministry of Environment.

3 This information may be found in the OEFA website.
< http://www2.oefa.gob.pe/index.php?option=com_content&view=article&id=89> (Visited on December 8th, 2013).

> ***"Regulatory duty**: includes the power to issue the rules which regulate the exercise of the environmental enforcement as part of the National Environmental Assessment and Enforcement System (SINEFA), and other ones of general nature related to the verification of the compliance of the enforcing environmental obligations of the companies under its responsibility; as well as those ones necessary for the exercise of the duty of supervision of the environmental enforcing entities, which are of compulsory obligation for such entities in the three levels of government, within the scope and in matters of its powers.*
>
> *"In exercise of the regulatory duty, the OEFA is competent, among others, to* ***classify administrative offenses and approve the scale of corresponding penalties, as well as the criteria of adjustment of these penalties and the effects of the preventive, precautionary and remedial measures to be issued by the corresponding competent instances****". [emphasis added].*

As we can see, the OEFA is empowered not only to classify administrative offenses but also, to approve the scale of corresponding penalties. Under this context, the agency in question has issued the so-called General Rules for the Exercise of the Power to impose penalties of the OEFA, **which establish criteria and guidelines to regulate the exercise of the power to impose penalties** by the Decision of Board of Directors No. 038-2013-OEFA/CD, dated September 17th, 2013, including such related to the classification of offenses and the enactment of penalties and remedial measures. These rules are legally binding and in addition, constitute a guide for the Environmental Enforcement Entities – EFA in national, regional and local matters.

2.2 Regarding the General Rules for the Exercise of the Power to impose penalties of the OEFA

2.2.1 Classification of offenses

In general terms, the Rules which are under analysis are classified as assumptions of fact of administrative offenses *"those conducts of act or omission which signify or express the non-compliance of enforcing environmental obligations, including those ones related to the environmental enforcement"* (Number 4.1 of the Fourth General Rule). It is important to emphasize that the mentioned General Rules related to the general offenses are defined in the Article 17° of the Law No. 29325 – Law on *National Environmental Assessment and Enforcement System* by emphasizing that the OEFA is even responsible for developing the subtypes offenses, which may be general, transversal and sectorial[4].

4 In accordance with the Numbers 3.3, 3.4 and 3.5 of the Third General Rule, *"the sub types of general offenses are those related to the obstruction of the environmental enforcement duties"*. The sub types of transversal offenses, on their part, *"are those ones related to the*

Within the types of general offenses, the Article 17° previously mentioned establishes the follows:

> *"***Article 17°. - Administrative offenses and power to impose penalties**
> *Constitute administrative offenses under the scope of powers of the Agency for Assessment and Environmental Enforcement (OEFA) the following conducts:*
> *a) The non-compliance of the obligations included in the environmental rules.*
> *b) The non-compliance of the obligations under the responsibility of the companies and established in the instruments of environmental management[5] indicated in the environmental rules in force.*
> *c) The non-compliance of the environmental commitments specified in contracts of concession[6].*

General Rules for the Exercise of the Power to impose penalties of the OEFA

> *d) The non-compliance of the* **preventive, precautionary or remedial measures,** *as well as the provisions or* **orders issued by the competent instances of the OEFA.**
> *e Others which are related to the scope of its powers".*
> *[emphasis added]*

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non-compliance of the instruments of environmental management or environmental rules applicable to several enforced economic activities". Finally, the sub types of sectorial offenses *"are those ones related to the non-compliance of environmental obligations included in the sectorial environmental legislation applicable according to the type of economic activity".*

5 In accordance with the Law No. 28611 – General Law on Environment, environmental management, as a process is constituted of the group organized of principles, technical rules, processes and activities oriented to administer the interest, expectations and resources related to the objectives of the environmental policy and attain, in some way, a better quality of life and the comprehensive development of the population, the development of economic activities and the preservation of the environmental and natural heritage of the country (Number 1 of the Article 13°). On the other hand, as stipulated in the Number 1 of the Article 16° of the mentioned mechanism, the instruments of environmental management are mechanisms oriented to the execution of the environmental policy under the basis of the principles established in this Law, and as indicated in its regulatory and complementary rules.

6 In general terms, a concession is the granting of the right of exploitation, of goods and services by the Administration or enterprise to a third party for a certain period. The Constitution 1993 includes two precepts which establish the constitutional context of the concessions; such is the case of the Articles 66° which is referred to natural resources and the Article 73° which is referred to the concessions regarding public assets. See DANÓS, Jorge, "El Régimen de los Contratos Estatales en el Perú". On: http://www.itaiusesto.com/wp-content/uploads/2012/11/1_11-El-regimen-de-los-contratos-estatales-en-el-Peru.pdf. p.166.

As we can see, the rule is clear enough when defining the conducts which are subject of administrative offense. Nevertheless, in order to understand perfectly the scopes of the mentioned mechanism, it is necessary to briefly refer to those so-called preventive, precautionary or remedial measures to be issued by the OEFA within the scope of its powers, as well as to the "particular orders", mentioned in the Item d) of the mechanism under analysis.

2.2.1.1 Precautionary measures

In general terms, the precautionary measures may be defined as *"legal instruments which have as purpose to ensure the execution or compliance of the subsequent decision to be issued as a result of a particular procedure"*[7]. Within the legal system of the OEFA, the Number 1 of the Article 20° of the Regulation of Administrative Penalty Procedure of such institution, approved by Decision of Board of Directors No. 012-2012-OEFA/CD, dated December 7th, 2012, establishes that the precautionary measures may be adopted before or once initiated the administrative penalty procedure and must be processed in separate folder. In turn, the Number 2 of the Article 20° of the related mechanism establishes that the mentioned measures will be ordered *"in order to ensure the effectiveness of the final decision when existing authenticity of the existence of administrative offense and damage threat for the delay in the issuance of the final decision"*.

The OEFA gathers the following precautionary measures in the Number 3 of the Article 20° previously mentioned:

(i) Confiscation of objects, instruments, artifacts or substances used for the development of the economic activity;
(ii) Cessation or restriction under conditions of the economic activity;
(iii) Lifting, treatment, storage or destruction of materials, substances or destruction of materials, substances or infrastructure;
(iv) *Partial or total, temporary or definitive shutdown of the premises or establishments where the economic activity which caused the offense is carried out; or*
(v) Others which are necessary to prevent irreparable damage to the environment, natural resources or health of the people"[8].

7 GUZMÁN, Christian. "Medidas cautelares, provisionales, correctivas y reparativas en el procedimiento sancionador". En Jorge Danós y otros (Coordinadores). *Derecho Administrativo en el Siglo XXI.* Volumen I. Lima: Adrus D&L Editores S.A.C., 2013, p. 678.

8 Number 3 of the Article 20° of the Regulation of the Administrative Penalty Procedure of the Agency for Assessment and Environmental Enforcement – OEFA, approved by Decision of Board of Directors No. 012-2012-OEFA/CD.

It is important to point out that the precautionary measures will be issued by the Presidency of Board of Directors (Number 20.3 of the Article 20°) and even these ones may issue complementary actions to these ones, such as: the installation of signs, placards or advertisements that identify the measure which was imposed, as well as the positioning of seals, devices or mechanisms which hinder, restrict or limit the execution of the activity or the continuation of the construction, among others (Article 22°). Moreover, it may be noted that against the precautionary measures the lodging of the appeal for reconsideration proceeds, which must be resolved within a maximum term of sixty working days (Numbers 24.1 and 24.6 of the Article 24°).

2.2.1.2. Preventive measures

The preventive measures may be defined, according to the Regulation of Direct Supervision of the OEFA and approved by Decision of Board of Directors No. 007-2013-OEFA/CD[9], as every *"ordinance through which the company is asked for the execution of a particular obligation, either carrying out or not when an impending threat or high risk to cause serious damage to the environment, the natural resources and health of people, as well as to mitigate the causes which produce the deterioration or the environmental damage" is demonstrated (Item j) of the Article 5°).*

The preventive measures the OEFA may issue in accordance with the Article 24° of the mentioned ordinance are the follows:

"a) Partial, temporary or total shutdown of the premises or establishments where the activity which puts the environment or health of people at risk, is carried out.
b) Partial, temporary or total cessation of the activities which put the environment or health of people at risk.
c) Temporary confiscation of the used objects, instruments, artifacts or substances which put the environment or health of people at risk.
d) The similar destruction or action of materials or dangerous waste which put the environment or health of people at risk
e) Any other appropriate measure to attain the purposes of prevention in accordance with the Article 22° of this Regulation".

It is important to point out that, according to the Article 22-A° of the Law No. 29325 amended by the Law No. 30011 *"to have a preventive measure, the start of an administrative penalty procedure is not required"*. In addition, it must be emphasized that such measure may be carried out without prejudice to the administrative penalty that might be granted while extending its validity until its compliance has been verified and the conditions which caused it have disappeared.

9 Published in the Official Gazette El Peruano on February 28th, 2013.

2.2.1.3. Remedial measures

In general terms, a remedial measure has as purpose *"to correct the situation which was caused as a result of the administrative offense by reinstating it to its previous condition"*[10]. Within the scope of the OEFA, the Number 22.1 of the Article 22° of the Law No. 29325 recognizes the possibility of issuing remedial measures *"to revert or reduce as possible, the damaging effect that the offending conduct could cause in the environment, the natural resources and health of people"*.

Among the remedial measures that such agency may issue are included are not limited to the following (Article 38° of the Regulation of the Administrative Penalty Procedure of the OEFA):

"(i) The confiscation of the objects, instruments, artifacts or substances used for the development of the economic activity;
(ii) Cessation or restriction under condition of the economic activity which caused the offense;
(iii) The lifting, treatment, storage or destruction of materials, substances or infrastructure;
(iv) Partial or total shutdown of the premises or establishments where the economic activity which caused the offense is carried out;
(v) The obligation of the party which caused the damage to restore, rehabilitate or repair the changed situation, according to the case and if such is not possible, the obligation to compensate it in environmental and/or economic terms[11];
(vi) Compulsory environmental Training courses whose cost is covered by the offender and whose attendance and approval is an indispensable requirement;
(vii) Adoption of measures of mitigation of the threat or damage;
(viii) Imposition of compensatory obligations supported in the National, Regional, Local or Sectorial Environmental Policy, according to the case;
(ix) Compliance procedures according to the instruments of environmental management proposed by the competent authority;
(x) Others considered necessary to revert or reduce as possible, the damaging effect that the offending conduct could cause in the environment or health of people; and,

10 GUZMÁN, Christian. "Medidas cautelares, provisionales, correctivas y reparativas en el procedimiento sancionador". En Jorge Danós y otros (Coordinadores). *Derechos Administrativo en el Siglo XXI.* Volumen I. Lima: Adrus D&L Editores S.A.C., 2013, p. 684 (quoting Morón Urbina).

11 The text of this item is also adhered to the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325.

(xi) Others considered necessary to prevent the continuation of the damaging effect that the offending conduct causes or may cause in the environment, the natural resources or health of people[12].

It is important to emphasize, in addition, that through Decision of Board of Directors No. 010-2013-OEFA/CD[13] the "Guidelines for the application of the remedial measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System" were approved in order to allow the companies and regulatory bodies of the OEFA *"to understand the application and scopes of remedial measures"* specified in the Item d) of the mentioned Article 22°.2.

Finally, it may be specified that, in accordance with in the rule under consideration, there are conceptual differences between the remedial measures and the administrative penalties as affirmed in the quote below:

> *"The penalties are administrative measures which affect the legal context of the offending companies negatively and aiming to act as a disincentive to the execution of illegal conducts. The penalties may be monetary (for instance, the fine) as well as non-monetary (for instance, the warning).*
>
> *On its part, the remedial measures aiming to 'revert' or 'reduce as possible' the damaging effect of the offending conduct; these ones attempt to correct the negative effects of the offense over the protected legal right; to reinstate the condition of things to the previous situation to that from the commission of the*

12 Number 2 of the Article 38° of the Regulation of the Administrative Penalty Procedure of the Agency for Assessment and Environmental Enforcement – OEFA, approved by Decision of Board of Directors No. 012-2012-OEFA/CD. It may be noted that, as Guzmán says: *"the increased adjustment in the application of reparation measures is within the scope of the National Environmental Assessment and Enforcement System, in which it is even possible to issue remedial measures including the obligation of the party which caused the damage to restore, rehabilitate or repair the changed situation as appropriate; and if that is not feasible, such remedial measures may constitute the obligation to compensate (sic) the changed situation in environmental and/or economic terms. In this case, we may affirm that we deal with the possibility that the OEFA may issue remedial measures which restitution or compensatory purposes, those which were issued by a Judge some time ago"*. GUZMÁN, Christian. "Medidas Cautelares, Provinciales, Correctivas y Reparativas en el Procedimiento Sancionador". En *Derecho Administrativo en el Siglo XXI.* Volumen I. Lima: Adrus D&L Editores S.A.C., 2013, p. 690.

13 Published in the Official Gazette El Peruano on March 23rd, 2013.

offense. As we can see, the purposes of the penalties and remedial measures are different"[14].

2.2.1.4. Particular Orders

In addition to the preventive, precautionary and remedial measures previously mentioned, the administrative penalty offenses consist of particular orders through which *"some information is required and provide the execution of audits, studies, among others"* (Number 5.2 of the Fifth Rule). As we can see, this relation is merely illustrative; this must be extended depending on the case and particular circumstances.

2.2.1.5. Conclusions

The General Rules for the Exercise of the Power to impose penalties of the OEFA has clearly classified the liable offenses to be enforced by such agency. Within this group are the administrative offenses related to the non-compliance of administrative measures (for instance, remedial, preventive, precautionary measures and particular orders), non-compliance of the obligations included in the environmental rules and the non-compliance of the obligations under the responsibility of the companies established in the instruments of environmental management, among others. Moreover, it may be noted that, as indicated in the Third Rule, the OEFA will establish the subtypes of offenses; these ones must be general, transversal and sectorial, in the terms specified in the corresponding ordinance.

2.2.2. Objective responsibility and system of penalties

Concerning this matter, the General Rules recognize, in accordance with the provisions of the Article 18° of the Law No. 29325[15] that the responsibility in environmental matters is objective. That is to say that the conduct of the individual, that is, his intention or guilt is a non-relevant factor in the analysis of the commission of the damage, the concurrence of the detrimental fact will simply enough as a criterion to confer responsibilities. Nevertheless, it may be noted that the company which is accused will be exempted from responsibility if this one proves the broken causal link, either for act of God, force majeure or specific fact by third party (Number 6.2 of the Sixth Rule).

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14 Number 19 of the "Guidelines for the application of the remedial measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System".

15 ***"Article 18°.- Objective Responsibility***
The companies are objectively responsible for the non-compliance of obligations derived from the instruments of environmental management, as well as the environmental rules and the orders or ordinances issued by the OEFA".

The penalties which may be imposed before an administrative offense are monetary or non-monetary. The non-monetary penalty is the warning and the monetary penalty is the fine. Pursuant to the provisions of the Item b) of the Number 136.2 of the Article 136° of the Law No. 28611 – General Law on the Environment, amended by the Second Amending Supplementary Provision of the Law No. 30011, the Board of Directors of the OEFA will classify as a maximum fine for the serious offenses, the amount of 30,000 Peruvian tax units – UIT (Numbers 7.1 and 7.2 of the Seventh Rule).

In this respect, a point which merits to be outstanding is the issuance by the OEFA of the "Methodology for the calculation of base fines and the application of the aggravating and mitigating factors to be used in the adjustment of penalties, in accordance with the provisions of the Article 6° of the Supreme Decree No. 007-2012-MINAM" (with an Explanatory Manual), approved by Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD, published in the Official Gazette El Peruano on March 12th, 2013[16]. The importance of the mentioned Methodology resides in providing objective criteria for the adjustment of penalties that the administrative authority determines for the non-compliance of the environmental rules. For instance, if the decision which imposes a fine also includes the issuance of remedial measures as specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325, according to the Manual, the base fine will consist of the illicit benefit, a proportion of the environmental damage and the probability of detection, according to the form specified in the Number 37 of the Explanatory Manual previously mentioned.

According to the Eighth Rule of the mechanism under analysis, the scale of penalties is established depending on the seriousness of the administrative offense. In that sense, the Number 8.2 of such Rule establishes the follows:

> *"(...) the Board of Directors of the OEFA will approve the scale of penalties while observing in compliance with the Number 19.1 of the Article 19° of the Law on the National Environmental Assessment and Enforcement System, which indicates that the offenses and penalties are classified as minor, serious and major, and its determination must be based on the damage to health and the environment, in its feasibility or damage certainty, in the extension of its effects and other criteria which may be defined according to the rules in force".*

16 It is important to point out that although the Methodology approved is applicable to the large and medium scale mine in accordance with the provisions of the Supreme Decree No. 007-2012-MINAM, this may be applicable to the other enforcing activities by the OEFA according to the suppletory rule pointed out in the Decision of Board of Directors No. 035-2013-OEFA/PCD.

Under that premise, through Decision of Board of Directors No. 042-2013-OEFA/CD, was approved the "Classification of Offenses and Scale of Penalties related to the Effectiveness of the Environmental Enforcement"[17], applicable to the individuals or legal entities which execute economic activities which are under the scope of powers of the OEFA[18].

Briefly, this last rule classifies the offenses in three groups: (i) the offenses related to the delivery of information to an Environmental Enforcement Entity (EFA), for instance, the denial to deliver information or the reference of information after the deadline, form or any mode established; (ii) the offenses related not to hinder the duty of direct supervision, such as to hinder the installation or operation of equipment to carry out monitoring in the facilities of the enterprises which are supervised; and (iii) the offenses related to the filing of the report of environmental emergencies[19]. Also, this one establishes that the offenses may be categorized as minor, serious and major. In order to determine the fine to be imposed in a concrete case, the "Methodology for the calculation of the base fines and the application of aggravating and mitigating factors to be used in the adjustment of penalties" previously mentioned will be applied, or the rules which may replace it.

On the other hand, it may be emphasized that the rule has included criteria to establish the scale of penalties, among them: (i) the environmental threat of the involved parameters; (ii) the real damage to the flora, fauna, health or human life; (iii) the percentage of exceeding the Permissible Maximum Limits; (iv) the development of activities in prohibited areas or zones; and (v) the lack of operating authorization for the exploitation of natural resources (Eighth Rule). Besides, it is important to emphasize that the illegal activities will be suppressed with a major penalty (those ones which are executed in a prohibited area) and informal activities (those ones which are executed without operating authorization).

17 Published in the Official Gazette El Peruano on October 16th, 2013. This rule will become effective on January 1st, 2014.

18 The Decision previously mentioned classifies general offending conducts. In response to this, such classification may be supplementally used for the other Environmental Enforcement Entities – EFA in national, regional and local matters, in accordance with the provisions of the Article 17° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System.

19 This information may be found in the OEFA website www.oefa.gob.pe/?p=30995 (Visited on December 8th, 2013). It is important to point out that in each of the three groups previously mentioned has been included a type of aggravating offender to carry out the offending conducts described in each group in a context of real or potential environmental damage. For instance, the aggravating offender may be adjusted if the misleading information is sent to the EFA in order to hide a spill of hydrocarbons.

Finally, it is clear that, in accordance with the principle of non-confiscation, the fine to be imposed will not be more than ten per cent (10%) of annual gross income received by the offender the previous year at the date in which the offense was committed. In addition, in case that the company is carrying out activities within a shorter term to that one established in the previous paragraph, the annual gross income will be estimated by multiplying by twelve the monthly gross income average registered from the start date of such activities (Tenth Rule)[20].

III. CONCLUSIONS

The "General Rules on the Exercise of the Power to impose penalties of the Agency for Assessment and Environmental Enforcement - OEFA" establish criteria and guidelines to regulate the exercise of the power to impose penalties, including to that one related to the classification of offenses and the imposition of penalties and remedial measures in order to ensure the compliance of the principles of legality, classification, proportionality and non-confiscation and to attain, at the same time, an effective and convenient environmental protection.

The General Rules are binding and constitute, in addition, a guide for the Environmental Enforcement Entities – EFA in national, regional and local matters.

In the General Rules, the scopes of the duty of classification of the OEFA have been established. In that sense, it is important to note that in the Article 17° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System; the types of general offenses are specified, corresponding to the OEFA develop the subtypes offenses, which may be general, transversal and sectorial.

The General Rules have included criteria to establish the scale of penalties, among them: (i) the environmental threat of the involved parameters; (ii) the real damage to the flora, fauna, health or human life; (iii) the percentage of exceeding the Permissible Maximum Limits; (iv) the development of activities in prohibited areas or zones; and (v) the lack of operating authorizations for the exploitation of natural resources. It is important to emphasize that the illegal activities will be suppressed with a major penalty (those ones which are executed in a prohibited area) and informal activities (those ones which are executed without operating authorization).

20 Moreover, it may be established that the amount of the fine which was imposed will be reduced in twenty-five per cent (25%) if the company pays it off within the term of fifteen (15) working days from the notice of the act which includes the penalty and, in turn, the company does not contest the penalty which was imposed. The reduction will be up to thirty per cent (30%) if in addition to the requirements previously mentioned, the company has authorized in its writs of defenses that the administrative acts are notified by email during the penalty procedure (Eleventh Rule).

There are several rules issued by the OEFA, among them, the "Regulation of the Administrative Penalty Procedure", the "Regulation of Direct Supervision of the OEFA" and the "Guidelines for the application of the remedial measures specified in the Item d) of the Number 22.2 of the Article 22° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System", which are useful for the effects of the understanding and application of these General Rules.

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CHALLENGES OF THE POWER OF CLASSIFICATION ON ENVIRONMENTAL OFFENSES UNDER RESPONSIBILITY OF THE OEFA

MARTHA INÉS ALDANA DURÁN

Summary

The author introduces the backgrounds of the power of classification of the environmental offenses by regulation, as well as the experience on this subject in the Ministry of Environment through the classification for the activities of mining exploitation. Also, she develops the process of formulation of the rules currently conferred to the Agency for Assessment and Environmental Enforcement (OEFA), the power of classification of the offenses and penalties. To the same extent, she introduces the first classifications of offenses and penalties currently approved by the OEFA. Finally, she addresses some of the challenges for the future in the exercise of this important duty under its responsibility now.

Introduction. II. Backgrounds of classification of offenses and penalties by regulation in environmental matters. III. Adjustment of classification of offenses and penalties in the SINEFA Law 2009. IV. Experience of classification of offenses and penalties by Supreme Decree of the MINAM. V. Amendments introduced in the Law No. 30011 on the power of classification of offenses and penalties under responsibility of the OEFA. VI. First classifications of offenses and penalties approved by the OEFA. VII. Future challenges in terms of classification of offenses and penalties. VIII. In conclusion.

I. INTRODUCTION

The enforcement and penalty duty constitutes an expression of the power conferred to the State by the citizens so that this one, on behalf of the society, suppresses the rule-breaking conducts of the rules in order to promote that its objectives of public interest may be attained through their prompted compliance that these ones aspire to attain.

In the context of an ideal society, if everyone complies with the duties which are assigned to, sanctions or burdensome consequences for offending conducts will not be necessary to be established.

The social responsibility and the environmentally positive practices concerning a voluntary nature may be the regular standard of behavior. However, reality shows us that it is necessary to have mechanisms of coercion which ensure people to respect the rights of third parties and comply with the orders established in the rules. That is particularly critical in environmental issues, due to the fragility of natural ecosystems which are used as support for our survival and damages that these rule-breaking conducts may cause in the environment and in the health of population.

In this context, the approval of a scale of offenses and penalties constitutes a means that, for its own existence, promotes the compliance of the obligations through the imposition of the possible sanction applicable to the offending conducts. In turn, the classification of offenses and penalties constitutes one of the guarantees of due process, which attempts to ensure the predictability on the decisions of the Administration.

The applicable offenses and penalties in environmental matters have been established in the sectorial rules, having as reference the regulations in the General Law on Environment. However, it is clear that its adjustment does not comply with common criteria which ensure a transversal rationality in its formulation. With this new approach of the environmental enforcement to be implemented in this country, the offenses and penalties attempt to be coherent among each other and dissuasive in a similar way, beyond the peculiarities applicable to each activity.

The process to formulate a scale of environmental offenses and penalties is complex due to its technical level and the conception of substantive obligations in environmental rules which is constant. For such reason, the legislator has established under certain rules, the regulatory contribution as a mechanism for the development of this tool.

In this article, the backgrounds of the classification of offenses and penalties are introduced by regulation in environmental matters, particularly emphasizing in the exercise of this duty under the responsibility of regulatory agencies. Also, this one addresses the experience gained with the classification of offenses and penalties by Supreme Decree of the Ministry of Environment in matters of activities of mining exploitation and the new rules on this matter are established in the amendment of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System (SINEFA) by the Law No. 30011. It is also important to emphasize the content of the first scales of offenses and penalties approved by the Agency for

Assessment and Environmental Enforcement – OEFA, which can be supplementally used for other Environmental Enforcement Entities (EFA), different from the OEFA. Finally, the main future challenges are presented in this important matter.

II. BACKGROUNDS OF CLASSIFICATION OF OFFENSES AND PENALTIES BY REGULATION IN ENVIRONMENTAL MATTERS

The most direct background of the exercise of the power of classification by regulation through the decisions of its highest directing body is in the experience of the regulatory agencies.

In effect, the Law No. 27332 – Framework Law on the Regulatory Agencies of the Private Investment in the Public Services 2000 was amended in January, 2002[1] to be included expressly as part of the regulatory duty of the regulatory agencies, the follows:

> Law No. 27332 – Framework Law on the Regulatory Agencies of the Private Investment in the Public Services
> ***"Article 3°. - Duties:***
> *(...)*
> *c) Regulatory duty: (...) In turn, include the power to classify the offenses for non-compliance of obligations established by legal provisions, technical rules and those ones derived from the contracts of concession, under its scope, as well as for the non-compliance of the regulatory provisions and regulations ordered by them. Also, these ones will approve their own Scale of Penalties within the maximum limits established by Supreme Decree countersigned by the President of Council of Ministers and the Minister of the sector that the Regulatory Agency belongs to".*

Under this legal basis, the scales of offenses and penalties applicable for non-compliance of the obligations under its respective scopes of powers[2] have been approved by Decision of Board of Directors from the different regulatory agencies.

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1 Amendment introduced by Law No. 27631, published in the Official Gazette El Peruano on January 16th, 2002.

2 In the case of the OSINERGMIN, there is a variety of decisions of Board of Directors which regulate the classification of offenses and penalties. A single scale has not been established that might summarize them.

Although the rules within the scope of the OSINERGMIN indicate that its regulations must be subject to prepublication, in the case of the classifications of offenses and penalties, the cases have been many in which these ones have been excluded from such requirement for grounds of urgency[3].

It is important to note that the regulation which regulated the transfer of duties of the OSINERGMIN to the OEFA[4] established that this last entity was empowered to impose the offenses in environmental matters which were classified through rules and regulations issued by the OSINERGMIN by applying the scale of penalties that such regulatory agency would have approved for such purpose.

In a certain way, although the OEFA is in process so that its own scales of offenses and penalties are approved, this one is still making use of some scales which were approved by the OSINERGMIN and those ones are still in force, as in the case of the scale applicable to the activities of mining exploitation[5].

III. ADJUSTMENT OF THE CLASSIFICATION OF OFFENSES AND PENALTIES IN THE SINEFA LAW 2009

Although the OEFA was created on May, 2008 by the same rule that the Ministry of Environment (MINAM)[6] created, it was necessary to issue a complementary regulation by the creation of a practical system so that this one develops and clarifies the duties under its responsibility.

In a certain way, in December 2008, the Executive Branch proposed the creation of the National Environmental Assessment and Enforcement System (SINEFA) through the Project of Law No. 2952/2008-PE. In relation to the regulatory duty regulated in the second paragraph of the Number 5 of the Article 11° of the Project, included the follows:

3 On the basis of the provisions of the Article 25° of the General Regulation of the OSINERGMIN approved by Supreme Decree No. 054-2001-PCM. This is the case of the Decisions of Board of Directors No. 388-2007-OS/CD, No. 118-2010-OS-CD, No. 308-2009-OS/CD, among others.

4 Article 4° of the Supreme Decree No. 001-2010-MINAM.

5 Decision of Board of Directors No. 211-2009-OS/CD.

6 Second Final Complementary Provision of the Legislative Decree No. 1013.

> *"The power to propose the classification of the offenses for non-compliance of environmental obligations established by legal and technical rules, as well as the corresponding Scale of Penalties, these ones will be approved by Supreme Decree countersigned by the Ministry of Environment".*

In turn, in the Article 17° of the related Project of Law, in the Title IV on the Administrative Penalty Power of the OEFA, in Chapter I on General Rules, was indicated that:

> *"Upon proposition of the OEFA, the MINAM is empowered to classify by Supreme Decree, the facts and omissions which constitute environmental administrative offenses pursuant to the regulatory duty specified in the sub-paragraph e) of the Article 11 of this Law".*

In addition, in the second paragraph of the Article 19° of the related Project of Law was indicated that:

> *"Upon proposition of the OEFA, the MINAM will approve the scale of penalties where the applicable penalties will be established for each type of offense, having as a base the penalties established in the Article 136 of the General Law on Environment".*

However, after the parliamentary debate, the original version of the Article 17° of the Law No. 29325 – SINEFA Law was written as follows:

> ***Law No. 29325 – Law on the National Environmental Assessment and Enforcement System***
> ***"Article 17°. - Offenses***
> *The administratively enforcing conducts for environmental offenses are those which are specified in the Law No. 28611, General Law on Environment and other laws on this subject".*

As we can see in the final drafting, this article omitted to point out that the MINAM was empowered to classify the environmental administrative offenses by Supreme Decree, but this fact was already adhered to the corresponding Project of Law.

In that regard, some observations were inevitable:

> *"(...) in the SINEFA Law, the power of the OEFA to carry out the proposals of classification of offenses to be approved by the MINAM has not been included; by indicating that this one may be only applicable in relation to the approval of the corresponding scale of penalties.*

This may constitute some limitation in the exercise of the proper duties of such entity"[7].

In the process of implementation of the OEFA, the necessity of having a tool which allows the classification of offenses was suggested. For this reason, the Executive Branch proposed the Project of Law No. 3493 to the Congress, introduced on September 12th, 2009.

Such project included, as Single Article, a provision which reinserted the idea which was originally presented in the Project of SINEFA Law in order to empower explicitly the MINAM to classify the corresponding offenses by regulation. In that regard, in the Statement of Reasons of the related legislative proposal was noted the follows:

> *"(...) the Article 17 of the Law No. 29325 only anticipates that the administratively enforcing conducts for environmental offenses are those which are specified in the Law No. 28611, General Law on Environment and other laws on this subject, without providing clearly the possibility for these ones to be classified by regulation, which constitutes a constraint to the enforcing and penalty duty of the OEFA (...)"*[8].

The Project of Law was approved and finally, the promulgation of the Law No. 29514[9] was achieved, amending the Article 17° of the SINEFA Law with the following text:

> ***"Article 17°. - Offenses***
> *Through Supreme Decree, countersigned by the Minister of Environment and by regulation, the administratively penalty conducts are classified for environmental offenses specified in the Law No. 28611, General Law on Environment and other rules on the subject".*

With this legal tool, the OEFA had means to formulate the corresponding regulatory proposal (project of Supreme Decree) from March 2010, which may allow

7 ALDANA, Martha. "Pasado, Presente y Futuro de la Institucionalidad Ambiental en el Perú". *GN – La Revista de Gas Natural*. Gerencia de Fiscalización de Gas Natural. Organismo Supervisor en Energía y Minería – OSINERGMIN, Lima, año 1, número 1, 2009, p. 241.

8 Project of Law No. 3493/2009-PE. Statement of Reasons. p. 6.

9 Enacted on March 26th, 2010.

and/or update the required classifications to better exercise the duties under its responsibility. Also, in the same year, the first rule for the transfer of duties of environmental enforcement of the OSINERGMIN to the OEFA had been approved[10].

In the context of this transfer of duties, the necessity of updating the scale of offenses and penalties applicable for the development of the activities of mining exploitation was identified, while a scale approved by the Ministry of Energy and Mines in 2000[11] was still in force. This scale, in addition to establish fixed fines (non-adjustable) applicable to the offenses described there, this one gathered a maximum limit of applicable penalty which did not coincide with the maximum limit of fines applicable to the environmental offenses.

In effect, according to such scale, the penalty for applicable maximum fine was 600 Peruvian tax units (UIT) which was the applicable limit established in the Environment and Natural Resources Code[12]. However, for the year 2012, the maximum limit of fines applicable for environmental offenses increased up to 10,000 UIT (from the year 2005), approved by the Law No. 28611 – General Law on Environment.

Therefore, while having the corresponding legal authorization to formulate the classification of offenses and penalties, the updating of the related scale applicable to the mining activity was prioritized.

IV. EXPERIENCE OF THE CLASSIFICATION OF OFFENSES AND PENALTIES BY SUPREME DECREE OF THE MINAM

The OEFA sent to the MINAM the proposal of scale of applicable offenses and penalties applicable to the activity of mining exploitation and related activities[13].

10 Supreme Decree No. 001-2010-MINAM.

11 Approved by Ministerial Order No. 353-2000-EM/VMM.

12 Single Article of the Law No. 26913 which amends the Environment and Natural Resources Code enacted by Legislative Decree No. 613 published in the Official Gazette El Peruano on January 20th, 1998. At present, both regulations are revoked by the Fourth Complementary, Temporary and Final Provision of the Law No. 28611 – General Law on the Environment. In its original version, the Environment and Natural Resources Code established a maximum amount of fines for environmental offenses of 200 UIT.

13 Through the Official Letter No. 1626-2010-OEFA/PCD from December 9th, 2010.

On its part, the MINAM proceeded to its prepublication by Ministerial Order No. 267-2010-MINAM from December 31st, 2010.

Therefore, the implementation of the power of classification under the responsibility of the MINAM was summarized in the approval on November 2012, regarding the new scale of offenses and penalties applicable to such activities[14]. This regulation updated the maximum limit of penalty of the fine up to the amount of 10,000 UIT (by the time, this one was in force as a maximum amount of applicable environmental penalties). At the date, this is the scale used for the sanction of the environmental offenses in these activities.

However, as we can see, around two years have passed between the prepublication of the approval and the publication of the scale which was approved.

This delay and necessity of having a more flexible mechanism for the development of the classifications applicable by the OEFA, as a result, the power of classification was included as part of the exercise of the regulatory duty under the responsibility of the OEFA in the context of amendments to the SINEFA Law by following the same model in force and applicable to the regulatory agencies from the year 2002.

V. AMENDMENTS INTRODUCED IN THE LAW NO. 30011 ON THE POWER OF CLASSIFICATION OF OFFENSES AND PENALTIES UNDER RESPONSIBILITY OF THE OEFA

When the Executive Branch presented the Project of Law No. 1851/2012-PE, in order to introduce amendments to the SINEFA Law, this one was expressly included within the regulatory duty of the OEFA and as part of the powers of the Board of Directors of the entity, the power of approving the classification of applicable offenses and penalties by decisions of this official body.

This regulatory project was not subject to changes in relation to this power and therefore, the OEFA is legally authorized in this subject with the publication of the Law No. 30011 (from April 26th, 2013).

14 Chart of Classification of Environmental Offenses and Scale of Fines and Penalties applicable to the Large and Medium scale mine related to Activities of Exploitation, Benefit, Transport and Storage of Ore Concentrates approved by Supreme Decree No. 007-2012-MINAM, published in the Official Gazette El Peruano on November 10th, 2012.

As a result of the amendments introduced for the related regulation, the power of classification of offenses and penalties under the responsibility of the OEFA is regulated in the Law No. 29325 – SINEFA Law as follows:

> **"Article 11°. - General duties**
> *(...)*
> *Challenges of the power of classification on environmental offenses under the responsibility of the OEFA*
>
> *11.2 The OEFA exercises, in its quality of governing body of the National Environmental Assessment and Enforcement System (SINEFA) the following duties:*
> *a) Regulatory duty:*
> *(...)*
> *In exercise of the regulatory duty, the OEFA is competent to classify administrative offenses, among others, and approve the scale of corresponding penalties, as well as the criteria of adjustment of these ones and the scopes of the precautionary, preventive and remedial measures to be issued for the corresponding competent instances.*
> *(...)".*
>
> **"Article 17°. - Administrative offenses and power to impose penalties**
> *Through decision of Board of Directors of the OEFA, the conducts are classified and the scale of applicable penalties is approved. The classification of general and transversal offenses and penalties will be additional in application to the classification of offenses and penalties to be used by the EFAs".*
>
> **"Article 19°. - Classification and criteria for the classification of penalties**
> *(...)*
> 19.2 The Board of Directors of the OEFA approves the scale of penalties where the applicable penalties are established for each type of offense, having as base those ones which are established in the Article 136 of the Law 28611, General Law on Environment".

In relation to this regulation, it may be noted that the Constitutional Tribunal (hereinafter, the TC) has recognized the legal validity of the assignment of the power of classification by regulation.

In effect, the principle of legality in penalty matters[15] hinders that the commission of an offense may be attributed if this one is not previously determined in the

15 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 230°.- Principles of the administrative penalty power

law, and also this one prohibits that a penalty may be imposed if this one is not also determined by the law[16].

This principle imposes three requests[17], as the TC indicates:

(i) the existence of a law *(lex scripta)*;
(ii) when the law is prior to the fact which was imposed penalties *(lex previa);* and,
(iii) when the law describes a factual assumption of strictly determined *(lex certa)*.

It is important to emphasize that the TC insists on the follows:

> *"The principle of legality must not be equalized with the* ***principle of classification****[18]. The first one which is guaranteed by the sub-item 'd' of the sub-paragraph 24) of the Article 2° of the Constitution, is satisfied when complying with the prevention of the offenses and penalties in the law. On the contrary, the second one* ***constitutes the precise definition of the conduct considered as an offense by the law. Such precision of what is considered as unlawful from the administrative perspective; therefore, this one is not subject to an absolute law reserve, but also, this one can be complemented by the corresponding regulations, as derived from the Article 168° of the Constitution.*** *The lack of an absolute law reserve in this subject, as Alejandro Nieto says (Derecho administrativo sancionador, Editorial Tecnos, Madrid 1994, Pág.*

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1. Legality. - Pursuant to the legally binding rule, the entities are empowered to impose penalties and anticipate the administrative consequences that, as penalty, may be applied to a company. However, such entities, in any case, shall order the deprivation of liberty.

(…)"

16 Judgment of the Constitutional Tribunal, attributed to the File No. 2050-2002-AA/TC.

17 Judgment of the Constitutional Tribunal, attributed to the File No. 010-2002-AI/TC.

18 **Law No. 27444 – Law on the General Administrative Procedure**
"Article 230°.- Principles of the administrative penalty power
(...)
4. Classification. - only the offenses expressly legally binding rules, according to their nature, are considered as administratively punishable conducts without further interpretation. The regulatory provisions of development may specify or adjust those ones oriented to identify the conducts or determine penalties, without constituting new punishable conducts to those ones legally specified, unless the cases in which the law enables to classify by regulation.
(...)".

> *260), "this one causes, not the replacement of the law by the regulations, but the collaboration of the regulation in the regulatory tasks, where this one acts according to the law and as a mere complement of this one"*[19]. *[emphasis added].*

In this conceptual framework, in the File No. 05262-2006-PA, the TC indicated the follows:

> *"(...) it must be clear that it is perfectly possible and constitutionally legitimate the compliance of penalties through regulations, provided that when these ones do not distort the purpose of existence of the law to be regulated, in strict compliance of the principles of reasonableness and proportionality, which are also part of the right to due process"*[20].

In this regard, Durán Martínez affirms:

> *"The truth is that it is common that the illicit conduct is not only set forth in the law but, the law is often referred to the regulation. As a result, we have what we refer to as the regulatory collaboration or regulatory complementarity"*[21].

But, Nieto adds:

> *"The regulations may only regulate what the law has entrusted them and what it has provided them within the instructions and standards"*[22].

In this regard, Morón mentions the follows:

> *"(...) the law itself may call the support of the Administration in order to conclude the task of classification (...) It deals with a type of assignment of tasks that the legislator carries out in the Administration since technical or very dynamic aspects are addressed which do not justify to maintain them*

19 Judgment of the Constitutional Tribunal, attributed to the File No. 2050-2002-AA/TC.

20 File No. 05262-2006-PA. Empresa de Distribución Eléctrica de Lima Norte S.A.A. Item 6.

21 DURÁN, Augusto. *Principios de legalidad, tipicidad y culpabilidad.* En DANÓS, Jorge et ál. *Congreso Internacional de Derecho Administrativo. Derecho Administrativo en el Siglo XXI,* Vol. 1, p. 492. Quoting Nieto and Vásquez Pedrouzo.

22 NIETO, Alejandro. *Derecho Administrativo Sancionador.* Madrid: Tecnos, 2011, p. 267.

within the legal reserve, but always determining what is essential regarding the unlawful conduct"[23].

It is in this context that the Law No. 30011 includes a description of the general offenses, to be carried out by regulation and authorized by this rule. In effect, the description of the penalty conducts by the OEFA is set forth in the first part of the Article 17° of this Law, which indicates:

Article 17°. - Administrative offenses and power to impose penalties

Constitute administrative offenses under the scope of powers of the Agency for Assessment and Environmental Enforcement (OEFA) the following conducts:

a) The non-compliance of the obligations included in the environmental regulation.

b) The non-compliance of the obligations under the responsibility of the companies established in the instruments of environmental management indicated in the environmental regulation in force.

c) The non-compliance of the environmental commitments specified in contracts of concession.

d) The non-compliance of the preventive, precautionary or remedial measures as well as of the provisions or orders issued by the competent instances of the OEFA.

e) Others which are related to the scope of its powers.

Therefore, the duty of classification under the responsibility of the OEFA will consist of the power to regulate the specific content of these offenses, which (positively) constitute the source of the enforcing environmental obligations or substantive obligations under the responsibility of the companies. It is not legally viable that through the classification of offenses and penalties, the OEFA establishes new obligations for the companies[24].

It may be noted that the regulatory assignment established in the Law No. 30011 responds to the technical complexity of the issues subject of classification, as well as to the necessity of paying attention to the dynamism of the activity which is permanently subject to new regulations which may establish new enforcing en-

23 MORÓN, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* 8ª ed., Lima: Gaceta Jurídica, 2009, p. 687.

24 Number 4.2 of the Fourth Rule of the Decision of Board of Directors No. 038-2013-OEFA/CD – Approve the "General Rules on the exercise of the Power to impose penalties of the Agency for Assessment and Environmental Enforcement - OEFA".

vironmental obligations which are required to have a mechanism allowing permanently to carry out its classification in order to make its enforcement viable.

The determination of the scale of penalties applicable by the OEFA, this one must be subject to the provisions of the SINEFA Law[25] which is referred to the follows:

> ***"Article 19°. - Classification and criteria for the classification of penalties***
>
> *19.1. The offenses and penalties are classified as minor, serious and major. Their determination must be based on the damage to health and the environment, in their feasibility or damage certainty, in the spreading of their effects and other criteria which may be defined according to the regulation in force".*

In a certain way, the SINEFA Law, with the amendments introduced by the Law No. 30011, provides the necessary legal context for the appropriate exercise of the duty of classification under the responsibility of the OEFA now.

VI. FIRST CLASSIFICATIONS OF OFFENSES AND PENALTIES APPROVED BY THE OEFA

For the purpose of organizing the exercise of this important duty, the first action of the Board of Directors of the OEFA in this subject was to approve by Decision of Board of Directors No. 038-2013-OEFA/CD[26], the "General Rules on the exercise of the Power to impose penalties of the OEFA".

Within these General Rules[27] is indicated that the subtypes offenses (which carry out the offenses established in the Article 17° of the SINEFA Law) may be:

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25 In turn, this one determines to carry out in the context of the regulations which regarding this matter the Law No. 28611 establishes – General Law on Environment including a description of the penalties applicable in environmental matters (Article 136°). This regulation must be interpreted in accordance with the SINEFA Law which, in turn, determines the powers of the OEFA to establish remedial measures (Article 22°); in such a way to prevent a punishable consequence to be both a penalty and also a remedial measure.

26 Published in the Official Gazette El Peruano on September 18th, 2013.

27 Number 3.3 of the Third Rule of the "General Rules on the exercise of the Power to impose penalties of the OEFA" approved by the Decision of Board of Directors No. 038-2013-OEFA/CD.

(a) General: Those ones related to the obstruction of the duties of environmental enforcement[28].
(b) Transversal: Those ones related to the non-compliance of the instruments of environmental management or environmental regulations applicable to different enforced economic activities.
(c) Sectorial: Those ones related to the non-compliance of environmental obligations included in the sectorial environmental legislation applicable according the type of economic activity.

In accordance with the provisions of the SINEFA Law[29], the classification of general and transversal offenses will be additional in application to the classification of offenses and penalties used by the Environmental Enforcement Entities (EFA)[30] which are conferred to the power to impose penalties. Under this rule, we attempted to provide the required legal authorization to the EFAs, which does not have this legal tool. Such effect will involve the highest authority of the OEFA to issue a legal rule so as to provide publicity to such additional application in order that the companies subject to its scope of powers know, when opportune, which conducts are prohibited and which penalty these ones may be imposed to.

At the date of elaboration of this article, in exercise of the powers conferred to the OEFA and the context given for those General Rules previously mentioned and the corresponding public inquiry[31] then, its Board of Directors has approved two regulations which regulate classifications of offenses and penalties to be mentioned below:

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28 In this case, the concept of Environmental enforcement must be generally understood. In accordance with the provisions of the Common System of Environmental Enforcement, approved by Ministerial Order No. 247-2013-MINAM, generally, the environmental enforcement includes the actions of surveillance, control, monitoring, follow-up, verification, assessment, supervision, (environmental) enforcement in a strict way and other actions in order to ensure the compliance of enforcing environmental obligations and those ones derived from the exercise of the environmental enforcement. Environmental enforcement, in a strict way, according to this regulation, includes the power to investigate the commission of possible enforcing environmental offenses and to impose penalties (Number 2.2 of the Article 2°).

29 Article 17° of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System.

30 According to the Item a) of the Number 2.1. of the Article 2° of the "Common System of Environmental Enforcement are EFAs those public entities in national, regional or local level which are generally referred to any or all the actions of environmental enforcement.

31 The rules which are issued by the OEFA are subject to prepublication in the Official Gazette El Peruano, according to the order established in the Article 39° of the Regulation on Transparency, Access to the Environmental Public Information and community involvement

6.1 Classification of offenses and scale of penalties related to the effectiveness of the environmental enforcement (general offenses)

Through Decision of Board of Directors No. 042-2013-OEFA/CD, published in the Official Gazette El Peruano on October 16th, 2013, the "Classification of offenses and scale of penalties related to the effectiveness of environmental enforcement applicable to the economic activities which are under the scope of powers of the OEFA". This one develops general subtypes offenses.

The offenses specified in the mentioned rule are classified in three groups:

(i) Offenses related to the delivery of information to the EFA.
(ii) Offenses related not to hinder the duty of direct supervision.
(iii) Offenses related to the filing of the report on environmental emergencies.

The detail of these offenses will be explained below[32]:

a) Offenses related to the delivery of information

This group of offenses is related to the obligation of the companies to deliver information in order to allow the appropriate development of the environmental enforcement.

In this group, the following offending conducts have been provided:

- **Refuse, without good cause, to deliver the information or the documentation that the supervisor requires as part of field supervision, provided that the company has the responsibility to have that documentation in the supervised facilities.**

Concerning this matter, the Article 18° of the Regulation of Direct Supervision of the OEFA33 establishes that the company must maintain under its power, if pos-

and Inquiry in Environmental Affairs approved by Supreme Decree No. 002-2009-MINAM. In addition to this mechanism of access, the OEFA carries out meetings where this one calls to who have formulated comments during the period of inquiry of the rules to ensure more community participation in the process of formulation of rules under its responsibility.

32 Taken from the Statement of Reasons of this rule.

33 Number 18.1. of the Article 18° of the Regulation of Direct Supervision of the OEFA, approved by Decision of Board of Directors No. 007-2013-OEFA/CD.

sible, all the information related to its activity in the facilities and places subject to direct supervision, must deliver it to the supervisor when this one asks for it.

On the basis of the above, the conduct of the company is imposed penalties for the fact of not delivering the information required by the supervisor, provided that this one is compelled to have this in its facilities. That is, provided that such obligation is adhered to the applicable regulation, in its instrument of environmental management or order issued by the OEFA. Such offense is minor.

- **When required information or documentation is not sent to the Environmental Enforcement Entity, or send it after the deadline, form or mode.**

In that regard, the Articles 18° and 19° of the Regulation of Direct Supervision of the OEFA establish that the company is responsible for sending the required information through physical or electronic means, according to the form and terms established in the applicable regulation or in accordance with the OEFA. For such effect, procedures will be developed and the formats which are necessary will be approved.

To this effect, it may be classified as an offense, when the required information is not delivered, as well as the delivery made out of term, form or mode established in the legislation or orders issued by the OEFA. That offense is minor.

For instance, in the projects of mining exploration, the drilling carried out through drills must be registered to compare the depth and angles applied for each case with those ones stated in the instrument of environmental management. Without this information, the enforcement of such commitments may be delayed or less effective. Therefore, in these cases, when the required information is not delivered, this one must be imposed a penalty.

- **Send misleading information or documentation to the Environmental Enforcement Entity.**

The reference of misleading information damages the legal authority, even; this one hinders the opportune exercise of the actions of environmental enforcement that the environmental authority would have carried out if this one had had the correct information. For this reason, this offense is qualified as serious.

By way of example, the document which has been counterfeited in its content may be considered as misleading information.

Finally, it is important to point out that this offense will be administratively imposed penalties, without prejudice to other legal actions that might be granted.

- **If a situation of potential or real environmental damage exists, incur in any of the previous conducts.**

It is convenient to suppress with a major penalty the development of the conducts previously described in a context of potential or real environmental damage. Concerning this matter, it may be taken into account that the commission of this offense may hinder that the authority of environmental enforcement carries out an opportune intervention in order to prevent or remedy the environmental damage. For such reason, this offense is qualified as major.

For instance, the company will commit this offense when this one delivers misleading information to the authority of environmental enforcement in order to hide a hydrocarbon spill. In such circumstances, the effectiveness of the environmental enforcement may be severely affected, since it may limit that opportune measures are adopted to remedy the environmental damage which was caused.

b) Offenses related not to hinder the duty of direct supervision

This group of offenses is related to the obligation of the companies not to interfere in the exercise of the actions of direct supervision under the responsibility of the OEFA.

This group includes the following assumptions:

- **Delay, without good cause, the ingress to the facilities or infrastructure subject of direct supervision.**

Concerning this matter, the Article 20° of the Regulation of Direct Supervision of the OEFA mentions that the company is compelled to provide the supervisor all the amenities for the ingress to the facilities within a term not more than ten minutes.

Considering the parameter above, the competent authority will determine in each case if the delay is or not unjustified, in accordance with the principle of reasonableness, since the unjustified delay constitutes an offense while the development of the direct supervision is impaired. This possible offender is qualified as minor.

For instance, an unjustified delay is constituted when indicating the supervisors that they cannot enter into a mining unit when the assigned person to accompany them during the supervision is not present. Generally, in these cases, the wait may

be extended for one or two hours, which hinders the regular development of the supervision.

- **When the amenities are not provided for the ingress to the facilities or infrastructure subject of supervision or for its regular development.**

In this case, the omission of the company to provide the amenities for the ingress to the facilities and the development of the supervision is established as an offense, since this hinders or limits the exercise of the environmental enforcement. This offense is qualified as minor.

It is important to note that among the amenities which must be provided the supervisor are the transport, the special equipment and other means which allow the regular development of the supervision.

For instance, the company may commit this offense when this one does not provide the supervisor the necessary transport for his displacement inside the site of exploration or when this one does not facilitate the personnel to accompany him for the location of the exploitation equipment by alleging that this one does not have personnel for such purpose, but without any justification.

- **Refuse the ingress to the facilities or infrastructure subject of direct supervision.**

In this case, the conduct of the company which consistently refuses the ingress to its facilities, when hindering the execution of the supervision, including the appropriate decision making to protect the environment is classified as an offense. For such reason, this offense is qualified as serious.

For instance, when it is not allowed the ingress of the supervisor to the fish-processing plant by alleging a possible address change without justification, this situation constitutes an offense.

- **When the amenities such as the transport, accommodation and food are not provided to the supervisor when he carries out field supervision in facilities which are difficult to access.**

Firstly, in order to adjust this assumption, the supervision must be carried out in places which are difficult to access. For instance, the areas where there are no routes of communication allowing motorized traffic, or in which the providing public services of ground, river or maritime transportation has a daily service (return) or the existence of other restrictions. Secondly, the OEFA must have asked for support of

the company so that this one provides the supervisor the transport, accommodation and food when necessary.

In this context, if the company does not comply with providing such goods and services, this one commits an administrative offense, which does not only put the effectiveness of the environmental enforcement at risk, but the security and health of the supervisors. For such reasons, this offense is qualified as serious.

- **Obstruct the tasks of direct supervision through the disproportionate or unjustified request of requirements of security and health approved by the company.**

For the development of the inspection, the supervisor is compelled to meet the requirements of security and health approved by the company. Nevertheless, such requirements may not be disproportionate or unjustified, since that may obstruct the exercise of the duty of direct supervision. In this regards, if in accordance with the principle of reasonableness is, in a concrete case, verified that the requirements which were approved before were disproportionate, an administrative offense may be adjusted and qualified as minor.

For instance, the OEFA has imposed penalties to a company for having blocked the ingress of the supervisor to the refinery and foundry by alleging that in such area the delivery of precious minerals to the enterprise in charge of transporting them was carrying out. For the OEFA, this security measure was not reasonable.

- **Obstruct or hinder the exercise of the powers of the supervisor related to the obtaining or reproduction of physical or digital files.**

This offense is harmful to the obtaining of necessary supporting means for the effectiveness of the environmental enforcement. Such offense is qualified as minor.

- **Obstruct or hinder the tasks of the specialists and technicians who accompany the supervisor for the development of field supervision.**

Similar to the previous offense, the obstruction of the tasks of the specialists and technicians is harmful to the obtaining of relevant supporting means for the environmental enforcement. This conduct constitutes a minor offense.

- **Obstruct or hinder the installation or operation of equipment to carry out monitoring in the establishments of the supervised enterprises or in the geographical areas related to the activity which is being supervised,**

provided that such equipment do not cause difficulties to the activities or the providing of services of the companies which are subject of supervision.

The installation or operation of equipment to carry out monitoring is transcendent to know the presence and concentration of contaminants in the environment, as well as the condition of preservation of the natural resources in the facilities of the company or in its areas related to this one. For such reason, the conduct of the company for not allowing the installation or operation of this equipment constitutes an administrative offense, which is qualified as minor.

In a concrete case, the installation of the monitoring equipment may be hindered if for instance, it is not allowed that these ones may be plugged in a power outlet. On the contrary, its operation may be obstructed if there is a power outage once the equipment is already installed. Both assumptions constitute administrative offenses.

- **Give misleading statements during field supervision.**

With this offense, the company violates the duty of probity and consequently, this one hinders the administrative authority to carry out when opportune the actions of enforcement which are necessary. For such reason, this offense is qualified as serious.

- **When there is a potential or real environmental damage situation, any of the previous conducts will be committed.**

This aggravated offense is adjusted when any of the conducts previously described are carried out in a context of potential or real environmental damage. For such reason, this offense is qualifies as major.

For instance, this offense is adjusted when the installation of monitoring equipment is hindered in order to prevent that the environmental authority finds out the presence of contaminants in the environment in the area which is supervised.

c) Offenses related to the filing of the report of environmental emergencies

This group of offenses is referred to the non-compliance of the obligation of the company to file when opportune the reports of environmental emergencies.

In this group, the following offenses have been included:

- **When the Reports of Environmental Emergencies are not sent to the Environmental Enforcement Entity or sending it out of the established term, form or mode.**

Concerning this matter, it is important to note that the Number 4.1. of the Article 4 of the Regulation of Report of Environmental Emergencies of the activities under the scope of powers of the OEFA[34], mentions that the companies must report the environmental emergencies to the OEFA according to the established terms and formats. In that sense, if a company omits to report an environmental emergency or makes it after the deadline, form or mode established in the previous Regulation, this one will be imposed penalties. This offense is qualified as minor.

Send misleading information or documentation to the Environmental Enforcement Entity on the Reports of Environmental Emergencies.

It is important to note that through the reports of environmental emergencies the company informs the environmental authority on the characteristics and circumstances in which an emergency of this type was produced (fire, explosion, spill, among others).

If the company sends misleading information regarding the damage which was caused or the causes which produced the environmental emergency, this may seriously affect the effectiveness of the environmental enforcement, since the interventions which are pertinent may not be carried out. For this reason, this offense is qualified as serious.

- **When there is a potential or real environmental damage situation, any of the previous conducts will be committed.**

Finally, a consistent aggravating offense has been included for carrying out the conducts previously described in a context of real or potential environmental damage. For this reason, this offense is qualified as serious.

For instance, this offense is adjusted if the company does not send information (report of environmental emergency) regarding the discharge of toxic substances to a body of water, which would have caused a potential or real damage to the fauna living in the area. The purpose is to prevent the administrative responsibility.

34 Approved by Decision of Board of Directors No. 018-2013-OEFA/CD.

Depending on the seriousness of the offense, the competent authority will be able to impose as penalty a warning or fine. In the case of fines, the maximum limit increases to 1,000 UIT[35].

The regulation has established a *vacation legis* for its entry into effect. In this regard, it may be specified that the classification of offenses and scale of penalties related to the effectiveness of the environmental enforcement will become effective on January 1st, 2014.

It is important to note that the OEFA has been applying the classification of these offenses according to the regulation applicable to the sector which enforces (energy[36], mining[37] and production[38]). However, these general classifications are neither uniform nor homogeneous due to a variety of penalties applicable before similar offenses committed by the companies. For instance, in fishing and aquatic activities the maximum penalty for obstructing the supervisions is 30 UIT when for a similar offense in the mining energy sector, the penalty reaches to 1,000 UIT.

Also, the classifications which have been using specify general conducts to impose penalties for the obstruction of the environmental enforcement with ranges of penalty which sometimes are wide enough.

In effect, in the Energy Sector, the Decision of Board of Directors of the OSINERGMIN No. 028-2003-OS/CD, amended by Decision of Board of Directors

35 In order to determine the fine to be imposed in a concrete case, both for this classification and for the others that the OEFA uses, the "Methodology for the calculation of the base fines and the application of the aggravating and mitigating factors to be used in the adjustment of penalties" will be used, approved by Decision of Presidency of Board of Directors No. 035-2013-OEFA/PCD or the regulation which replaces it.

36 In the Energy Sector (electricity and hydrocarbons) is used the classification of offenses and scale of penalties specified in the Decision of Board of Directors of the OSINERGMIN No. 028-2003-OS/CD, amended by the Article 5° of the Regulation of the Registry of Hydrocarbons, approved by the Decision of Board of Directors of the OSINERGMIN No. 191-2011-OS/CD.

37 In the Mining Sector is used the classification of offenses and scale of penalties in force specified in the Ministerial Order No. 353-2000-EM/VMM and the Decision of Board of Directors of the OSINERGMIN No. 185-2008-OS/CD.

38 In the Production Sector (fishing) is considered the classification of offenses and scale of penalties specified in the Single Organized Text of the Regulation of Inspections and Fishing and Aquatic Penalties – RISPAC, approved by Supreme Decree No. 019-2011-PRODUCE.

of the OSINERGMIN No. 191-2011-OS/CD, specifies as an offense the action of *"hinder, obstruct, refuse or interfere with the supervisory duty of the OSINERGMIN and/or the supervisory enterprises"*. Such offense is imposed penalties with a fine up to 1,000 UIT.

Different from this previous set of rules, the classification approved by the OEFA specifies the conducts which are prohibited, standardizes and adjusts the applicable penalties and approves only one classification for all the sectors which are under the scope of powers of the OEFA, considering that the conducts which hinder the effectiveness of the environmental enforcement are common in all the sectors which were enforced.

6.2 Classification of offenses and scale of penalties related to the non-compliance of the permissible maximum limits (transversal offenses)

Through Decision of Board of Directors No. 045-2013-OEFA/CD, published in the Official Gazette El Peruano on November 13th, 2013, was approved the "Classification of offenses and scale of penalties related to the non-compliance of the Permissible Maximum Limits (LMP) specified for economic activities under the scope of powers of the OEFA". This is the first rule which develops subtypes of transversal offenses[39].

In order to establish the offenses and the corresponding scale of penalties, it may be considered if the conducts cause potential or real damage to the flora or fauna or to life or human health. In this regard, sixteen offending conducts have been specified.

The first twelve of these conducts have been classified depending on the potential damage. In these cases, in order to determine the scale of penalties, the percentage of exceedance of the Permissible Maximum Limits – LMP (10%, 25%, 50%, 100% and 200%), as well as the nature of the involved parameter[40], depending on if this one includes or not a greater environmental threat.

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39 Subsequently, the OEFA has approved another rule of transversal classification as the classification of offenses and penalties related to instruments of environmental management and activities in prohibited areas by Decision of Board of Directors No. 049-2013-OEFA/CD, published in the Official Gazette El Peruano on December 20th, 2013. This rule will become effective on February 1st, 2014. For the future, other classifications of transversal issues will be approved.

40 For the determination of these parameters, the regulation established in the Article 7° of the Regulation of the Law has been considered as reference, which regulates the declaration of Environmental Emergencies approved by Supreme Decree No. 024-2008-PCM.

The four remaining conducts have been classified depending on the real damage. In these cases, in order to determine the scale of penalties, the relevance of the protected legal right has been taken into account (for instance, flora, fauna, health or human life) and if the activity had or not authorization to discharge effluents or emissions to the environment. The highest range is specified when the company develops its activities without having such authorization and causing a real damage to life or human health. The highest fine (25,000 UIT) will be imposed to the informal company which causes real damage to life or human health and committed the most significant aggravating factors.

For the application of this classification of offenses, the rule establishes that the number of parameters which exceed the LMPs and the amount of points of control in which such exceedance occurs does not constitute new offenses, but aggravating factors for the adjustment of the penalty.

In that regard, in the corresponding Statement of Reasons for the application of this new rule is noted the follows:

> *"(...) this may be the case that the administrative authority verifies that a company has exceeded the permissible maximum limit in three points of control. In the first one, if this one has exceeded in 10% the permissible maximum limit established for lead. In the second one, if this one has exceeded in 25% the permissible maximum limit specified for iron. In the third one, if this one has exceeded in 50% the permissible maximum limit specified for lead. In this assumption, the commission of an offense will be attributed. For such effect, the major offense will be considered, which in this case will be that which represents the greater percentage of exceedance of the parameter which involves a greater environmental threat (exceeding in 50% the permissible maximum limit specified for lead). The number of overflown parameters and the amount of points of control in which is verified such exceedance will be considered as aggravating factors of the possible penalty to be imposed"*[41].

It is important to note that, the same as the scale of general offenses previously described, for this classification is also established a *vocation legis* for the entry into effect of the classification which was approved. In that sense, it may be specified that the classification of offenses and scale of penalties related to the non-compliance of the Permissible Maximum Limits will become effective on January 1st, 2014.

41 Agency for Assessment and Environmental Enforcement. Project of Classification of Offenses and Scale of Penalties related to the non-compliance of the Permissible Maximum Limits. Statement of Reasons. Item 1.2.4 Aggravating factor.

We must note that with this classification, the non-compliance referred to exceed the established LMP will be specifically addressed. Thus, this offense involves to be complemented with the offenses established in the corresponding sectorial classification according to each activity[42].

The LMPs are instruments of transversal environmental management. Their enforcement must also comply with the same criterion. At present, we have only one classification in this subject applicable to all sectors which are under the scope of powers of the OEFA; without putting aside the consideration of the particular characteristics that each activity may have.

VII. FUTURE CHALLENGES IN TERMS OF CLASSIFICATION OF OFFENSES AND PENALTIES

The OEFA will continue with the important task of approving the classifications of offenses and penalties under its responsibility. This one will be really a permanent task which must go with the process of environmental legislation updating which is promoted by the Ministry of Environment[43].

The experience of the practical application of the classifications that the OEFA approves, this one will prove if the approach and the options of regulatory development adopted at the date were or not the correct ones. In that case, we will have a flexible mechanism to approve these rules by Board of Directors, which will firmly allow accelerating the development and consolidation of this fundamental tool for a strengthened environmental enforcement.

42 Where the offenses related to the execution of monitoring in areas of control with particular frequency and regarding particular parameters, the filing of monitoring reports, among others are classified. These offenses will be still imposed penalties under the sectorial classifications currently applicable, while the OEFA does not approve the classification of sectorial offenses of the activity in particular.

43 In January, 2012, the MINAM approved the Ministerial Order No. 018-2012-MINAM through which was established orders for the updating of the sectorial environmental legislation. In compliance with such provision, sectorial environmental rules have been established which had not been approved before (in the agricultural and housing sector) and the rules of the other sectors are in process of updating. To the extent that rules applicable to sectors under the scope of powers of the OEFA are ordered, the corresponding classifications of applicable offenses and penalties will be required to elaborate.

VIII. IN CONCLUSION

The classification of offenses and penalties constitute an indispensable tool, so that the companies know the possible offenses in which they may incur and their possible burdensome consequences. This one is a guarantee, both for the compelled ones to fulfill with the rules and also a means to prevent the arbitrariness by the Administration.

When the OEFA was created in 2008, the duty of classification of offenses and penalties was not regulated, which was corrected by the SINEFA Law in 2009 but incompletely, that is why it was necessary that a specific law was issued in 2010 in order to provide such powers to the Ministry of Environment and was indicated that such authority may exercise such duty through the issuance of Supreme Decrees. During the validity of this rule, the approval of the scale of offenses and penalties applicable to the activities of mining exploitation and similar activities in force at the date was only attained.

At present, as a result of the amendments introduced in the Law No. 30011, the OEFA has the legal authorization, by its Board of Directors, to establish the classification of environmental offenses and penalties whose enforcement is under its responsibility. The offenses and penalties of general and transversal nature to be approved by this one will be supplementally used for the Environmental Enforcement Entities in national, regional or local matters.

At the date of drafting of this article, after the corresponding procedures of public inquiry, the OEFA has approved the classification applicable to the offenses and penalties related to the effectiveness of environmental enforcement, as well as the classification of offenses and penalties for excess of permissible maximum limits. To continue with the exercise of the regulatory duty in this matter constitutes one of the critical tasks under the responsibility of this entity.

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REGULATION ON INSTALLMENT AND/OR DEFERMENT BENEFIT FOR PAYMENT OF FINES IMPOSED BY THE OEFA

ANMARY NARCISO SALAZAR
LUZ ORELLANA BAUTISTA
PERCY GRANDEZ BARRÓN

Summary

The authors consider that the Regulation on Installment and/or Deferment Benefit for Payment of Fines imposed by the Agency for Assessment and Environmental Enforcement (OEFA) constitutes a measure which facilitates the payment of monetary penalties imposed to the companies for the non-compliance of their environmental obligations.

I. Introduction. II. Compulsory enforcement power to impose administrative fines. III. Regulations of Installment and/or Deferment for Payment of Fines. IV. Conclusions.

I. INTRODUCTION

One of the problems that the companies often face is the lack of liquid assets to comply with the payment of environmental fines that have with the OEFA, despite of their intention of compliance. For such reason, several companies ask the OEFA for the possibility of installing and/or deferring the imposed fines.

In that sense, in order to optimize and facilitate the compliance for the payment of environmental fines and so as to avoid that the lack of liquid assets is a problem which complicates such compliance, the Regulations of Installment and/or Deferment for the Payment of Fines imposed by the OEFA (hereinafter, the Regulations) became effective as of October 17th, 2013. This has been approved by Decision of Board of Directors No. 041-2013-OEFA/CD. Amended by Decision of Board of Directors No. 043-2013-OEFA/CD.

To that effect, the main measures provided in the Regulations will be explained including the deadlines of installment and/or deferment of the environmental fine, the requirements to be protected to the mentioned benefits, the characteristics of the qualification and granting procedure and the causes of loss.

II. COMPULSORY ENFORCEMENT POWER TO IMPOSE ADMINISTRATIVE FINES

In general terms, the administrative or contraventional penalty[1] may be defined as that negative payment specified by the legal system and imposed by the Public Administration –previously empowered by expressly conferring such power to impose penalties for the commission of an administrative offense[2].

Understanding this administrative penalty as legally negative consequence of an illicit conduct, its purpose is not only restrictive but also, general preventive before the community (exemplify) and a special one before the offender. In this context, it is particularly relevant that the penalties imposed by the administrative authority are not only expository but effectively enforceable, so that the compliance of the purposes is guaranteed.

Therefore, one of the characteristics of the administrative penalty is its enforceability; such characteristic empowers the Public Administration to obtain its compliance compulsorily and not to appeal to Tribunals with legal jurisdiction[3]. Thus, the compulsory enforcement may be considered as the mechanism that the Public Administration uses to ensure the compliance of the administrative penalty imposed within administrative act, having previously warning to the offender, in view of its refusal to spontaneously comply with the payment of such penalty.

The compulsory enforcement power to impose administrative penalties is carried out by proceeding specified in the Single Organized Text of the Law No. 26979

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1 JORGE, Pedro José. "Base Constitucional de la Potestad Sancionadora". En *Derecho Administrativo en el Siglo XXI.* Vol. I. Lima: Adrus Editores, 2013, pp. 454-455.

2 Cf. BERMÚDEZ, Jorge. "Elementos para definir las sanciones administrativas". *Revista Chilena de Derecho.* Número Especial, 1998, pp. 324-326.

3 This characteristic is specified in the Law No. 27444 – Law on the General Administrative Procedure whose Article 192° indicates the follows:
Law No. 27444 – Law on the General Administrative Procedure
"Article 192°.- Enforceability of administrative act
The administrative acts will be enforceable, unless otherwise expressly specified by law and ordered by the Court or subjected to condition or term in accordance with law".

Law on Coercive Enforcement Procedure approved by Supreme Decree No. 018-2008-JUS[4] whose Article 1° indicates the follows:

> *"This law establishes the legal framework of coercive enforcement acts corresponding to all Entities of Public Administration. Also, such law constitutes the legal framework to guarantee the offenders the implementation of a coercive due process".*

In this regard, the coercive enforcement procedure is defined as procedural instrument which allows the Public Administration to directly repay its credit by legal encumbrance (seizure) of goods from the debtor and to subsequently force a title transfer for its product and cancel the debt to be collected.

This coercive enforcement procedure is not cognitive but enforceable. Therefore, it is limited to comply with what it is ordered by a previous administrative act. Consequently, it is excluded the possibility to contest the acts whose purpose is to enforce what is ordered.

However, in order to guarantee the right to due process, the Single Organized Text of the Law on Coercive Enforcement Procedure has established different causes of suspension for the coercive enforcement procedure[5]. In effect, in spite of its

4 At present, there are two legal provisions regulating the coercive enforcement procedure: a) the Tax Code which is applicable by the National Superintendency of Tax Administration – SUNAT; and b) the Single Organized Text of the Law on Coercive Enforcement Procedure approved by Supreme Decree No. 018-2008-JUS, which is only applicable by the local governments and national government entities different from the SUNAT (such as a Ministry) and decentralized public entities (for instance, the National Institute for the Defense of Competition and the Protection of Intellectual Property - INDECOPI).

5 **Single Organized Text of the Law on Coercive Enforcement Procedure approved by Supreme Decree No. 018-2008-JUS**
"Article 16°.- Suspension of Procedure
16.1. Any administrative or political authority will be able to suspend the Procedure, with the exception of the enforcer who must do that under responsibility when:
a) The debt has been expired or the obligation has been fulfilled;
b) The debt or obligation is expired;
c) The action is carried out against a different person from the Offender;
d) The notice of the administrative act has been omitted to the Compelled, which is used as title for the enforcement;

enforceability, the orders imposing administrative penalties will not be enforced, for instance, when there is a court decision which establishes the suspension of its effects. Concerning this matter, Guzmán[6] says the follows:

"(…) the administrative acts still have effects when those acts were contested before government agencies or contested before the Court by Contentious Administrative Proceeding, unless the company has obtained a precautionary measure on this one".

In that regard, in relation to the fines imposed by the OEFA, it is important to advise that, in accordance with the Article 20°-A of the Law No. 29325 – Law on the National Environmental Assessment and Enforcement System amended by the Law No. 30011, upon presentation of a contentious-administrative, amparo claim or other, does not interrupt nor suspend the coercive enforcement procedure of first

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e) It is in process or with pending expiration deadline for presentation of administrative appeal for reconsideration, revision or contentious-administrative claim filed within the deadline established by law against the administrative act used as title for the enforcement or against the administrative act which determines the joint and several liability of the company in the assumption included in the article 18, number 18.3 of this Law;

f) There is a court or out-of-court settlement agreement or agreement of creditors in accordance with the pertinent legal provisions or when the Offender has been adjudged bankrupt;

g) There is an order providing installment and/or deferment of payment;

h) When dealing with companies in asset restructuring process under amparo pursuant to the Law No. 27809, General Law on Bankruptcy System or rule which substitutes or replaces *it or included within the scope of the Decree Law No. 25604; and*

i) When the payment of non-taxable obligation in question is accredited to have been fulfilled before other Municipality which is attributed the same territorial jurisdiction by conflict of limits. Having clarified the conflict of jurisdiction, if the Municipality which started the coercive collection procedure is that with territorial jurisdiction will be forthwith entitled to recover payment against the Municipality which carried out the collection of the non-taxable obligation.

16.2 In addition, the coercive enforcement procedure must be suspended under responsibility when existing an order issued by the Judiciary in the course of amparo or contentious administrative proceeding or when ordering precautionary measure in or out of the contentious administrative proceeding. In such cases, the suspension of the proceeding must be carried out within the working day subsequent to the notice ordered by Court and/or precautionary measure or the information of this one by the enforcer or a third party in charge of the retention, in this last case, attaching a copy of the order or precautionary measure in writing and without prejudice pursuant to the article 23 of this Law related to the claim of legal revision.

(...)".

and second administrative instance orders referred to the imposition of administrative penalties issued by the OEFA.

In effect, the Article 20°-A of the mentioned Law provides for the company to ask for a precautionary measure which aims to suspend or invalidate the first or second administrative instance orders referred to the imposition of a fine, must previously prove the presentation of a personal property (only letter of guarantee) or real injunction bond in the name of the OEFA for the full amount of debt.

Likewise, the Single Organized Text of the Law on Coercive Enforcement Procedure gathers as another of the suspension assumptions of the procedure, the existence of an order which provides the installment and/or deferment of the payment of the fine. Despite the fact that such figures have not been explicitly specified, different entities have regulated the granting of such benefits as a means of facilitating the compliance of its payment[7].

In that context, it is important to note that the installment is understood, from the conceptual point of view, as the payment facility granted to the companies so that the imposed fine is paid in fees throughout a determined period; while in the case of deferment, the payment facility consists of delaying the payment of the fine for a determined period. Both payment facilities aim to allow the company respects willingly the debts generated by the imposition of pecuniary administrative penalties (fines).

III. REGULATIONS ON INSTALLMENT AND/OR DEFERMENT FOR PAYMENT OF FINES

In order to optimize and facilitate the compliance of pecuniary penalties imposed for violating the environmental rules by Decision of Board of Directors No. 041-2013-OEFA/CD[8], the Regulations on Installment and/or Deferment for pay-

6 GUZMÁN, Christian. *El Procedimiento Administrativo.* Primera edición. Lima: Ara Editores, 2007, p. 222.

7 Among these entities are, for instance, the Supervisory Body for Investment in Energy and Mining – OSINERGMIN, the National Institute for the Defense of Competition and the Protection of Intellectual Property – INDECOPI, the National Superintendency of Tax Administration – SUNAT, the National Port Authority – APN, among others.

8 Published in the Official Gazette El Peruano on October 16th, 2013.

ment of fines imposed by the Agency for Assessment and Environmental Enforcement was approved, which establish the qualification and granting proceeding of the related benefits.

Such Regulations of general scope are as a measure ensuring to answer the different requests filed by the companies for the granting of payment facilities of the fines imposed by the bodies of the OEFA. To this effect, the companies are granted an instrument which allow them comply with such obligations, either through the installment of the amount of the fines in deadlines up to five years or through the deferment of the payment of such fines up to a maximum of seven months in case of processing the installment independently.

3.1 Fines subject to benefits

In the Regulations are expressly specified the fines which are matter of installment and/or deferment, as well as those fines and debts which are not subject to the mentioned benefit.

In this regard, it may be specified that those fines which may be subject to installment and/or deferment are those stated on orders issued by the Directorate for enforcement, Penalty and Implementation of Incentives, provided that the orders which have not been subject to administrative contestation or the abandonment of the filed appeal. Also, those which will be subject to this benefit are, the fines imposed by the Directorate for enforcement, Penalty and Implementation of Incentives and the Environmental Enforcement Tribunal which are in coercive collection procedure and those which after being contested by Court, are authorized for the abandonment of the contested cause of action.

On the other hand, those fines which may enjoy the installment and/or deferment benefits are those coercive ones imposed by the OEFA; fines which provide false information or hide, destroy or modify information or any other type of record or document required by the OEFA, fines imposed for the fact of refusing, without justification, to deliver information or impede or draw out through violence or threat the exercise of the functions under the powers of the OEFA; fines which had been matter of previous installment and/or deferment; among another assumptions established in the Regulations.

3.2 Deadlines for installment and/or deferment of the fine

The Regulations have specified that the installment and/or deferment benefit will be granted regardless of the amount of the fine. In a certain way, a diagram of deadlines for its payment was established which will be granted depending on the

amount of the imposed fine as a penalty for the non-compliance of environmental obligations.

It may be specified that the Regulations allow the company pay in advance the scheduled fees, which entails that the Administration Office carries out the new calculation of interests, respectively.

Chart No. 1
Maximum deadlines for granting of benefits according to the amount of the fine

Scales according to amount of the fine	Maximum deadlines for granting of benefits
For fines less or equal to 500 UIT[9]	- Up to 6 months in case of installment. - Up to 2 months in case of deferment. - Up to 1 month of deferment and 5 months of installment when both fines have been granted together.
For fines more than 500 UIT and less or equal to 1,000 UIT	- Up to 12 months in case of installment. - Up to 4 months in case of deferment. - Up to 2 months of deferment and 10 months of installment when both fines have been granted together.
For fines more than 1,000 UIT and less or equal to 5,000 UIT	- Up to 24 months in case of installment. - Up to 4 months in case of deferment. - Up to 2 months of deferment and 22 months of installment when both fines have been granted together.
For fines more than 5,000 UIT and less or equal to 10,000 UIT	- Up to 36 months in case of installment. - Up to 5 months in case of deferment. - Up to 3 months of deferment and 33 months of installment when both fines have been granted together.
For fines more than 10,000 UIT and less or equal to 20,000 UIT	- Up to 48 months in case of installment. - Up to 6 months in case of deferment. - Up to 3 months of deferment and 45 months of installment when both fines have been granted together.
For fines more than 20,000 UIT	- Up to 60 months in case of installment. - Up to 7 months in case of deferment. - Up to 3 months of deferment and 57 months of installment when both fines have been granted together.

Source: Regulations on Installment and/or Deferment for payment of the fines imposed by the OEFA

Own elaboration

9 Peruvian Tax Units.

3.3 From the request of installment and/or deferment

The request to obtain the installment and/or deferment benefit must be written to the Administration Office and filed within ten working days after the date of notice of the order which declares consensual the order of fine imposed by the Directorate for Enforcement, Penalty and Implementation of Incentives or from the notice of the order by Environmental Enforcement Tribunal to exhaust all available administrative remedies.

Such request, as well as the documentation attached by the company, must be filed before Court Registry Office of the OEFA or Local Office of this one whose address corresponds to the company. As soon as the OEFA receives the request, the start of the coercive collection procedure will be suspended temporally in case this one has not been started.

Nevertheless, in case the coercive collection procedure had started, the company still has the opportunity to enjoy the installment and/or deferment benefit. Such company must file the request within seven working days after notice of the order to start such proceeding.

3.4 Personal property guarantee as requirement to obtain the benefit

The company which is interested in obtaining the installment and/or deferment benefit must grant a bank letter of guarantee so as to ensure entirely the payment of the fine in favor of the OEFA.

The related bank letter of guarantee must be submitted to the OEFA within the deadline that cannot be extended of ten calendar days from the notice of positive qualification issued by the Administration Office. Also, the company must expressly indicate that the bank letter of guarantee is granted to ensure the payment of the fine which matter of installment or deferment.

Notwithstanding the foregoing, it is important to specify that if the fine is less than 5 UIT, the company will not have the necessity of granting a bank letter of guarantee in favor of the OEFA.

On the other hand, it may be emphasized that among the payment facilities that the Regulations have provided to the company, there is a possibility to renew or substitute the letter of guarantee, provided that such letter is replaced for other, at least equal to the balance of the fine matter of installment and/or deferment.

3.5 Granting or denial of benefits

Prior to the granting of the benefit, the Administration Office must qualify the request for installment and/or deferment within a maximum deadline that cannot be extended of ten working days from its presentation before Court Registry Office of the OEFA or Local Office of this one whose address corresponds to the company.

In case the Administration Office issues a positive qualification, such qualification will be notified to the company and required to carry out the down payment of the fine within the deadline of ten calendar days when notified depending on the opportunity for the request presentation of the benefit as detailed below.

Chart No. 2
Percentages for the down payment related to the opportunity for the request presentation

Percentage of initial payment	Opportunity for request presentation of the benefit
20% of the amount of the fine subject to the installment and/or deferment will be paid.	In case the request submitted within 10 working days after the date when notified the order which declares consensual the order of fine imposed by Directorate for Enforcement, Penalty and Implementation of Incentives or from the notice of the order by the Environmental Enforcement Tribunal which exhausts all available administrative remedies.
40% of the amount of the fine subject to the installment and/or deferment will be paid.	In case the request submitted within 7 working days after the date when notified the order of start of the coercive enforcement procedure.
60% of the amount of the fine subject to the installment and/or deferment will be paid, as well as the total of costs and expenses generated by the coercive procedure.	In case of expired deadlines previously mentioned. For such effect, the benefit without prejudice to precautionary measures suspended as guarantee of the payment of the fine will be granted.

Source: Regulation on Installment and/or Deferment for payment of the fines imposed by the OEFA

Own elaboration

Once the requirements for granting of bank letter of guarantee and the accreditation of down payment of the fine, the Administration Office of the OEFA will

issue an order containing the installment period when requested; the number of monthly fees indicating its amount and date of expiration in case of installment; the applied interest rate which was valid at the date of the request presentation; and the description of the bank letter of guarantee granted in favor of the OEFA.

Also, the Administration Office must issue the mentioned order within a maximum deadline of ten working days from the next date of the presentation of accreditation for the down payment which is required to.

In that context, it is important to note if the company does not comply with paying the down payment which is required to or pays it without prejudice, the Administration Office will issue an order by refusing the request, which will result in restarting the process for the coercive collection procedure, if this had been suspended upon presentation of the request to enjoy the benefit.

Nevertheless, the company will have the right to appeal for reconsideration before the Administration Office by supporting its cause of action in compliance with the requirements entailed in the Regulations.

Notwithstanding the foregoing, it is important to emphasize that the Regulations, in order to provide legal certainty by anticipating the benefit whose interest will be the effective legal interest rate in national currency in force at the date of the request.

3.6 Loss of installment and/or deferment benefit

Also, the causes of loss of installment and/or deferment benefit for fine imposed by the OEFA have been established in the Regulations. In that sense, it is specified that the company will lose the installment and/or deferment benefit when:

It does not comply with a fee established in the schedule of payments or when paying without prejudice;

It does not comply with maintaining in force the bank letter of guarantee granted in favor of OEFA or substitutes for an amount less than the balance of the fine part of installment and/or deferment; or

It brings administrative or judicial appeals against the order which imposed the fine subject to installed and/or deferred payment.

Finally, it is important to emphasize that, as the granting of installment and/or deferment benefit is approved through an order issued by the Administrative Office

of the OEFA, the loss of the installment and/or deferment will be declared under the same formality, that is, by an order issued by the mentioned Office.

IV. CONCLUSIONS

When the Administration exercises its administrative penalty power, which is understood as one of the manifestations of punitive power of the State, this one exercises its power in order to enforce the penalties so that its repressive purpose is not only enforced, but also the general and special prevention of these ones.

In order to achieve this purpose, there are important tools which allow its compliance, even if this deals with the payment of fines. Such is the case that one of these tools, in fact, one of the most important ones, is the legal precept of the installment and/or deferment of the fines imposed by the Administration.

In that context, the Regulations on Installment and/or deferment for payment of the fines imposed by the OEFA, is understood as an instrument granted to the company which faces difficulties to assume the payment of the obligation within the deadlines and regular procedures, despite of its intention for compliance. Therefore, it may be anticipated the possibility of installing the amount of the fines in deadlines up to five years or defer the payment of these ones up to a maximum of seven months in case such amount is processed regardless of the installment.

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UNIVERSITY NETWORK OF TRAINING AND EDUCATION IN ENVIRONMENTAL ENFORCEMENT

ERIKA BEDOYA CHIRINOS (*)

Summary

This article explains the notion of citizen participation through the empowerment of young university students who have a special interest in environmental matters. The role of the Agency for Environmental Assessment and Enforcement (OEFA) is to offer them training tools in such areas and, specially, in environmental enforcement. It also details how the University Network of Training and Education in Environmental Enforcement (RUCEFA) strengths the institutionalization of the OEFA in the general public.

I. Introduction. II. Developing capacities as instrument for institutional strengthening and promoting citizen participation. III. University Network of Training and Education in Environmental Enforcement. IV. Goals of RUCEFA. V. Conclusions.

I. INTRODUCTION

After having spent five years since its creation, the Agency for Environmental Assessment and Enforcement (OEFA), considers necessary to train young university students in order to offer them specialized training and form a network of trainers throughout Peru, who will promote citizen participation through the filing of environmental complaints. All this is part of the task of the OEFA to form a culture of citizen participation in environmental matters having as one of its principal components the provision of tools to access to the environmental justice.

In that regard, the OEFA supports to involve both public and private universities of Peru through inter-institutional cooperation agreements aimed at establishing a network of young university students. They may train Peruvian school pupils and

(*) The author would like to thank María Teresa Ezquerra Benavides, Bruno Contti Chávez and Martín Garzón Herrera for their valuable contribution in gathering information for this article.

citizens who have fewer possibilities to access to information and specialized education in environmental matters.

II. DEVELOPING CAPACITIES AS INSTRUMENT FOR INSTITUTIONAL STRENGTHENING AND PROMOTING CITIZEN PARTICIPATION

It must be taken into account that this support for developing capacities to seek the institutional strengthening and to promote the citizen participation has existed prior to the OEFA. Over the last years, institutions such as National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI, by its initials in Spanish) and Ministry of Justice and Human Rights (MINJUS, by its initials in Spanish) have made efforts to train people in matters of their jurisdictions.

The INDECOPI signed agreements with the Ministry of Education in order to carry out the program "INDECOPI Educa" (*INDECOPI educates*) to provide a market and respect culture for consumer's rights. Likewise, the MINJUS[1] signed agreements with different universities of Peru to disseminate and promote the legal culture between disadvantaged social groups, so that the barriers preventing access to justice may be overcome, and to strength the governability of our country[2].

Taking as reference the initiatives of INDECOPI and MINJUS, the OEFA considered appropriate to develop the abilities of the university students with the purpose to train population and consolidate over time a culture of environmental enforcement in Peru.

III. UNIVERSITY NETWORK OF TRAINING AND EDUCATION IN ENVIRONMENTAL ENFORCEMENT

3.1 General Aspects

The University Network of Training and Education in Environmental Enforcement (RUCEFA)[3] is created in order to cooperate in the strengthening process of environmental enforcement through citizen participation. This network is formed

1 National Program on Legal Education for Social Inclusion (PRONELIS).

2 DERECHO & SOCIEDAD CIVIL. "Minjus fortalecerá la inclusión legal". At <http://blog.pucp.edu.pe/item/28177/minjus-fortalecera-la-inclusion-legal> (Consulted on November 28, 2013).

3 Decision of Board of Directors No 024-2013-OEFA/CD dated on May 28, 2013.

by university students who will be trained to contribute to the dissemination on environmental regulations, especially to the school students, peasant or native communities, community-based organizations, vulnerable populations and other population groups settled in areas with high levels of environmental conflict, or located in areas with high incidence of poverty.

The RUCEFA should be understood as an instrument through which it is guaranteed that the citizens have a deeper understanding on environmental obligations, as well as, mechanisms for making environmental complaints through the National Environmental Complaints Information Service (SINADA) in order to enable citizens to bring actions against the infringement or threatening of violation of their rights.

In order to achieve this purpose, citizenship–oriented training and education regarding environmental matters are combined. Likewise, alliances with public and private stakeholders of different sectors, such as educational, business, government and civil society sectors, are established.

The RUCEFA's work will seek to promote the environmental social responsibility of the university students and encourage, at the same time, the interest of this university community in incorporating subjects linked to environmental enforcement in their university curriculum.

This implementation would allow universities establishing inter-institutional cooperation agreements with RUCEFA to achieve eventually the incorporation of professionals into the workforce with a single advantage: to be highly sensitized and trained regarding environmental enforcement issues.

3.2. Objectives

The RUCEFA aims at obtaining the recognition of the OEFA as a promoter of environmental culture by encouraging the interest of students and general population in environmental matters and, specially, in enforcement issues. For achieving this purpose, the RUCEFA will work based on the following objectives:

(a) To collaborate in the process of strengthening the environmental enforcement through citizen participation.

(b) To support the dissemination of the regulation on environmental enforcement governed by the OEFA.

(c) To promote the citizen surveillance for preventing and complaining facts against environmental regulation.

(d) To assist in the disclosure of the National Environmental Complaints Information Service (SINADA).

(e) To promote social responsibility among university students.

(f) To encourage the interest of the university students in incorporating issues linked to environmental enforcement in their corresponding university curriculum.

3.3 Network Implementation

To participate in the RUCEFA, the OEFA signs inter-institutional cooperation agreements with concerned universities to identify university students with a high interest and commitment to the environmental matters. Likewise, the stakeholders shall comply with the following requirements to form part of this network:

(a) To be in the upper third.

(b) Having completed the fourth term or the second year of studies, as minimum requirement.

(c) To attach a cover letter written by the pertinent university authority (the Dean of the School, Academic Director, Degree Program Director, etc).

The RUCEFA's program is comprised by two stages to develop in order to comply with the purpose and objectives previously presented. The first stage is to train university students and the second one is to carry out educational activities performed by the qualified students and oriented to the target public.

Stage 1: Training

Three workshops which involve training of university students will be presented in detail in the following table. Also, different subjects of each workshop and its corresponding duration are showed.

Training stage	Subjects	Duration
National Environmental Assessment and Enforcement System (SINEFA) and Environmental Enforcement Entities (EFA)	What is SINEFA? What is EFA? The role of the OEFA regarding the EFA	3 class hours
OEFA	What is OEFA? Responsibilities of the OEFA What is environmental enforcement? Environmental enforcement process: - Assessment. - Supervision. - Enforcement and penalty. Environmental obligations of the companies. Goals of OEFA	3 class hours
National Environmental Complaints Information Service (SINADA)	What is SINADA? Mechanisms for filing environmental complaints Means for filing an environmental complaint Key elements for an environmental complaint Current contributions of environmental complaints by citizens Citizen participation as citizen's right Citizen participation applied to environmental management	5 class hours
Components of the execution of RUCEFA's workshops	Why is important the communication? The role of communication in preventing conflicts. Models and types of communication. Stakeholders in the communication process. Communication strategies applied to training. Communication tools in rural contexts. Hands-on workshop to design workshops to citizenship.	4 class hours

The first stage for implementing the RUCEFA involves two evaluations to participating students, which will be developed as follows:

(a) Entrance evaluation, which will allow evaluating the level of current knowledge on the subject.

(b) Final evaluation, which will allow evaluating the level of acquired knowledge.

Likewise, this stage comprises a certification and accreditation process to the university students trained in environmental enforcement matters. This will be very important to comply with the objectives of the RUCEFA, whose purpose is to build an environmentally-responsible citizenship. Such certification shall be granted before the commencement of the second-phase activities.

b) Stage 2: Educational activities for target public

The RUCEFA's implementation will allow that each stakeholder involved in this program obtains concrete and lasting benefits.

The universities benefit from having professors and university students trained in environmental enforcement, which is closely linked to social responsibility that is a key element in university training. Likewise, the network will be a tool to provide future professionals into the Peruvian market, who will be able to incorporate with the specialization in environmental enforcement, in both public and private sectors.

Moreover, the State benefits from implementing the multiplier effect through university students and training a large number of citizens, especially, those who do not have the chance to access to information regarding the meaning of surveillance and environmental enforcement culture.

Civil Society also benefits from becoming aware of the chance of taking part of the environmental enforcement macro-process. For example, one way to achieve this is to file a complaint when the citizen becomes aware of a negative impact on the environment. When citizens consider going to the OEFA to warn the State about this impact, they exercise their right of citizen participation; therefore, their supervisory actions form part of the environmental enforcement.

Finally, companies benefit from finding university students in the market, who will become professionals trained in environmental enforcement. This situation will improve in all levels the compliance with their environmental obligations.

In the extent that universities, students, civil society, companies and OEFA increase progressively their efforts for seeking results, the development of RUCEFA and their development will be translated into the above-mentioned aspects. Likewise, the progress of alliances will reflect an improvement of the quality of life of society as a whole and in the institutionalization and legitimization of environmental enforcement throughout Peru, which is the ultimate goal of the OEFA.

IV. GOALS OF RUCEFA

The goals proposed for implementing the RUCEFA are planned per year with the purpose of having presence in all the Peruvian universities.

4.1 Initial Steps

Since the creation of the RUCEFA, on May 2013, several strategies have been implemented in order to call public and private universities at national level.

In this first stage, the criteria for seeking universities with which the inter-institutional cooperation agreement is signed is the coincidence of the location of the educational institution with the department in which there are Decentralized Offices of the OEFA.

Other characteristic to choose the university with which such agreement is signed is the area of incidence of the educational entity. The twenty agreements signed up to December 2013 have been entered on several departments of Peru, taking into account that our country is in process of improving the implementation of its policies on a decentralized basis. For this reason, OEFA's and RUCEFA's actions must have greater emphasis within our country.

Thus, after seven months of RUCEFA's creation, inter-institutional cooperation agreements have been signed in ten of the twenty-four departments of Peru. It is very important to note that the signing of these types of alliances in all the Peruvian departments must be planned at the end of 2014 in order to institutionalize and legitimize the environmental enforcement nationwide.

4.2 First plans of RUCEFA

(a) The first plans of RUCEFA are as follows:
(b) To sign agreements with all universities of Peru.
(c) To certify students for each university with which an inter-institutional cooperation agreement is signed.

(d) To carry out, as minimum, twenty workshops per year for the target public of RUCEFA for each university with which an inter-institutional cooperation agreement is signed.
(e) Through certified students, each university will train two thousand people (2000), as minimum, in the training workshops of RUCEFA.
(f) To promote RUCEFA with a visible and exclusive space through other Ministry of Environment (MINAM) and OEFA websites, and in each website of associations grouping supervised companies.
(g) To promote RUCEFA as a visible and exclusive space through the Ministry of Environment (MINAM) and OEFA Facebook fan pages.

4.3 Planning for the year 2018

The purpose of the RUCEFA is to become a long-term educational program; therefore, its planning is as follows:

(a) To institutionalize environmental enforcement, nationwide, through the signing of inter-institutional cooperation agreements with public and private universities located in the twenty-four departments in Peru and in the Constitutional Province of Callao.
(b) To legitimize environmental enforcement, nationwide, through the presentation of RUCEFA to sign inter-institutional cooperation agreements with all public and private universities[4].
(c) To promote development and improvement of environmental enforcement through academic research.
(d) To promote a national congress of annual environmental enforcement.
(e) To make regional governments strategic collaborators for an optimal performance of RUCEFA's functions.
(f) To achieve a coordinated, planned and documented work among provincial governments, nationwide, and RUCEFA's members.

4 According to the university census in 2012, which was performed by the National Board of University Presidents –ANR, it is indicated that there are 137 universities locally, both public and private. The projections regarding the creations of universities in all Peru are estimated in an average increase of 4 universities per year. Therefore, there will be 161 higher education institutions for the year 2018. In NATIONAL BOARD OF UNIVERSITY PRESIDENTS –ANR, *Estadísticas Universitarias* 2012, p.7.
At:<http://www.anr.edu.pe/index.php?option=com_content&view=article&id=663:estadisticas-> (Consultation: November 12, 2013).

(g) OEFA's decentralized offices, at national level, will inform the recruitment process, among the certified students who have completed their university career and have optimally performed their functions in the exercise of RUCEFA's activities.
(h) The OEFA will carry out, at least, an academic activity in each public and private university with which the inter-institutional cooperation agreement is signed.
(i) The RUCEFA will organize, at least, a training workshop for target public, in each one of 195 provinces of Peru.
(j) The number of university students certified in the universities, whose inter-institutional cooperation agreements have been signed three years ago, will increase.
(k) A feedback plan of the former members of RUCEFA will be implemented towards the new members of the network, in the universities where the inter-institutional cooperation agreements have been signed three years ago.

V. CONCLUSIONS

RUCEFA aims at being the main ally of the institution with the purpose to form a supervision and enforcement culture of environmental obligations by supervised companies. The objective of this network is to spread to every part of our country, through the participation of university students. The purpose of the training provided by OEFA is that these students apply their knowledge acquired outside their university in order to train population and foment access to environmental justice.

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DIRECTOR OF THE WORK

HUGO GÓMEZ APAC

He obtained his law degree from the *Universidad Nacional Mayor de San Marcos*. Currently, he is President of the Board of Directors of the Agency for Environmental Assessment and Enforcement (OEFA), Vice-President of the Commission for Consumer Protection 1 of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Second Deputy Judge of the Andean Community Court of Justice and Professor of the Administrative Law course at *Universidad Peruana de Ciencias Aplicadas*.

He served the Ministry of Justice and Human Rights as National Director of Legal Matters and Vice-President of the Working Groups in charge of reviewing and proposing improvements to the Law on the General Administrative Procedure and the Law governing the Contentious Administrative Proceeding. At the Ministry of Foreign Trade and Tourism, he was Legal Adviser to the Minister's Office. At INDECOPI, he was President of the Commission attached to the Regional Office of Ica, Technical Secretary of the Defense of Competition Tribunal, Adviser of the Legal Management and Technical Secretary of the Commission of Free Competition.

He taught courses of Competition Law, Administrative Law and Public Service Regulation at the *Universidad Mayor de San Marcos*. Likewise, he taught courses of Legal Research Methodology, Administrative Law I and Legal Institutions of the Regulation.

AUTHORS

Jorge Abarca García

He obtained his bachelor's degree from the *Pontificia Universidad Católica del Perú*. He is a legal adviser at the Supervision Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

Mercedes Patricia Aguilar Ramos

Lawyer from the *Pontificia Universidad Católica del Perú.* She has postgraduate studies in Concession Regulation and Law from the *Universidad del Pacífico* and the *Universidad Peruana de Ciencias Aplicadas*. Also, she has a Master's degree in Administration from the *Universidad del Pacífico.* She is an Assistant Director of Instruction and Investigation of the Enforcement, Sanction and Application of Incentives Bureau, which forms part of the Agency for Environmental Assessment and Enforcement (OEFA). She has been Technical Secretary of the Administrative Tribunal of Users of the Supervisory Body for Private Investment in Telecommunications (OSIPTEL) and Legal Specialist in the conflict settlement among companies and Adviser of Business Relationships. Moreover, she was Legal Analyst in the Spain Telecommunication Market Commission and scholar of the Regulatory Excellence Program CMT-REGULATEL.

Martha Inés Aldana Durán

Lawyer from the *Universidad de Lima*. She is General Coordinator of Regulatory Projects of the Agency for Environmental Assessment and Enforcement (OEFA). She has a master's degree in International & Comparative Environmental Law from the Washington College of Law of the American University (Washington, D.C.), where she studied with the Fulbright Scholarship and with the Organization of American States Academic Scholarship, and obtained the Outstanding Student Award. Moreover, she holds a Postgraduate Diploma in Energy Law (from UPC) and a Diploma in Public Administration and Environment (from ESAN). She has been Advisor and Consultant for the Congress of the Republic of Peru, the Ministry of Health, the Ministry of Agriculture, the Supervisory Body for Investment in Energy and Mining, the National Environmental Council and the Ministry of Environment, among others public and private entities. She is author of different publications in Environmental Law matters.

Erika Bedoya Chirinos

Lawyer from the *Universidad de Lima.* She holds master's degrees in Higher Education from the *Universidad Andrés Bello of Chile*, and in Corporate Law from the *Universidad Peruana de Ciencias Aplicadas.* She has studies in Human Rights from the *Universidad Alcalá de Henares* and in Dispute Settlement from Louisiana State University. She is Professor of the courses "Negotiation and Conciliation Seminar", "Leadership Workshop I" and "Insolvency Law" at the *Universidad Peruana de Ciencias Aplicadas*". She is the Head of Communications and Public Attention Area, and General Coordinator of Training on Environmental Enforcement at the Agency for Environmental Assessment and Enforcement (OEFA).

Oscar Carrillo Verástegui

He holds a bachelor's degree from the *Universidad Mayor de San Marcos*. He is an Economic Analyst for the Subdivision of Penalty and Incentives of the Enforcement, Penalty and Application of Incentives Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

Mauricio Augusto Cuadra Moreno

Lawyer from the *Universidad Nacional de Trujillo.* He has specialized studies in matters related to Public Law from the *Universidad Complutense de Madrid*, among other universities in Peru and abroad. He was an Erasmus Mundus Scholar of the European Union, among other academic awards. Currently, he is studying for a Master's Degree in Public Management at ESAN. During his professional practice, Mr. Cuadra has carried out a professional stay in the Organization of American States in Washington D.C. (U.S.A.). He is an Assistant Director of Supervision to Entities of the Agency for Environmental Assessment and Enforcement (OEFA) and has served as a Technical Secretary of important Regulatory Working Groups in the Ministry of Justice and Human Rights.

María Luisa Egúsquiza Mori

Lawyer from the *Pontificia Universidad Católica del Perú.* She holds a master's degree in International Business and Economic Law from Georgetown University, Washington D.C. She is a Fulbright and DKG Scholar. Moreover, Mrs. Egúsquiza has postgraduate studies at the *Universidad de Salamanca,* Spain, and from the *Universidad Peruana de Ciencias Aplicadas.* She is Director of Enforcement, Penalty and Application of Incentives of the Agency for Environmental Assessment and Enforcement (OEFA). Also, she is member of the Commission for Consumer Protection No 2 of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) and member of the Arbitration Court of the Arbitration Center of OSIPTEL.

Jerry Espinoza Salvatierra

Lawyer from the *Universidad de San Martín de Porres.* He holds specialized studies in Administrative Law and System of Market Access at the *Universidad Peruana de Ciencias Aplicadas* and specialized studies in Environmental Law at the *Pontificia Universidad Católica del Perú.* He is a Legal Technical Coordinator in the Supervision Bureau of the Agency for Environmental Assessment and Enforcement (OEFA). Likewise, he has professional experience in Competition Law at *Estudio Muñiz, Ramírez y Olaya* and in the Commission for Consumer Protection of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI).

Jerico Fiestas Flores

He holds a bachelor's degree from the *Universidad del Pacífico.* He is an Adviser at the Subdivision of Penalty and Incentives of the Bureau of Enforcement, Penalty and Application of Incentives of the Agency for Environmental Assessment and Enforcement (OEFA).

Erick Leddy García Cerrón

He is a Lawyer from the *Universidad Mayor de San Marcos.* He has specialized studies in Environmental and Natural Resources Law at the *Pontificia Universidad Católica del Perú.* Mr. García is an Adviser in the Tribunal of the Agency for Environmental Assessment and Enforcement (OEFA).

Percy Grandez Barrón

He holds a bachelor's degree in Law from the *Universidad de San Martín de Porres.* Currently, he is member of the team of the Presidency of the Board of Directors of the Agency for Environmental Assessment and Enforcement (OEFA). Moreover, he is member of the Center for Environmental Law Studies from the *Universidad de San Martín de Porres.* Also, Mr. Grandez has served for the Attorney General's Office Specialized in Environmental Offenses and for the Attorney General's Office of the Ministry of Environment.

Milagros Granados Mandujano

She is a Lawyer from the *Universidad Nacional Mayor de San Marcos.* Granados has a master's degree in Constitutional Law from the *Universidad Católica del Perú.* Also, she has specialized studies in the field of Constitutional and Administrative Law, and has published legal documents in such matters. Mrs. Granados is Specialist in Regulations for the Presidency of the Board of Directors of the Agency for Environmental Assessment and Enforcement (OEFA).

Mario Huapaya Nava

He is a Lawyer from the *Pontificia Universidad Católica del Perú,* with a master's degree in Corporate Law with a major in Public Service Regulation at such university. Moreover, Mr. Huapaya has a master's degree in Public Administration from Maxwell School of Syracuse University. He is a Technical Secretary of the Environmental Enforcement Tribunal of the Agency for Environmental Assessment and Enforcement (OEFA). He was Head of the Office of the Legal Adviser of this entity. He was an Assistant Professor and Assistant at the Administrative Law Department of the Law School from the *Pontificia Universidad Católica del Perú, a* Postgraduate Professor at the *Universidad de Lima, Universidad Continental* and other universities. Mr. Huapaya has published several documents in specialized media.

Gabriela López Medrano

She is an Economist from the *Pontificia Universidad Católica del Perú.* She has also a master's degree from the Barcelona Graduate School of Economics. Mrs. López is a Professor of the Applied Industrial Organization course at the *Universidad de San Martín de Porres.* She is Assistant Director of Penalty and Incentives of the Enforcement, Penalty and Application of Incentives Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

José María Mariño Tupia

He is a Lawyer from the *Universidad Nacional Mayor de San Marcos,* specialized in Administrative Law. Also, he is an Adviser at the Agency for Environmental Assessment and Enforcement (OEFA).

Delia Morales Cuti

She is a Lawyer from the *Universidad Nacional Mayor de San Marcos.* She holds a master's degree in Competition and Intellectual Property Law from the *Pontificia Universidad Católica del Perú.* She is specialist in Technical Barriers to Trade. Currently, she serves as a Supervision Director of the Agency for Environmental Assessment and Enforcement (OEFA). She has also served as an Analyst in Competition and Consumer Protection Law in the Tribunal for Competition and Consumer Protection of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). Moreover, she has been a member of several technical working teams in the negotiations of the Free Trade Agreements (FTAs). She has been a speaker in national and international forums in conformity, accreditation, standardization and technical regulation assessment.

Anmary Narciso Salazar

She is a Lawyer from the *Pontificia Universidad Católica del Perú.* She has a master's degree in Civil and Commercial Law from the *Universidad Nacional Mayor de San Marcos.* She serves as Head of the Legal Adviser Office of the Agency for Environmental Assessment and Enforcement (OEFA).

Skarley Llanos Buiza

She is a Lawyer from the *Universidad de Piura* with a master's degree in Corporate Law from the *Pontificia Universidad Católica del Perú,* and with a specialization in Sustainable Development Management from the *Universidad ESAN.* She serves as a Lawyer in the Mining Sector for the Supervision Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

Zaira Ocampos Cano

She is a Lawyer from the *Universidad de Piura,* and has a master's degree in Regulation from the *Universidad Peruana de Ciencias Aplicadas*. Mrs. Ocampos is specialist in Hydrocarbon Law. Currently, she serves as Jurisprudence Specialist in the Environmental Enforcement Tribunal of the Agency for Environmental Assessment and Enforcement (OEFA).

Luz Orellana Bautista

She is a Lawyer from the *Universidad Nacional Mayor de San Marcos.* She has a master's degree in Economy and Regulation of Public Services from the *Universidad de Barcelona.* She has a master's degree in Law major in Intellectual Property and Competition from the *Pontifica Universidad Católica del Perú.* Also, she has a specialization in Management and Public Finances. She also serves as Counsel for the High-level Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

Ernesto Frederik Soto Chávez

He is a Lawyer from the *Pontifica Universidad Católica del Perú,* with specialized studies in Public Service Regulation and a master's degree in Telecommunication Economy. He is a Legal Adviser in the Environmental Enforcement Tribunal. Mr. Soto was recognized with a mention in 2012 by the British publication "The Legal 500" in the field *Public Law and Regulation.* He is a Scholar of the Organization of American States (OAS) and an Assistant Professor at the *Pontifica Universidad Católica del Perú.*

Hilda Tarazona Triveño

She is a Lawyer from the *Pontifica Universidad Católica del Perú, with specialization in Administrative, Mining and Environmental Law.* She is a Lawyer in the Environmental Enforcement Tribunal of the Agency for Environmental Assessment and Enforcement (OEFA). She has experience in the public sector in the areas of Administrative, Fishing, Mining and Environmental Law, and in the private sector in the area of Administrative Law. Moreover, she has experience in formulation, monitoring and evaluation of social development projects.

Francisco Miguel Villa Sotomayor

He is an Economist from *The Universidad Nacional Mayor de San Marcos.* He holds a Diploma of Specialization in Environmental Management and Environmental Impact Assessment from the Centre for Higher Education and Professional Development (CESAP), the Peruvian Engineering Association and the *Universidad Nacional Federico Villarreal.* Currently, he serves as Professional in Economic Evaluation for the Subdivision of Penalty and Incentives of the Enforcement, Penalty and Application of Incentives Bureau of the Agency for Environmental Assessment and Enforcement (OEFA).

Humberto Zúñiga Schroder

He holds a PhD in Law from the *Universidad de Edimburgo* (Scholar of such university). Also, he holds a master's degree in European and International Trade Law (LL.M) from the University of Amsterdam (NUFFIC scholar). Also, he is Lawyer from the *Pontificia Universidad Católica del Perú.* He serves as Counsel of the High Bureau of the Agency for Environmental Assessment and Enforcement (OEFA). He also served as International Officer of the Legal Service of the General Secretary Office of the Andean Community and as Professor of the "International Trade Law" course at the *Universidad Peruana de Ciencias Aplicadas*. He is author of the book called "Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law" (Kluwer 2011) and several academic articles within his field of specialization.

AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT - OEFA

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Member of the Board of Directors
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