

Environment 2012 – Peru

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1 Are there any environmental provisions in your constitution? If so, please describe the provisions and their implications.

Yes. Article 2,22 of the Constitution dictates that all persons have the right to benefit from an environment that is suitable for the development of their life. The government establishes the national environmental policy and promotes sustainable use of natural resources (Article 67).

Regarding natural resources, the Constitution established that they are the country's wealth. Therefore, the state regulates the utilisation of natural resources and establishes, through further regulations, the national environmental policy and promotes their sustainable use.

Articles 66 to 68 establish the framework for the use of natural resources. They are classified as renewable and non-renewable natural resources. It establishes that the use of natural resources by individuals and private companies has to be regulated by Law.

2 What is the environmental statutory and regulatory framework? Please identify the primary environmental statutes and regulations and the agencies (at all levels) with responsibility for environmental regulation and enforcement.

The main laws relating to the environment control and protection are the 1997 Natural Resources Sustainable Use Act, the 1997 Health Act, the 2000 Solid Waste Act, the 2005 Environmental General Act and the 2009 Water Act.

The Environmental General Act (Law 28611 of 15 October 2005), which provides the environmental legal framework in Peru, establishes a comprehensive regulatory structure and contains general rules and principles of environmental policy that shall be considered as minimum standards for all activities.

Based on the Environmental General Act, each ministry enacts environmental regulations applicable to activities under its jurisdiction (such as mining, oil and gas, manufacturing industries and fisheries). Also, following national environmental policy, the regional governments and municipalities also regulate the activities developed within their jurisdiction.

3 Please identify major environmental treaties and conventions that your jurisdiction has ratified or to which it is otherwise subject (eg, Kyoto Protocol, Basel Convention, POPs)?

Peru has signed and ratified several international environmental treaties, binding itself to preserve and conserve the nation's environmental, natural and cultural heritage.

Some of the most relevant treaties are: the Convention on Biological Diversity; the UN Framework Convention on Climate Change; the Vienna Convention for the protection of the Ozone Layer and Montreal Protocol; the Convention for the Protection of Flora, Fauna and Natural Scenic Beauty in the American Countries; the Convention on International Trade in Endangered Species of Wild Fauna and Flora; the RAMSAR Convention on Wetlands; the Antarctic Treaty; the UNESCO Convention of Paris; the Basel Convention on the control of transborder movements of Hazardous wastes and their deposits, among others.

4 What is the environmental permitting process in your jurisdiction? Are separate permits required for air, water and waste? Are permits required as a condition to construction of a facility? What is the average timeline for a facility to obtain environmental permits?

An environmental impact statement (EIS) must be submitted to and approved by the corresponding Ministry before starting construction. The EIS must be prepared by a consultant company registered before the same Ministry. The approval process of an EIS includes public participation mechanisms, as workshops with local people (before and during EIS preparation) and mandatory public hearings before approval.

The approval of the EIS is not the only environmental permit that must be obtained to start construction; other permits related to the use of water, wastewater discharge, use of explosives, fuel storage, radioactive material, etc, are needed.

The operation stage is mainly governed by national legislation and corresponding environmental regulations, and calls for a series of permits to be obtained or maintained (if permits granted at the construction stage still apply), such as definitive water use licences, authorisations for wastewater treatment and discharge, beneficiation concession, among others. Enforcement of said permits and EIS commitments is carried out through the mandatory auditing programmes.

5 Please explain the role of a 'social licence to operate' in your jurisdiction.

There is no such 'social licence to operate' in Peruvian law. It is colloquially used, but it is not a legal term. In colloquial terms 'social licence' means having the agreement with local people and communities to go ahead with a project.

6 Is there private ownership of oil, gas and minerals in your jurisdiction? If not, how are concessions granted and what environmental considerations apply?

There is no private ownership of oil, gas and minerals in Peru. Mineral concessions are granted based on an administrative procedure followed at Ingemmet. Oil and gas rights to explore and exploit are granted through a license contract or a service contract. Such contracts are signed by Perupetro, a state owned company that holds that right.

The approved Environmental Impact Assessment is the main requirement to be complied with. However, its approval does not grant any right over natural resources, or any kind of permit, such as water discharge authorisation, or water use rights, which should be obtained through specific administrative procedures.

7 What is the regulatory environment for renewable and alternative sources of energy and fuels (wind, solar, nuclear, biofuels, synfuels)?

The regulatory environment for renewable and alternative source is the 2008 Investment Promotion for Electricity Generation with the Use of Renewable Energy Act (Legislative Decree 1002 of 2 May 2008), which has been regulated by Supreme Decree 012-2011-EM. However, said law and regulations are not being widely implemented.

8 How are environmental laws and regulations enforced in your jurisdiction? Describe the approach to enforcement and the roles of the authorities responsible for enforcement.

Environmental laws and regulations are enforced by the national environmental enforcement agency, OEFA (Organismo de Evaluación y Fiscalización Ambiental) which was created in 2008. Before OEFA, enforcement was carried out on a sector by sector basis by each Ministry.

Besides OEFA, regional governments enforce environmental laws and regulations at the regional level and for some specific small scale activities (the case of small mining).

9 What types of administrative, civil and criminal penalties can be imposed for violations of environmental laws?

Sanctions can vary from coercive measures, such as warnings, fines and suspensions of activities, to corrective measures, such as training courses to comply with environmental obligations; as well as compensatory measures to mitigate environmental damage, among others. It is important to point out that to be enforceable, sanctions should be established by a law, not a regulation.

The Criminal Code, recently amended, establishes penalties from three to eight years of imprisonment.

10 How and under what authority are air emissions regulated in your jurisdiction?

Peruvian environmental law does not require permits for air emissions. Instead, it has established industry based maximum permissible level for emission, as well as environmental quality standard for air. Primary standards of air quality consider the maximum concentration of sulphur dioxide, particulate matter, carbon monoxide, nitrogen dioxide, ozone, lead and nitrogen dioxide, ozone, lead and hydrogen sulphide. The Directorate General of Environmental Health (DIGESA), within the Ministry of Health, is the agency in charge of the monitoring of air quality.

11 Who is liable for environmental contamination of soil, surface water and groundwater, and is the liability based on fault or on status?

Civil liability is covered through the Civil Code rules of non-contractual liability (a concept applicable to those cases where the action that caused the damage is not the result of an agreement or contract entered into between two or more parties). Non-contractual liability is regulated under two different approaches that can be defined as follows: a liability based on fault, and a 'strict liability', applicable to dangerous goods and activities. A two-year statute of limitation applies to environmental actions under the Civil Code. The two-year term starts at the moment the damage is initially caused or when the affected party becomes aware of it. Considering that environmental damage may be continuous, the two-year term may be extended indefinitely.

12 What is the law governing the remediation of contaminated property?

Peru has no law governing the remediation of contaminated property. In general terms, the Civil Code provisions are applicable.

The oil and gas industry, as well as the mining industry, have their own law governing the remediation of contaminated sites. However these two laws are not focused on contaminated private property, they are aimed at the remediation of those impacts related to abandoned or empty sites, mainly in urban areas.

13 What is the nature of liability for damage to natural resources and who can enforce and recover for such damages?

According to the Environmental General Act, an environmental damage includes damages to natural resources, and it is defined as a material detriment to the environment or some of its components that generates current or potential negative effects.

An environmental damage triggers administrative, civil and criminal liability. Each one of them follows an independent legal path.

Any citizen can enforce such damages, if complies with the rules of standing of the Civil Procedure Code. However initiation of a criminal or administrative investigation may be initiated after a citizen's denouncement.

Recovery of damages is still a novelty in Peru's courts. There is no definition on the subject.

14 How are environmental issues typically addressed in property transfers or mergers and acquisitions? Are there any specific laws that govern environmental aspects of such transactions?

It varies depending on the industry related to the mergers and acquisitions. Transactions over urban manufacturing industry sites impose less risk than transactions over rural mining sites. However, ground-water issues and soil issues are the main environmental aspects to consider. A base line study is needed to allocate liability between the parties; however, enforcement agencies do not take into consideration those contractual obligations between the parties. Compliance with environmental regulations is needed, but also compliance with the commitments agreed on the environmental impact statement, if any.

In other transactions, a representation and warranty stating that the goods are environmentally clean is needed for the benefit of the buyer. Nevertheless, the buyer should conduct its own due diligence to discover any environmental contingency that may affect the price initially agreed. If environmental liability is discovered, the seller shall be committed to clean up; if not, the buyer will acquire the liability which will be enforced by the corresponding environmental agencies. An escrow account is also agreed in order to set aside money from the payment to the seller in case an environmental issue arises.

15 What environmental laws apply to the shutdown or sale of a facility?

Except for the 2003 Mine Closure Law, Law 28090, there are no specific laws applying to the shutdown of a facility.

There is no environmental law ruling the sale of a facility.

16 Does your jurisdiction regulate or provide incentives to conduct environmental audits or assessments? If so, please describe.

Not at all. The regulatory approach is still a command-and-control one.

17 Are there any requirements for the conduct of environmental assessments or environmental impact assessments, such as a condition to obtaining a permit or in connection with a transfer of real property? If so, describe.

There are no requirements for the conduct of environmental assessments in connection with a transfer of a real property. However, it is becoming a common practice.

However, an environmental impact assessment shall be conducted and approved to obtain permits related to the use of land or natural resources. The approval of an environmental impact assessment (through the environmental certification) for new activities is already a general practice across the country.

18 What is the process and timetable for conducting and receiving approval of environmental impact assessments?

It depends on the industry. Approvals by the Ministry of Energy and Mines for mining and oil and gas projects may take up to 18 months. Approvals by the Ministry of Production for manufacturing industry projects may take up to six months.

There is a main framework process approved by the Environmental Impact Assessment national System Act, as follows: A summary of the activities and terms of reference shall be presented before the corresponding ministry for a preliminary evaluation to determinate if such activities require an environmental impact assessment. The environmental impact assessments shall be conducted by an independent consultant company registered before the corresponding ministry. A public consultation period is always included within the evaluation phase and any third party may participate and provide comments. Considering all this input, the corresponding ministry issues the environmental certification (approval of the environmental impact assessment).

The environmental impact assessment includes a description of the activities that would be performed and its area of influence; the identification and classification of the environmental impact along the whole cycle of the project; the environmental management strategy including the management plan, a con-

tingency plan, a compensation plan and abandonment plan if required; as well as community participation plan.

19 How are water rights allocated and transferred?

Under the Peruvian constitutional framework, since it is considered a natural resource that belongs to the nation, water is not subject to property rights; therefore, it cannot be transferred.

Water use rights are allocated through permits issued by the National Water Authority (ANA). The criteria for granting water rights consider the public interest and the availability of the resource.

However, as a consequence of the transference of ownership of a facility holding a water right, the buyer may request ANA to be considered as the new titleholder of the permit granted to the prior operator (the seller).

20 What regulatory requirements apply to the discharge of industrial wastewater in your jurisdiction?

Environmental quality standards for fresh water and seawater have been established based on the type of use of the water body, and all discharges to water bodies (sea, rivers, lake, wetlands, etc) require a prior treatment-and-discharge authorisation from ANA.

21 Are greenhouse gas emissions regulated in your jurisdiction? If so, describe the regulatory regime.

They are not regulated.

22 Are there any chemicals or products that are subject to special environmental requirements in your jurisdiction, such as asbestos or PCBs?

Yes, the use of asbestos, for example, has been restricted by the 2011 Law 29662. However, PCB substances are not subject to environmental regulations. Agrochemicals are also restricted and controlled.

23 What legal protections are afforded to patrimony or cultural heritage (protected areas, flora, fauna, species) and environmentally sensitive areas (wetlands, ecosystems)?

Peru has a National System for Protected Natural Areas that covers almost 17 per cent of its territory. Depending on the category of the area, industry access may be restricted or banned.

In terms of flora and fauna, Peru has listed those species considered in danger or threatened. Therefore, fishing, hunting or collecting them is prohibited.

Peru is also a signatory party to the RAMSAR Convention on wetlands, and those sites are protected within the National System for Protected Natural Areas.

Cultural heritage, is well protected by the Ministry of Culture. Affecting a cultural site is considered a criminal offence.

24 What constraints are there on availability of landfills for disposal of waste?

Landfills for disposal of waste and hazardous waste are very few in Peru. However, the mining and oil and gas industry has created a hazardous waste market which has triggered the construction of a few landfills, most of them close to Lima.

25 What regulations or government initiatives are there in your jurisdiction relating to extended producer responsibility or to sustainability?

Except for the provisions of the 2000 Solid Waste Act promoting extended producer responsibility, there are no other regulations. The Ministry of Energy and Mines has been working on draft regulations for electric and electronic waste, based on extended producer responsibility.

26 What right does the public have to access documents and reports filed with regulatory authorities? Describe the nature of and process for securing any protections for confidential business information.

All citizens have access to documents and reports filed with regulatory authorities, a right that is acknowledge with no restrictions, except for information related to commercial secrets, confidential information or national security. The Peruvian Constitution acknowledges this right and it has been already tried in court.

27 What are the rights of the public or NGOs/environmental groups to participate in environmental permitting or enforcement of environmental laws? Is such participation typical?

It depends on each permit or enforcement of environmental law. The approval of an environmental impact assessment is subject to public consultation, for example. However, a water discharge permit it is not subject to it. The enforcement of environmental laws is not open to the public until it ends with the final agency resolution. Nevertheless, the public may have access to certain documents that the agencies may consider appropriate. Participation of NGOs/environmental groups is typical in all major extractive industry projects requiring environmental permits.

28 What are the most significant current trends in environmental regulation and enforcement in your jurisdiction?

Based on current conflicts triggered by the lack of trust on a couple of major projects' environmental impact assessments, changes to the EIA Peruvian system are expected this year.

Manufacturing industry enforcement, formerly under the Ministry of Production, is now under the Ministry of the Environment's jurisdiction. This means that a new and stringent enforcement would be also starting this year.

The 2011 law implementing the ILO Convention 169 that requires that indigenous and tribal peoples are consulted on issues that affect them, is the main regulatory change. Its provisions have triggered concern in the extractive industry due to the effect that future consultation processes may have on future and current mining, electric power, and oil and gas projects.

29 Identify and describe the significance of any noteworthy court litigation in your jurisdiction regarding the environment.

We should say that there is no noteworthy court litigation regarding the environment on civil courts yet. However, litigation at the Constitutional Court based on injunction processes has been tried by citizen groups to protect the environment. One of the most relevant cases is an injunction order granted by the Constitutional Tribunal ordering three oil companies to stop activities until the 5-year programme of a Protected Natural Area was finished and approved.

30 What features of your jurisdiction's environmental laws are not covered by the previous questions?

N/A.

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