



EARTHJUSTICE
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March 31, 2011

Hon. Hillary Clinton, Secretary
United States Department of State
Office of the Secretary
2201 C Street NW
Washington, DC 20520

Hon. Timothy Geithner, Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Madam Secretary Clinton and Mr. Secretary Geithner:

This letter is in reference to a dispute between the Renco Group (Renco) and the Government of Peru.¹ The dispute relates to Renco's obligations to clean up the La Oroya Metallurgical Complex (LOMC), a smelting facility owned by Doe Run Peru (DRP), a subsidiary of the U.S.-based Renco. The LOMC is one of the most contaminating industrial facilities in the hemisphere and poses a severe threat to public health in the region.

It is our understanding that Renco has directly or indirectly asked the State Department and Treasury Department to contact the Government of Peru and the Inter-American Development Bank regarding this dispute. We are writing to encourage you to not support Renco in this matter. Many of the actions underlying the dispute are based on legitimate efforts of Peru to enforce environmental protection obligations against a company that has failed to uphold its commitment to complete environmental requirements. Peru should be able to enforce its laws to protect the lives, health, and human rights of the roughly 30,000 people affected by the contamination from this smelter. Efforts to protect the population of La Oroya deserve U.S. support, not opposition.

¹ See The Renco Group, Inc., *The Renco Group, Inc. v. the Republic of Peru, Notice of Intent to Commence Arbitration under the United States-Peru Trade Promotion Agreement*, Dec. 29, 2010, ("Notice of Intent to Commence Arbitration"); Letter from Congressman Donald M. Payne to Secretary of State Clinton and Secretary of the Treasury Geithner, Feb. 8, 2011, <http://www.gpo.gov/fdsys/pkg/CREC-2011-02-11/pdf/CREC-2011-02-11-pt1-PgE215-3.pdf>; see also Letter from Congressman Spencer Bachus to Secretary of the Treasury Geithner, Jan. 25, 2010, quoted in ABC News, "Members of Congress, Obama Administration Go to Bat for Billionaire Investor," Mar. 8, 2011, <http://abcnews.go.com/Blotter/members-congress-obama-administration-bat-billionaire-investor/story?id=13084422&page=2>.

Renco bases its claims on certain important misrepresentations of fact that undermine its legitimacy. This letter provides background relevant to Renco's claim and clarifies some of these misrepresentations.

Finally, we urge the State Department not to intervene without consulting with the Environment and Natural Resources Division of the Department of Justice concerning the relationship between Renco's dispute with Peru and the United States' currently pending litigation² against Renco-affiliated entities.

Background

The LOMC is located in the city of La Oroya, Peru. DRP has owned the LOMC since 1997, and operated it until 2009 when it voluntarily closed the smelter. Since the LOMC began operating in 1922, La Oroya has become one of the most contaminated sites in the world. As a result of decades of virtually uncontrolled contamination including releases of lead, arsenic, sulfur dioxide, and other toxic substances, the environment in and around La Oroya is severely degraded. Beyond the historical contamination, ongoing releases of toxic substances when the smelter is operating pose extreme risks to the health of the surrounding population. As DRP notes on its website, "Of La Oroya's 12,000 children, 99.7 percent have blood lead levels that exceed acceptable limits."³ The Peruvian Constitutional Tribunal and the Inter-American Commission on Human Rights have also recognized that high levels of pollution in La Oroya have been causing serious health problems for the local population.⁴ The environmental and health impacts of contamination from smelters are well known, and at the time of purchasing the complex from the government of Peru in 1997, Renco already had significant experience with these problems from owning lead smelting facilities in the United States that had failed to comply with U.S. air quality regulations, requiring the company to take significant mitigation actions.⁵

DRP's Repeated, Unfulfilled Promises to Meet its Environmental Requirements

In 1993, Peru passed a law calling for the adoption and implementation of environmental management plans (known by the Spanish acronym "PAMA") for mining and smelting operations. In January 1997, Peru developed a PAMA specific to the LOMC. When DRP purchased the LOMC from Peru later that year, the transfer contract established that DRP would

² See *U.S. et al. v. Doe Run Resources Corp. et al.*, case number 10-cv-1895, Consent Decree (E.D. Mo. 2010), http://www.epa.gov/region7/cleanup/doe_run/pdf/consent_decree.pdf; see also "Lead Producer to Pay \$7M Fine, Spend \$65M on Cleanups," Oct. 11, 2010, <http://www.nytimes.com/gwire/2010/10/11/11greenwire-lead-producer-to-pay-7m-fine-spend-65m-on-clea-21972.html>.

³ Doe Run Peru, Lead Poisoning in La Oroya, <http://www.doe-run-la-oroya-peru.com/lead-poisoning-in-la-oroya/>.

⁴ See Pablo Miguel Fabián Martínez, *y otros contra el Ministerio de Salud y la Dirección General de Salud Ambiental (Digesa)*, Sentencia del Tribunal Constitucional, Sala Segunda del Tribunal Constitucional, EXP. N.º 2002-2006-PC/TC, May 12, 2006; Inter-American Commission on Human Rights (IACHR), Annual Report 2007, ch. 3, ¶ 46, <http://www.cidh.org/annualrep/2007eng/Chap.3e.htm#Precautionary> (describing Commission's basis for Aug. 31, 2007 granting of precautionary measures in the La Oroya case); see also IACHR, *La Oroya Community vs. Peru*, see also IACHR, *La Oroya Community vs. Peru*, Report No. 76/09, Aug. 5, 2009, <http://www.cidh.oas.org/annualrep/2009eng/Peru1473.06eng.htm> (declaring *La Oroya* case admissible).

⁵ See, e.g., EPA, *In the Matter of Doe Run Resources Corp.*, Administrative Order on Consent, Docket No. RCRA-7-2000-0018, CERCLA-7-2000-0029 (2000), ¶¶ 24-25, <http://www.epa.gov/region7/air/rules/missouri/doerun-herc.pdf>; <http://www.federalregister.gov/articles/2001/12/05/01-30102/approval-and-promulgation-of-implementation-plans-state-of-missouri>.

assume responsibility for nine environmental projects in the PAMA and any eventual modifications as established by Peruvian law, within the 10-year period provided by law, ending in 2006.⁶ In spite of seeking and gaining approval for changes to various PAMA requirements in 1999, 2001, and 2002,⁷ DRP did not complete its PAMA commitments by 2006 as required by law and the terms of the contract.⁸ Foreseeing that it would not comply with the original ten-year deadline for completing its PAMA, DRP asked for and received an extension in 2006.⁹ The 2006 PAMA extension gave DRP until October 31, 2009 to complete the requirements of the original PAMA and comply with Peruvian environmental law. In September 2009, the Government of Peru granted a second extension to DRP.¹⁰ Nevertheless, DRP has yet to complete the primary remaining PAMA project.

Notably, the main project that DRP has not completed is the construction of additional acid plants – the largest of the nine projects, requiring about 60% of the foreseen environmental investment needed for all of the PAMA projects.¹¹ This remaining project is also critical in terms of mitigating public health impacts, as the acid plant would control a substantial portion of the toxic air pollution that is harming the La Oroya population.

DRP is now requesting another twenty-month extension, asserting that it will complete its obligations in that timeframe. Yet DRP made similar assurances in 2007, and failed to uphold its commitment.¹² Considering DRP's repeated unfulfilled promises to build the acid plant, there is no reason why the government of Peru should trust DRP to follow through on its promise.

For Peru, completion of the PAMA requirements via construction of the acid plant is an urgent matter of public health. The graph on the next page shows the atmospheric concentrations of lead – one of many toxic substances emitted by the LOMC – before and after the smelter closure. It is evident that the operation of the metallurgical complex is the sole factor responsible for the failure to meet air quality standards in the city.

⁶ See Stock transfer agreement between Doe Run Peru and Centromin Peru, Oct. 23, 1997 (“Stock transfer agreement”), clause 5; see also PAMA, approved by Resolución Directoral No. 017-97-EM/DGM (Jan. 15, 1997), modified by Resolución Directoral No. 325-97-EM/DGM (Oct. 6, 1997); see also The Renco Group, Inc., Notice of Intent to Commence Arbitration, ¶¶ 1-3.

⁷ See Resolución Directoral No. 178-99-EM/DGM (Oct. 19, 1999); Resolución Directoral 133-01-EM/DGM (Apr. 16, 2001); Resolución Directoral 028-2004-EM/DGM (Oct. 25, 2002).

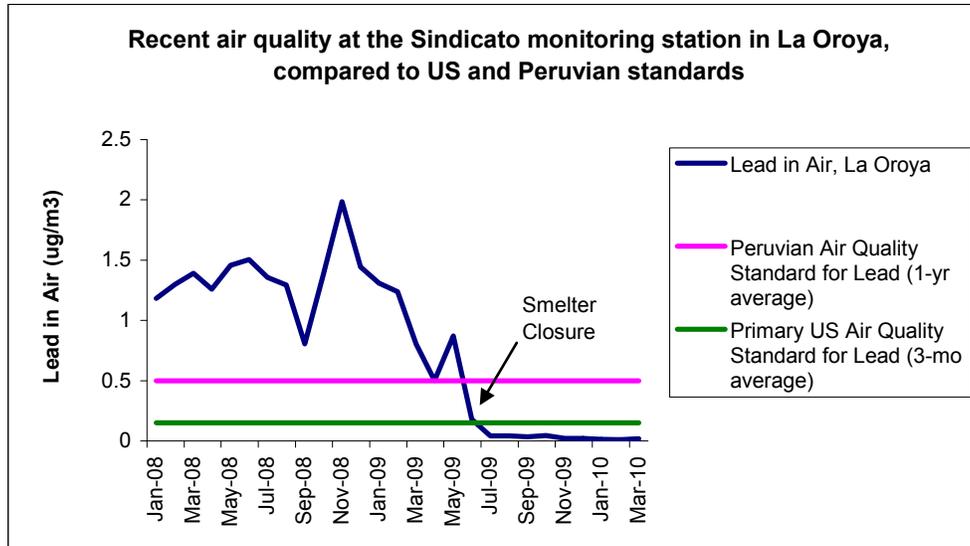
⁸ See Resolución Directoral No. 334-97-EM/DGM (Oct. 16, 1997) (setting deadline of Dec. 2006; see also The Renco Group, Inc., Notice of Intent to Commence Arbitration, ¶ 32.

⁹ See Resolución Directoral No. 257-2006-EM/AAM (May 29, 2006) (extending deadline to Oct. 2009); see also Doe Run Peru, Request for Special Extension for Deadline to Comply with the Sulfuric Acid Plant Project [title translated from Spanish] (“Request for Special Extension for Deadline”), Dec. 2005, <http://www.minem.gob.pe/minem/archivos/file/DGAAM/estudios/oroya/voll.pdf>.

¹⁰ See Ley No. 29410 (Sept. 25, 2009) (extending deadline to May 2012).

¹¹ Doe Run Peru, Request for Special Extension for Deadline (acid plant comprising \$90-104.6 million of total foreseen investment for all of DRP's PAMA projects of \$173.95 million).

¹² See ABC News, “Members of Congress, Obama Administration Go to Bat for Billionaire Investor” (citing Doe Run Peru press release from 2007 announcing that the work would be done in Sept. 2008), Mar. 8, 2011, <http://abcnews.go.com/Blotter/members-congress-obama-administration-bat-billionaire-investor/story?id=13084422>.



Renco notes that DRP has “made significant additional investments to improve conditions in the La Oroya Community.”¹³ What DRP may or may not have done in this regard does not excuse the company for failing to comply with contractual obligations, such as the obligation under the original PAMA to construct new sulfuric acid plants. DRP also fails to mention that Peru has already reduced the requirement for construction of acid plants.¹⁴ Regardless, the fact remains that DRP has not completed all nine initial PAMA projects, to the detriment of the public health of tens of thousands of people in La Oroya and beyond.

Peru’s PAMA law makes clear that a party that fails to comply with its PAMA requirements is subject to fines and partial or total closure of operations.¹⁵ In this case, DRP voluntarily shut down the complex and has failed to meet legislatively established deadlines for guaranteeing funding for reopening the complex and completing its PAMA requirements.¹⁶

Peru’s Soil Remediation Requirements

Although Peru, by way of the state-owned mining company Centromin, assumed full responsibility for soil remediation around the complex, the government’s deadline for cleaning the soils has not passed.¹⁷ The transfer contract made Centromin responsible for all soil contamination that had occurred historically and that would occur up through the end of PAMA implementation by DRP in 2006. Peru’s decision to predicate the deadline for soil remediation on DRP’s construction of the acid plant makes sense. If built according to plan, that acid plant would capture a sizeable portion of toxic emissions arising from the smelter. With the smelter

¹³ The Renco Group, Inc., Notice of Intent to Commence Arbitration, at 9 (section C.3).

¹⁴ The original PAMA required the construction of new capacity to produce 505,000 MT/year Sulfuric Acid. Peru in 1999 already granted a PAMA modification so that DRP will now only need to produce a total of 375,000 MT/year of acid—a substantial reduction that will likely have significant implications for air quality in the long-term.

¹⁵ Decreto Supremo No. 016-93-EM (Apr. 28, 1993) (modified by Decreto Supremo No. 059-93-EM (Dec. 10, 1993), art. 48).

¹⁶ Ley 29410 (Sept. 25, 2009).

¹⁷ See <http://www.activosmineros.com.pe/amsac/index.php/proyectos-en-ejecucion/proyecto-3> (citing Resolución Directoral No. 082-2000-EM-DGAA) (Apr. 17, 2000) (postponing deadline for Centromin’s PAMA requirements such that it need not remediate the soils until DRP completes its PAMA requirements).

operating, cleaning and replacing soils before DRP has honored *its* legal obligation to build the final acid plant would be a wasted investment because the soils would immediately become re-contaminated.

Moreover, despite Renco's claims to the contrary, Peru has begun remediating the soils.¹⁸ With the smelter closed, Peru should indeed proceed to remediate all soils. Peru should also guarantee that the smelter will not be allowed to reopen without fully operational state-of-the-art technology for capturing the toxic emissions. Once Peru has remediated the soils, all liability for further contamination would rest with the company that operates the complex and contaminates the environs.¹⁹

Alleged Unfair Treatment

Renco claims the Government of Peru subjected DRP to "unfair treatment" in violation of the U.S.-Peru Trade Promotion Agreement. Renco claims the Government of Peru treated it unfairly by not granting adequate extensions for its PAMA. The truth of the matter is that the Government of Peru took unprecedented steps, granting an extension not only once, but twice, even going so far as to pass new laws to enable the Government to accord DRP more time to comply with its legal obligations. Especially in light of the severe health impacts resulting from the daily smelter contamination, these were controversial decisions. Rather than treating DRP unfairly, the Peruvian government made substantial exceptions for DRP by granting these extensions and permitting the complex to continue operating without demonstrating full PAMA compliance. No other mining or smelting facility in Peru was accorded an extension to complete its PAMA requirements.

Furthermore, at the time DRP received these extensions, DRP accepted terms that included financial guarantees to cover the cost of completing the outstanding project. Renco claims that the Government of Peru, after granting the extension, added financially "onerous" obligations by requiring that financial guarantee. In fact, the extension approval expressly included the financial guarantee as a condition of granting the extension, stating that the extension would be "without effect" if that condition were not complied with.²⁰ Thus, DRP was fully aware that there would be requirements for a financial guarantee²¹ and, in fact, upon requesting the initial modification, had stated that it would comply with those requirements.²² There is no basis to say that DRP was unfairly treated when the Government of Peru passed laws with the sole purpose of accommodating DRP's desire for more time, and when DRP was actually given more time, twice, to comply with initial commitments, while fully informed of the legal requirements corresponding to these extensions.

Additionally, Renco claims that Peru treated DRP "less favorably" than the Peruvian company Centromin.²³ For example, Renco claims that Peru imposed "onerous" financial conditions when

¹⁸ See Activos Mineros [successor to Centromin], Annual Report 2009, http://www.activosmineros.com.pe/amsac/images/stories/Archivos/Memoria%20Anual/ACTIVOS_MINEROS_MEMORIA_2009.pdf.

¹⁹ See Stock transfer agreement, ¶¶ 5.1, 5.8.

²⁰ Resolución Directoral No. 257-2006-EM/AAM, art. 2.

²¹ See Decreto Supremo N° 046-2004-EM (Dec. 29, 2004).

²² Doe Run Peru, Request for Special Extension for Deadline, at 9.

²³ The Renco Group, Inc., Notice of Intent to Commence Arbitration, ¶ 54.

granting the extension request, but that it did not impose the same requirements on Centromin. The fact is, Peruvian law requires financial guarantees as a condition of granting an extension,²⁴ and Centromin, unlike DRP, did not fail to meet its environmental obligations such that it needed to request an extension.

Finally, Renco is alleging that, if Peru were to become a creditor of DRP, this would constitute unlawful expropriation of the complex from DRP. Peru has made a claim against DRP for payment of the cost of completion of the remaining PAMA projects, in light of the fact that DRP is responsible for completing its PAMA obligations. DRP knows and has known since it signed the transfer contract in 1997 that it incurred legal obligations to perform certain environmental projects pursuant to the PAMA.²⁵ Thus, there would be no expropriation, given that DRP was notified of its financial obligations to comply with its PAMA requirements.

Conclusion

Since DRP and the Renco Group took over the LOMC in 1997, the company has consistently failed to meet its environmental obligations in a timely fashion. The Government of Peru has done all but treat DRP unfairly, and in fact has passed special laws to enable it to grant extensions for DRP to complete its PAMA requirements. DRP has failed to meet even the extended deadlines. Whether DRP ever intends to complete its final PAMA requirement by building the acid plant is uncertain, and given Renco's history in both the United States and Peru, along with DRP's false past assurances, it is likely that the company will continue to seek extensions.

In light of the significant human rights violations and health harms caused by operation of the LOMC without adequate control technology, the Government of Peru should not permit the complex to reopen unless the final acid plant has been built and other effective measures to protect public health and the environment have been put into place. Governments must have the right to ensure timely compliance with their environmental laws, and enforcing such laws should not constitute a violation of international agreements.

Renco's attempt to turn the facts around against Peru is duplicitous. DRP continues to flout its deadlines to complete its PAMA requirements²⁶ while pointing a finger at Centromin, whose deadline to remediate the soils has not passed and is indeed predicated on DRP's compliance.²⁷ DRP presents itself as a victim of "disparate treatment," but DRP knew what its obligations were at the time it purchased the complex and received the extensions it requested.

For these reasons, the Department of State should not support Renco in its dispute with the Government of Peru. To the contrary, the United States should do all within its power to encourage Renco to comply with all of its environmental obligations and ensure public health protection in La Oroya. Should you have any questions, please do not hesitate to contact us.

²⁴ See Decreto Supremo N° 046-2004-EM (Dec. 29, 2004).

²⁵ See Stock transfer agreement, clause 5.

²⁶ See Resolución Directoral No. 257-2006-EM/AAM.

²⁷ See <http://www.activosmineros.com.pe/amsac/index.php/proyectos-en-ejecucion/proyecto-3> (citing Resolución Directoral No. 082-2000-EM-DGAA); see also The Renco Group, Inc., Notice of Intent to Commence Arbitration, ¶ 55.

Sincerely,



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cc: Hon. Donald M. Payne
Hon. Spencer Bachus
Hon. Barbara Boxer