

Elements of the Violation a.k.a. “Code Analysis”

Structural Regulatory Training

Code Analysis Goals

Was there a violation?

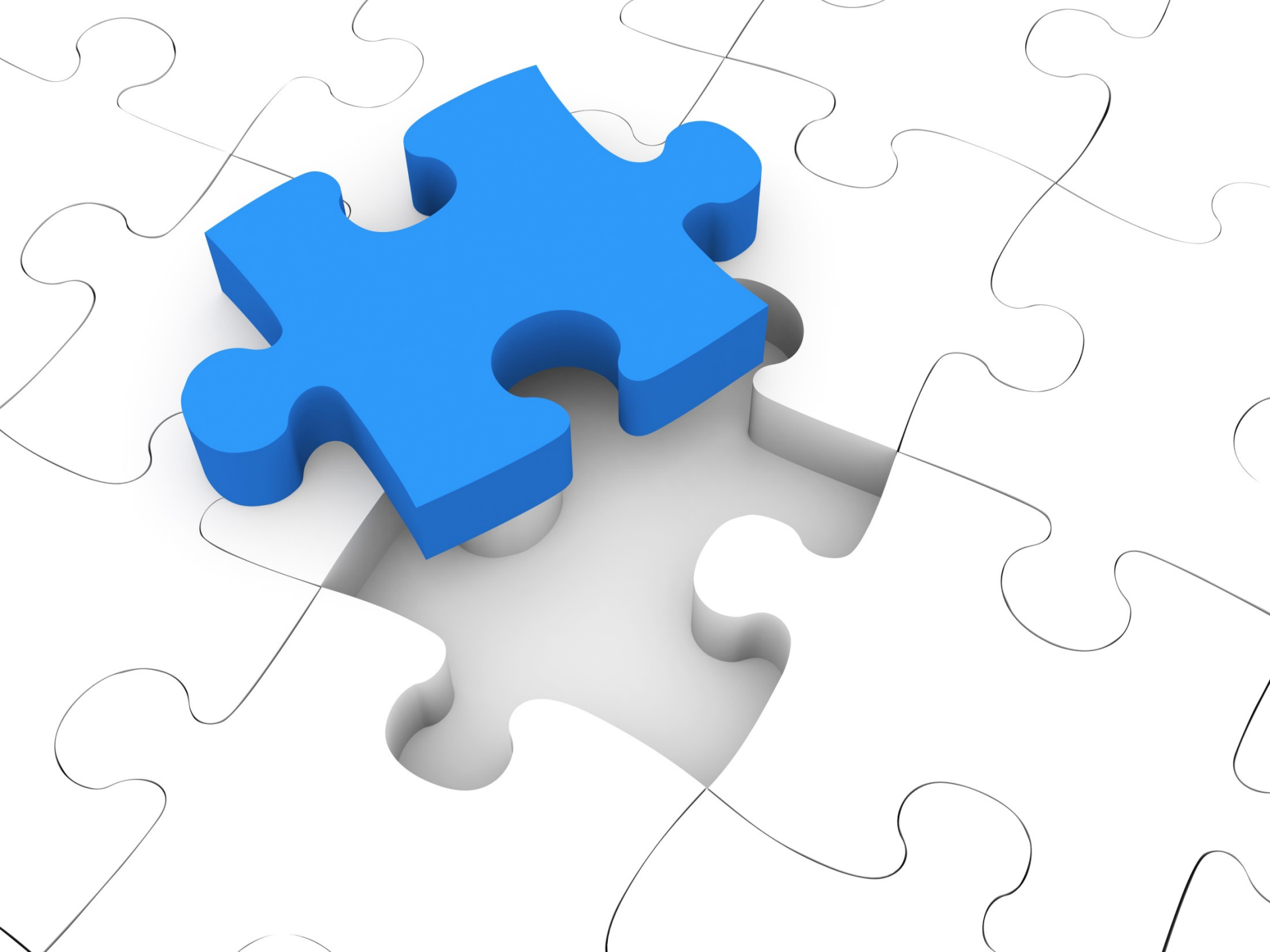
1. What are the specific elements of the requirement?
2. **What specific evidence do you possess to show the respondent did not comply with an element of the requirement?**

Code Analysis

The “code analysis” exercise identifies the specific elements of the violation – this exercise is the basic analytical task that must be performed before initiating an enforcement action

What is the Requirement?

- Each law or regulation is a unique requirement
- Each requirement is made of a set of elements

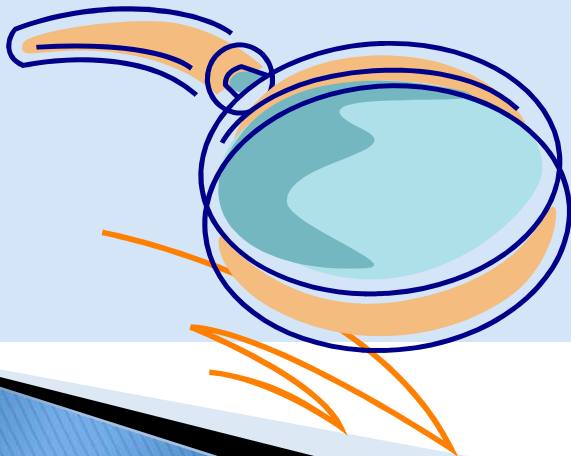


Definitions of “Element”

- An “element” is the simplest part that makes up the requirement
- An “element” may be a condition that must be present OR an action that must have occurred

Element or Not?

Don't confuse "elements"
with words or phrases that
are clearly **"exceptions"**
or **"clarifiers"**



Troublesome Words

- | | |
|---|---|
| <ul style="list-style-type: none">• And• Or• When• Except• Other | <ul style="list-style-type: none">• Notwithstanding• Substantial• Hazard• Immediately• Use |
|---|---|

How?



Elements + Evidence = Success

Once you've listed the elements, it is critical to match each item of evidence for each element.

Element 1: Evidence items---

Element 2: Evidence items---

Element 3: Evidence items---

Evidence Defined

Evidence is a fact of consequence which tends to furnish proof that an element was present or had occurred.

- **Each element of a law or regulation must be proven with evidence to establish that a violation occurred**

Evidence Needed

- **The elements of the law or regulation will determine what kind of evidence is needed to prove a violation**
- **Evidence must be credible and trustworthy**

Examples of Evidence

- ▶ **Witness statements**
- ▶ **Expert testimony**
- ▶ **Photos & diagrams**
- ▶ **Laboratory analyses**
- ▶ **Reports**
- ▶ **Hearsay**

Test Your Code Analysis!

Do your code analysis elements answer these questions?

1. **What is the requirement?**
 - What has to be done?
2. **Who or What needs to be protected?**
3. **Who is required to perform or complete the requirement?**

Disclaimer

NOTE: The following examples of code sections (elements and evidence) are presented for training purposes only, and for the requirements of each code section that were current at the time of this training presentation.

An actual incident may also have additional evidence unique to that inspection/investigation that should also be included in your Elements of the Violation code analysis.

3 CCR §6738.2**

The employer shall assure that appropriate protective eyewear, providing brow and temple protection, that conforms to the curvature of the face and side protection to the eyes, is worn when its use is required...

Selection of Protective Eyewear

ELEMENTS

1. There is an employee and employer as defined in 3CCR §6000.
2. Pesticide applied at the site.
3. Labeling requires wearing eye protection when mix/load and when applying.

EVIDENCE

1. Establish the proper employer by statements from employer, employee, other employees, or observations of employee working, etc. Business card with employee's name on it. Training records showing employee's name.
2. Inspector observations, container labeling, photos taken, applicator interview statements, service slip, etc.
3. Original or copy of registered label is reviewed by inspector.

Selection of Protective Eyewear

ELEMENTS

4. Eye protection meeting regulation and label (ANZI Z87.1) was provided by employer, fit conformed, good condition, and available at the site (or not).

5. Eye protection provided was worn by the applicator (or not).

EVIDENCE

4. Eye protection present on site shows Z87.1, applicator not wearing it was observed, photographed, applicator demonstrates to inspector by donning it, etc.

5. Inspector documents observations on inspection report, takes photos, etc.

3 CCR §6738.3(a)**

The employer shall assure that appropriate chemical-resistant gloves are worn by employees when their use is required.

(a) If the barrier material is specified by a category on the product labeling, the required glove material must be:

(1) Category A: barrier laminate, butyl rubber, nitrile rubber, neoprene, natural rubber, polyethylene, polyvinyl chloride (PVC), or Viton®...

Selection of Gloves

ELEMENTS

1. There is an employee and employer as defined in 3 CCR §6000.
2. Pesticide was applied at the site.
3. Labeling requires wearing chemical resistant gloves when mix/load and when applying.

EVIDENCE

1. Establish the proper employer by statements from the employer, employee, other employees, or observations of the employee working, etc. Business card with employee's name on it. Training records showing employee's name.
2. Inspector observations, container labeling, photos taken, applicator interview statements, service slip, etc.
3. Original or copy of (registered) label is reviewed by inspector.

Selection of Gloves

ELEMENTS

4. Gloves meeting regulation and label was provided by employer, fit conformed, good condition, and available at the site (or not).

5. Gloves provided were worn by the applicator (or not) when required by label & regulation.

EVIDENCE

4. Gloves present on site, inspector observed, etc.

5. Inspector documents observations on inspection report, takes photos, etc.

Other Helpers

Check the Citeable Sections list:

<http://www.cdpr.gov/docs/enforce/admnacts/citsec.pdf>

Enforcement Compendium Volume 4

-- Inspection Procedures

http://www.cdpr.ca.gov/docs/enforce/compend/vol_4/inspect_procedures.htm

Enforcement Compendium Volume 8

-- Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling

http://www.cdpr.ca.gov/docs/enforce/compend/vol_8/pestlaw.htm

Do the Code Analysis Exercise

In Summary...

- ✓ **For every alleged violation found**
 - Inspection reports
 - Investigations
 - Other sources
- ✓ **It is also an invaluable help to describe your reasoning in Decision Reports**

Do the Code Analysis Exercise

- ✓ **BEFORE** the investigation case report is written or inspection is completed
- ✓ **BEFORE** the NOPA is written
- ✓ **BEFORE** the NOPA is signed by the Commissioner

Do the Code Analysis

The Big Picture Benefits

The “Code Analysis” can:

- ✓ Increase “fairness” of penalty actions; AND
- ✓ Help you control the overall fine amount in penalty actions

Group Exercises

Small Teams:

- ✓ Choose a scribe
- ✓ Choose a presenter
- ✓ **The team will identify and list elements for the given law or regulation**
- ✓ List evidence to prove elements
- ✓ Present team code analysis to the class

Group Exercise Checklist

1. What is the requirement?
2. Did the person fail to satisfy the elements of the requirement?
3. What specific evidence do you have to show the person did not comply with each element of the requirement?"

6678 Service Container Labeling

ELEMENTS

When there is a service container...
It **shall be labeled** with **all three** of the following list of items:

Name and address of the person or firm responsible for the container.

Identity of the pesticide in the container.

Signal word – “Danger,” “Warning,” or “Caution,” in accordance with the label on the original container

EVIDENCE

Photograph of the service container, interview with person using the service container

Photographs, statement in report detailing exactly what required items were missing from the required labeling for service containers, copy of the labeling, etc.

Photograph of the label on the original (manufacturer/registrant) container as to which signal word must appear on the service container. Copy of the labeling.

8505.7 Secondary Locks

ELEMENTS

Space to be fumigated shall be vacated by all occupants.

All entrances locked, barricaded, or otherwise secured against entry.

Until the end of the exposure period, and opened for ventilation. Relocked, barricaded, or otherwise secured against reentry.

Until licensee declares fumigated space to be safe for reentry.

(Licensee posts Notice of Reentry)

EVIDENCE

Establish by statements, reports, photographs, diagrams, etc. that the company verified that the premises were vacated **(OFN, fume log, etc)**

Statements, reports, photographs of devices used, diagrams, etc.

Copy of labeling, photos of entrances unlocked at any time. Check registered label (& CAP) to determine length of exposure & aeration periods.

Statements, reports, photo that the space was opened for ventilation, diagrams, etc. Statement, signs documents, reports, indicating **licensee declared the space safe for re-occupancy.**

12973 Use In Conflict w/Registered Labeling

ELEMENTS

The product used was a pesticide.

The pesticide was used in conflict with its registered labeling.

The labeling is registered.

The labeling was delivered with the product.

EVIDENCE

Specific testimony regarding definition of a pesticide (FAC 12753) or testimony identifying specific EPA Reg. No. of product.

Testimony photos or witness statements demonstrating a use that conflicts with a specific statement or statements on the REGISTERED pesticide labeling.

Certification statement from DPR's Registration Branch, stating the pesticide was registered at the time of alleged misuse.

The registered label was affixed to the container...there is a photograph of the label affixed to a container that was used in this application; a witness statement indicating that this product was used and the labeling was affixed to the container.

Thanks Everyone!

For more information see DPR's website:
Enforcement Branch – Training Resources