Using Elements of the Violation Worksheets

Purpose

"Elements of the Violation Worksheets" (worksheets) are intended to:

1) Provide an elementary analysis of a legal requirement; and,
2) Outline elements necessary to prove the violation by "a preponderance of the evidence," which is the burden of proof required for administrative civil penalty actions.

The worksheets are guides to assist you in proving a violation.

Element variations are possible

Analyzing the elements of a violation is not an exact science. There may be more than one perspective on how to analyze a specific code section (or requirement), resulting in a slight variation on the number of elements. The most important thing to remember is that the point of the elements exercise is to perform an analysis of a code section to make sure you don't miss any of the elements required to prove a violation.

How to prove a violation – in a nutshell

- Select a law, regulation, rule or requirement;
- Break it into its relevant elements (components);
- Provide a piece of evidence to prove each element;
- Use this information to determine whether or not a violation occurred.

Worksheet terms

- **Elements** are the pieces (or components) which must be addressed to prove parts of the violation.
- **Evidence** is a fact of consequence that tends to furnish proof of an element or violation.
- **Facts** can be difficult to concisely define. For our purposes, we will consider them:
  1) Statements that can be proven; or
  2) Things that actually exist.

  For example, facts can be substantiated by credible testimony, documents, photographs, illustrations, etc.
- **Inferences** are conclusions, reached by considering other facts and deducing a logical consequence from them. By engaging in reasoning, a fact or conclusion becomes more or less likely to have occurred.
- **Strategies** are plans of action to solve a problem or address an issue.

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Having difficulty?

If you are having difficulty determining the elements, it may be because you have encountered a "clarifying statement," or a list within an element, or a "defense," or an "exception" incorporated into the requirement.

In addition, answering the following who, what, when, where, why and how questions may help you to determine the elements:

- **Who** is required to perform or complete the requirement?
  There may be a clarifying statement found within "who."
- **Who** is the requirement designed to protect?
  There may be a clarifying statement, defense, or exception found when considering "who" the requirement is intended to protect.
- **What** is the general requirement?
  Occasionally this is not stated or it may not be clear. Try looking at the title of the law or regulation as it is written in a code book format. Also look at nearby subheading titles, for context guidance. Are there any inferences or exceptions?
- **What** has to be done to fulfill the requirement?
  Is there a specific method to be followed?
- **What**, if any, are the exceptions to the requirement?
- **When** or **where** is the requirement to occur?
- **Why** is this requirement important?
  A specific "why" is sometimes not stated or apparent. Usually, the answer is something to the effect of "for the purpose of protecting the public health, safety, and the environment." Try looking at the title of the law or regulation as it is written in a code book format. Also look at nearby subheading titles, for context guidance.
- **How** is the requirement to be completed?

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Example of a clarifying statement

"Notwithstanding that substantial drift would be prevented . . . . "

This statement could be restated to say, "In spite of what we mentioned a moment ago about the likelihood that harm or damage might occur, you also have to comply with the following requirement . . . ."

Example of a broad element

"The applicator shall evaluate . . . ."

Occasionally there will be a list following "evaluate" or other subjective words. Look for clues within the list (e.g., "and", "or"). Sometimes, the list has no clues and the list might not stand on its own – that is when it might be part of another element. If there isn't a list accompanying a broad element, consider utilizing the testimony of an expert witness to offer an opinion about how to comply with this requirement based upon their knowledge and experience.

Caveat

The worksheets are not intended to override common sense or specific legal advice. They may not provide examples of every type of evidence that may be available and they may not ask every question that might be relevant to prove a violation; however, they are useful to help organize thoughts and assist reviewers in evaluating a case before deciding to begin an enforcement or penalty action.

Elemental wisdom

- Make sure you consider all of the elements of the violation.
- Consider how an objective "trier of fact" (hearing officer) might view the elements.
- Consider the elements during the investigation if you want your case to be successful when it is considered by an objective third party.
- Consider alternative explanations. Chances are good that the respondent will present alternative explanations.
- Is your "evidence" relevant to the elements of the violation? The "trier of fact" will have difficulty making findings of fact and a decision in your favor if you fail to address most or all elements of the violation/s.
- Use your best judgment.

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Why bother with the worksheets?

Elements of the Violation Worksheets can be helpful at any stage of an enforcement action process.

If you are an investigator: Try to complete additional worksheets for frequently cited violations – it's a good way to help you organize your investigation activities and to focus on the evidence you need to collect for a successful prosecution.

If you are an advocate or a case reviewer: Try to complete additional worksheets for other sections your agency frequently cites; it's a good way to "self-check" your action before you ask the Commissioner to sign a Notice of Proposed Action.

If you are a Commissioner: Try to complete worksheets for violations that are before you, preferably before you sign the Notice of Proposed Action; it's a good way to check on the investigation quality of the proposed action and to evaluate staff work.

If you are a Hearing Officer: Try to complete worksheets for actions that are before you, preferably before the hearing; it's a good way to help you organize your hearing notes.