

## **Chapter 2**

# **Elements of the Violation**

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## Section 2.1


### How to Read and Understand the Codes

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**Introduction** Laws and regulations are instituted to address specific problems. However, sometimes the text of a law or regulation may appear confusing. While an initial proposal may be simple, after various parties in the process have an opportunity to review and comment words and phrases may be added, deleted, or edited. The intended specific solution may become more complex than the initial proposal as the result of the many compromises. To help in deciphering laws and regulations, the following steps may be helpful.

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**Code analysis steps** The following code analysis steps may seem basic or obvious; however, they are routinely used by paralegals, legal researchers, and attorneys. The steps are also helpful to pesticide enforcement personnel, hearing officers, and others who need to understand the requirements of laws and regulations.

Step	Action
1	Read the section – then read it again. A more accurate understanding of the content may be gained with each reading. Reading it aloud may help identify the basic ideas within the requirement.
2	Focus on the words “and,” “or,” and “except.” These are the words that can partially or completely change the intentions and/or requirements of sections.
3	All words and punctuation have meaning. Do not ignore words you do not immediately understand, refer first to the definitions for the code section. If a word is not defined in the applicable code section or in guidance from DPR, then any standard published dictionary of American English can be used to define the term. Punctuation delineates a portion of a clause or idea, a continuation of a clause or idea, or a complete idea. Sometimes punctuation seems inconsistent or redundant. This may be purposeful. If the case is appealed, the Director, the DRC, DPR’s Office of Legal Affairs, or a court will look at the section and interpret all the words and punctuation.
4 	Interpret the section so that it is consistent with the State’s other pesticide laws and regulations, and policies of DPR, if possible. If a section appears to contradict another law, regulation, or written State policy, the section may be misinterpreted, or an exception or exemption stated in another law or regulation may have been overlooked.

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## How to Read and Understand the Codes, Continued

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### **Tips for interpreting regulations**

- Regulations should be interpreted to be consistent with the mission of the agency.
  - For difficult regulations, reconcile them by looking to the Initial and Final Statement of Reasons (see “Rulemaking records” below), to other regulations of the same agency, and the law(s) which authorize the regulation to be adopted.
  - Strictly interpret regulations that can result in a punishment.
  - Liberally interpret regulations that are intended to protect the general welfare.
  - Do not interpret a regulation in a manner that is contrary to common sense.
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### **Rulemaking records**

The state agency adopting regulations has rulemaking files to support the action. DPR’s oldest rulemaking files date back to 1967 when pesticide regulation duties were part of CDFR. Since the early 1980s, the rulemaking files have generally contained:

- approval or disapproval of the rulemaking file by the Office of Administrative Law,
  - a Notice of Proposed Action, an announcement to the public about the rulemaking and serves as an invitation for them to participate,
  - the Initial and Final Statement of Reasons, explaining the necessity, purpose, and rationale for the action(s) the department is proposing to take or explaining the actions taken,
  - text of the proposed changes and final regulations,
  - if applicable, a notice of proposed changes to the regulation, and the changed text, and
  - any other documents supporting the rulemaking including, but not limited to: internal memos or emails, memos or emails to or from other state agencies, hearing transcripts, documents relied upon, and public comments submitted during the public comment period and the Department’s response.
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### **Do not give up**

As stated earlier: “read the section again” or, try reading it aloud to a colleague. Always consult relevant Enforcement Letters and the Compendium Volumes for guidance. For particularly challenging situations, CAC staff may contact their EBL if they have difficulty understanding the applicability of a particular State pesticide law or regulation.

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## How to Read and Understand the Codes, Continued

### Sentence construction

Laws and regulations can be constructed in various styles. Some may be simple and straightforward; others require a more complex construction of ideas and elements. Sections that are conjunctive or disjunctive are easier to prove with factual testimony and other evidence. After reviewing the chart, try the exercise at the bottom of the page.

Construction	Concept	Application
Conjunctive	“and”	<ul style="list-style-type: none"> <li>• All elements of a list must be satisfied</li> <li>• Easier to apply</li> <li>• Predictable</li> <li>• Decision maker has little discretion in application</li> </ul>
Disjunctive	“or” “except”	<ul style="list-style-type: none"> <li>• Only one of a list of elements must be satisfied</li> <li>• Easier to apply</li> <li>• Predictable</li> <li>• Decision maker has little discretion in application</li> </ul>
Aggregate	Some, but not all elements, are in a list; “such as” “including”	<ul style="list-style-type: none"> <li>• Various factors affect application</li> <li>• Not straightforward or easy to apply</li> <li>• Less predictable</li> <li>• Decision maker may have significant discretion in application</li> </ul>
Mixture	Balance the weight of elements to make a determination; “shall consider the following”	<ul style="list-style-type: none"> <li>• Various factors affect application</li> <li>• One factor may have greater weight than other factors</li> <li>• Not straightforward or easy to apply</li> <li>• Unpredictable</li> <li>• Decision maker has considerable discretion in application</li> </ul>

### Exercise

Identify the construction style of the following sections:

- 3 CCR section 6130(b)(1)
- 3 CCR section 6195(a)
- 3 CCR section 6412(a)
- 3 CCR section 6450.1(c)
- FAC section 12973

## Section 2.2

### What is an Elements of the Violation Analysis?

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#### Introduction

The Elements of the Violation analysis is a basic exercise used by enforcement agencies to confirm sufficient evidence exists to cite a violation of a law or regulation. To perform this analysis, the cited section is broken down (simplified) into its individual functional parts, or Elements. Then, each element is correlated with evidence. Each element must have corresponding evidence for the citation to be valid and enforced. If one element is not supported with corresponding evidence, a citation cannot be issued for that code section.

Practically speaking, an Elements of the Violation analysis occurs during pesticide use inspections (observing evidence that supports selecting a code non-compliance), the issuance of a violation notice (confirming a violation did occur), investigations (collecting evidence to prove a violation), and when implementing an enforcement action (selecting codes to cite with the strongest evidence for each element). The analysis is the underpinning of a successful administrative civil penalty case that could be subject to a hearing and appeal.

**It is essential that pesticide use enforcement staff develop skills to break down statutes and regulations into basic elements.** This Chapter outlines the steps and provides templates and examples of analyses of often-cited codes.

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#### Identifying probable violations

When CAC staff discover a *probable* violation, the necessary elements must be present to *prove* the violation. Constructing a simple checklist of the elements on an Elements of the Violation Worksheet (Section 2.4) will:

- Simplify variables of the incident (e.g., eliminate the collection of irrelevant evidence), focus investigation and evidence collection priorities, and identify irrelevant/implausible theories.
  - Identify strengths and weaknesses of a potential violation, making the investigation, Violation Notice, or the NOPA simpler and more concise.
  - Help staff drafting the investigation report, decision report, or NOPA organize the required information.
  - Ensure the CAC does not proceed with an unsubstantiated action.
  - Help the County Advocate prepare the CAC's case for a hearing with a logical presentation that is easy for the Respondent and the Hearing Officer to follow.
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## Section 2.3

### How to Determine the Elements of the Violation

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**Introduction** Each law or regulation is a specific requirement composed of a unique combination of elements. Identify and examine the elements, in conjunction with the evidence collected, to determine if the person (whether an applicator, a grower, a business, etc.) failed to comply with the requirement(s).

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**Definitions:  
Elements of the  
Violation  
analysis**

**Elements** are the basic requirements of a law or regulation which must be addressed to prove the violation. It is a condition that must be present or an action that must have occurred. A series of elements make up a requirement.

**Evidence** is a fact of consequence that furnishes proof of the violation.

**Facts** are statements that can be proven or items that actually exist. For example, facts can be proven by credible documentation, testimony, photographs, etc.

**Opinion** is a statement that expresses a feeling, an attitude, a value judgment, or a belief. It is a statement that may be neither true nor false, or it may feel true for some but false for others.

**Inference** is a conclusion based upon reasoning. By engaging in reasoning, a conclusion becomes more or less likely to have occurred. Make inferences only with sufficient facts. Inferences should always be noted or labeled as such.

**Strategy** is a plan of action to solve a problem or address an issue.

*Note: Not all elements have inferences or require strategies.*

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**Difficult words** Some words or phrases in laws and regulations have a bearing on identifying the elements, but also can make it difficult to determine how many elements are present. For example:

- **“and”** – may indicate there are two or more parts to the element.
  - **“or”** – the element can be attained by more than one means.
  - **“notwithstanding”** – think of the word in terms of “despite the fact” or “although it is expected” in relation to the action the requirement is addressing. It is a clarifier that usually notes the goal or purpose of the law or regulation and does not indicate an element.
  - **“when”** – indicates the element has a condition.
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## How to Determine the Elements of the Violation, Continued

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**Difficult words,**  
(continued)

- “**except,**” “**other,**” or “**unless**” – indicate there is a condition or situation that is an exception to the law or regulation. Exceptions are explicitly stated in the codes. They usually designate concepts that are not elements.
  - “**immediately**” – without interval of time, straightaway; does not mean “very quickly,” or “within the hour.”
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**Common terms with specific legal meanings**

Some elements are everyday words or terms, but when they are used in laws and regulations they may have specific legal definitions which differ from those in English dictionaries.

For example, the word “Person” is defined in 3 CCR section 6000 as “any individual, partnership, association, corporation, business entity or organized group of persons whether incorporated or not.”

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**Locations of legal definitions**

Sometimes certain words or terms will be repeated frequently in laws or regulations. These terms have a specific meaning in the regulatory context. For interpreting California laws or regulations, definitions are frequently found in:

- FAC Division 6 (Pest Control Operations) sections 11401-11411
- FAC Division 7 (Agricultural Chemicals, etc.) various sections (e.g. 12752-12759, 12978.7(a), 12996.5, 13190)
- 3 CCR section 6000
- B&PC sections 8501-8512
- 16 CCR Division 19 (Structural Pest Control Board) various sections (e.g., 1902, 1918, 1970.1, 1970.3, 1970.5)

Use caution when reviewing similar terms found on federal pesticide labeling as federal and California regulatory definitions may differ.

If a word is not defined in the applicable code or in guidance from DPR, then the dictionary definition can be used. Merriam-Webster Collegiate Dictionary 11<sup>th</sup> edition is referenced in this Volume, however any standard published dictionary of American English can be used if the source reference is included.

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## How to Determine the Elements of the Violation, Continued

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**References to other sections**

Some laws and regulations have references to other sections. These referenced sections may have additional exceptions or restrictions to the subject law or regulation and need to be reviewed before doing the Elements of the Violation exercise.

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**How to analyze a code**

1. Select a law, regulation, or rule.
  2. Break it down into its relevant elements (components).
  3. Provide a piece of evidence to prove each element.
  4. Determine whether or not a violation occurred.
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**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 requirement, resulting in a variation on the number of elements or the construction of the element.

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**Elements analysis helps prove the violation and strengthens the case**

Perform an “Elements of the Violation” analysis, listing the elements and specific evidence for each element. This elementary analysis of the requirement (or violation) and its specific elements will help you to determine what evidence may be necessary.

The Hearing Officer needs at least one piece of evidence for each element to make a finding of fact that the Respondent violated or failed to comply with a legal requirement (the law or regulation at issue). After doing this analysis you may discover there may not be sufficient evidence to prove a potential violation in a hearing. This analytical exercise may result in a lower number of potential violations suitable for prosecution in a pesticide administrative civil penalty action.

The elements analysis exercise also helps the County Advocate to plan or outline their presentation to the Hearing Officer, to focus on the relevant matters, and to present evidence necessary to prove a violation by the preponderance of the evidence standard.

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## How to Determine the Elements of the Violation, Continued

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### Additional guidance

If it is difficult to determine the elements, it may be because the law or regulation has an “unwritten” element, clarifying statement, or a list within an element. Answering the following questions may help determine the elements:

- **Who** is required to perform or complete the requirement?
  - There may be a clarifying statement found within “who” or a definition that needs to be considered.
  - This may be an “unwritten” element.
- **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.
  - This may be an “unwritten” element.
- **What** is the general requirement?
  - Occasionally, this is not stated, and it may be unclear; look at the title of the regulation for guidance. Also look at nearby subheading titles, for context. Are there any inferences or exceptions?
- **What** must 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” may not be stated or apparent. Usually, the answer is something to the effect of, “for the purpose of protecting the public health, safety, and the environment.”
- **How** is the requirement to be completed?

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### Example of a clarifying statement

Clarifying statements are not necessarily elements that would tend to prove or disprove a fact. They tend to be introductions or clarifying language to assist the reader to understand the Legislature’s or Director’s intent for creating a requirement.

Example 3 CCR section 6614 (b):

*“Notwithstanding that substantial drift would be prevented, ...”*

This statement could be restated to say, “Although it is expected people will take precautions to prevent substantial drift, ...”

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## How to Determine the Elements of the Violation, Continued

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### Example of a broad element

Occasionally, elements are so broad they may seem subjective or may use terms that confer discretion in how the element is interpreted and applied. This is usually intentional on the part of the Legislature or Director because it is not always possible to anticipate every problem that could arise in the future. The language is intended to make the requirement robust enough so that it can apply to a variety of unanticipated situations.

For example: *The applicator shall evaluate ...*

Occasionally there will be a list following “evaluate” or additional discretionary language. Look for clues within the list (e.g., “and”, “or”). Occasionally, the list has no clues, but the list might not stand on its own – that is when it might be considered part of another element. Sometimes, there is not a list accompanying a broad element – in those cases, consider utilizing the testimony of an expert witness to offer an opinion, based upon their knowledge and experience.

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### Elemental wisdom

- Consider all of the elements of the violation.
  - Consider how an objective trier of fact might view the elements.
  - Is the evidence relevant to the elements of the violation? An investigation report with several matching binders of a perfectly tabbed attachments won’t convince a Hearing Officer to make findings and a decision in the County’s favor if all elements of the violation(s) are not addressed.
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### Elements of the Violation Worksheet

The Elements of the Violation Worksheet (Section 2.4) is intended to:

1. Provide an elementary analysis of a legal requirement; and,
2. Outline the elements necessary to prove the violation by a preponderance of the evidence.

The Worksheet is not intended to override common sense or provide specific legal advice. It may not provide examples of every type of evidence that may be available and may not ask every question that might be relevant to prove a violation. However, it is a useful tool to help organize thoughts and assist reviewers in evaluating a case before deciding to begin an enforcement action.

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## How to Determine the Elements of the Violation, Continued

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### Reviewing an analysis

Ask the following questions:

- What is the general requirement? What is it that must be done to comply with the law or regulation?
- Who is required to perform or complete the requirement?
- Who is the requirement designed to protect?
- How is the requirement to be completed? Is there a specific method?
- Are there other parts of the requirement that are very specific or detailed? (e.g., type of equipment, specifications, named documents, records, licenses, etc.)
- Where and/or when is the requirement to occur?
- Are there any exceptions, defenses, limitations, or clarifications that must be addressed to prove the element?
- Does an inference need to be supported as part of the elements/evidence analysis?  
*An inference is a conclusion based upon reasoning. The reasoning may make it more or less probable. Inferences should only be made when supported with sufficient facts. Inferences may not be necessary to prove the elements of the violation. Inferences should be clearly labeled as such.*
- Are there any words that must be addressed, such as “and,” “or” “except,” or “notwithstanding”?
- Does the interpretation of the requirement result in any ambiguities?
- Does the interpretation of the requirement make sense? Does it seem to be in harmony with other laws or regulations found near this particular law or regulation?
- Look up the name or title of the regulation section (or the chapter and article title) to ensure the code is considered within its proper context.
- Has the Citable Sections report been checked? This report lists sections that can be generally relied upon to identify sections that can be called a “violation” in pesticide administrative civil penalty actions. (See section 3.3 for more information).

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## How to Determine the Elements of the Violation, Continued

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**Exercises –  
Break down the  
Elements**

Review the following code sections and break them down using the element worksheet in Section 2.4.

**FAC section 31603** which defines “Vicious dog” as:

- (a) Any dog that, when unprovoked, in an aggressive manner, inflicts severe injury on or kills a human being.

**3 CCR section 6610** Backflow Prevention

Each service rig and piece of application equipment that handles pesticides and draws water from an outside source shall be equipped with an air-gap separation, reduced pressure principle backflow prevention device or double check valve assembly. Backflow protection must be acceptable to both the water purveyor and the local health department.

**B&PC section 8538(b)** Notice to Occupants

(b) In the case of Branch 1 applications, the notice prescribed by subdivision (a) shall be provided at least 48 hours prior to application unless fumigation follows inspection by less than 48 hours.

In the case of Branch 2 or Branch 3 registered company applications, the notice prescribed by subdivision (a) shall be provided no later than prior to application.

In either case, the notice shall be given to the owner, or owner’s agent, and tenant, if there is a tenant, in at least one of the following ways: ...

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## Section 2.4 Elements of the Violation Worksheet

<b>Code:</b> FAC B&PC LC 3 CCR 16 CCR		
<b>Section:</b>		
<b>Text:</b>		
<b>Elements</b>	<b>Evidence</b>	<b>Inference</b>
<i>What must be proved to establish each element? What are the simplest parts of the requirement?</i>	<i>A fact of consequence that furnishes proof of the violation. A fact is a statement that can be proven using evidence (e.g., documentation, testimony, photos).</i>	<i>A conclusion based on reasoning. The reasoning can make it more or less probable.</i>
<b>Strategy:</b> <i>plans of action to solve a problem or address an issue</i>		

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## Elements of the Violation Worksheet, Continued

### Example

This is an example analysis for a non-compliance discovered when a pesticide use report was flagged for an off-label use on pears. As part of the investigation, the county inspector spoke with the property operator and checked the pesticide storage area, obtaining photos of the product label attached to the container.

This evaluation is necessarily fact specific. The determination of elements, evidence and inferences will change depending on the situation.

### Elements of the Violation Worksheet

<b>Code:</b> FAC		
<b>Section:</b> 12973		
<b>Text:</b> The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.		
<b>Elements</b>	<b>Evidence</b>	<b>Inference</b>
Use (Definition 3 CCR 6000) of a substance	Submitted pesticide use report showing use Interviewed property operator and confirmed	Substance was applied
Substance is a Pesticide (Definition FAC 12753)	Label in storage had EPA Registration Number Active ingredient, directions for use	Product is a pesticide
Conflict with labeling (Definition from 3 CCR 6000)	Pears are not a site listed in the directions for use, nor can be interpreted to be included	Application conflicted with labeling instructions
Labeling registered in California	EPA number matches DPR's product label database	Label registered with DPR
Labeling delivered with the pesticide	Confirmed with operator that product still in storage Label still affixed to pesticide in storage Took photographs of label	Label was delivered with pesticide
Or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner	Product not a restricted material, no county permit conditions	No additional limitations or conditions apply
<b>Strategy:</b> No issues identified		

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**Section 2.1**  
**exercise**  
**answers**

- 3 CCR section 6130(b)(1): Mixture construction  
“A Class A violation is **one of the following:** ...”
- 3 CCR section 6195(a): Aggregate and mixture constructions  
“The determination will be made by **considering the following** factors **including, but not limited to:** ...”
- 3 CCR section 6412(a): Disjunctive construction  
“**Except** as provided in this section and Sections 6400, 6414 and 6416, restricted materials shall be possessed **or** used only under permit of the commissioner **or** under his direct supervision, **or** under permit of the director in any county in which there is no commissioner.”
- 3 CCR section 6450.1(c): Conjunctive construction  
“Fumigation methods using post-water treatments must be applied at a rate of 0.15-0.25 inches per hour **and** meet one of the following water requirements depending on soil texture:”
- FAC section 12973: Disjunctive construction  
“The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide **or** with any additional limitations applicable to the conditions of any permit issued by the director **or** commissioner.”
-