

Paul Burke

Comment attached from Burke, Qureshi and Elkins.

Comments on California Proposed Landfill Rules¹

4/17/26

We oppose the wiggle room now spread throughout the rule by changing “will” many times to “shall”.

Lawyers were trained that “shall” means a requirement, but courts have given it wiggle room, saying it’s ambiguous, and can mean “should,” “will,” or “may.” “Must” is not ambiguous. When CARB explains requirements, it says “must” 38 times, as it did 90 times in September.² So putting “shall” in the rule can only be seen as giving violators wiggle room and more issues to litigate. The landfill rules have said “will” and “must” since the rules were adopted in 2010, and CARB cites no examples when they were found ambiguous. Other agencies are shifting to “must”.

Regulations need to give sufficient notice of what is required and not required to operators, neighbors and voters. The wording must be clear, specific and unambiguous. After regulations are adopted, the staff Notice which says “This change... does not change the meaning”³ is not readily available to these audiences, and the rules stand on their own.

If you insist on swimming against the tide by changing to shall, at least do what California Mental Health rules do, and have a definition that “shall” means “must.” This might reduce litigation.

- Existing: 9 CCR § 514 “May” is permissive. “Shall” is mandatory. “Should” means desirable.⁴
- Needed: 17 CCR § 95475(a)(38) **“Shall” is mandatory.**

The California Government code sets standards:

- GOV 11342.580 “Plain English” means language that satisfies the standard of clarity provided in Section 11349
- GOV 11349(c) “Clarity” means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

California Prison Industry changed from shall to must in 2021, and gave a thorough explanation.⁵

- CALPIA is replacing the word “shall” to “must” in regulations to promote plain language and clarity as shall is not used in common language... shall is used more in legal circles while must is used more often by people generally and in speech...
- shall is one of the most heavily litigated words in statutes and regulations...
- Nearly every jurisdiction has held that the word “shall” is confusing because it can also be interpreted to mean “may, will or must”...
- Until recently, law schools taught attorneys that “shall” means “must.” That’s why many attorneys and executives think “shall” means “must”...
- The use of shall can take parties down the long and arduous path of litigation.
- Even though shall has been used for generations as a word to create a mandatory obligation, the word actually contains layers of ambiguity. Shall can be interpreted to mean must, may, will or even should...
- many opinions have interpreted shall to mean must, while others have interpreted it to mean may or will. Continuing to use the word shall, especially if it is not clearly defined, will result in unnecessary litigation...
- The obligation to inform the public, person impacted by and beneficiaries of regulations includes the obligation to communicate effectively...

Federal practice:

¹ https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2025/LMR/notice_15-day.pdf

² <https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2025/LMR/isor.pdf>

³ https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2025/LMR/notice_15-day.pdf

⁴ <https://www.law.cornell.edu/regulations/california/9-CCR-514>

⁵ <https://web.archive.org/web/20251102215217/www.calpia.ca.gov/wp-content/uploads/calpia/Regulations/8001/Explanatory%20Statement-sht-Shell-PIA.pdf> linked from <https://www.calpia.ca.gov/about/regulations/pending-changes/>

- The ambiguity of “shall” goes back at least to 1877: *West Wis, Ry, v. Foley*, 94 U.S. 100, 103 (1877)
 - “Shall” ought undoubtedly to be construed as meaning “must,” for the purpose of sustaining or enforcing an existing right; but it need not be for creating a new one.
- *Railroad Co. v. Hetch*, 95 U.S. 168, 170 (1877).
 - As against the government, the word “shall,” when used in statutes, is to be construed as “may” unless a contrary intention is manifest.
- *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) is often cited. Note 9 says:
 - Though “shall” generally means “must,” legal writers sometimes use, or misuse, “shall” to mean “should,” “will,” or even “may.” See D. Mellinkoff, *Mellinkoff’s Dictionary of American Legal Usage* 402-403 (1992) (“shall” and “may” are “frequently treated as synonyms” and their meaning depends on context); B. Garner, *Dictionary of Modern Legal Usage* 939 (2d ed. 1995) (“[C]ourts in virtually every English-speaking jurisdiction have held-by necessity-that *shall* means *may* in some contexts, and vice versa.”). For example, certain of the Federal Rules use the word “shall” to authorize, but not to require, judicial action. See, e. g., Fed. Rule Civ. Proc. 16(e) (“The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.”) (emphasis added); Fed. Rule Crim. Proc. 11(b) (A *nolo contendere* plea “*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.”) (emphasis added by Supreme Court).
- Responding to concerns like that, “*shall* has been removed from most sets of federal rules, including Civil, Criminal, Appellate, and Evidence rules.”⁶
 - For example, since 2007, rule 1, Note 3 of Federal Rules of Civil Procedure, has said the “*rules replace ‘shall’ with ‘must,’ ‘may,’ or ‘should,’ depending on which one the context and established interpretation make correct in each rule.*”⁷
- Federal guidance says, “Use ‘must’ not ‘shall’ to impose requirements. ‘Shall’ is ambiguous, and rarely occurs in everyday conversation. There is a strong preference for ‘must’ as the clearest way to express a requirement or obligation... Many agencies already use the word ‘must’ to convey obligations.”⁸
- The Federal Register *Document Drafting Handbook* says, “We use ‘must’ to indicate a requirement.”⁹

“Black’s Law Dictionary reports at least five distinct, and sometimes contradictory, meanings for the word [shall] including has a duty to, should, may, will, and is entitled to. And courts have interpreted shall to mean must, may, will, and is among others. In short, shall is complicated because it is vague.”¹⁰

Other comment letters cover procedures and deadlines.

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⁶ <https://www.lesusacanada.org/shall-we-remove-shall/>

⁷ https://www.law.cornell.edu/rules/frcp/rule_1

⁸ <https://digital.gov/guides/writing-understanding/familiar-terms>

⁹ <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>

¹⁰ <https://www.lesusacanada.org/shall-we-remove-shall/>