

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA            )  
  )  
                  v.                        ) Cr. No. 07-134 S  
  )  
SOUTHERN UNION                        )

**JURY INSTRUCTIONS**

**Introduction**

At this time, it is my duty to instruct you on the law applicable to this case. You must accept the rules of law that I give you and apply them to the facts in this case as you find those facts to be.

In applying the law that I am about to explain to you in these instructions, you must consider the instructions as a whole. You should not choose one part and disregard another. You must accept and apply the law as I give it to you in its entirety.

You must accept and apply the rules of law that I give to you whether you agree with them or not. It would be a violation of the oath you took as jurors to base a decision on any version of the law other than that contained in my instructions just as it would be a violation of that oath to return a decision upon anything but the evidence in this case. It is not up to you to decide what the law is or should be. Your duty is to apply the law as I explain it to you.

You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the jury room a written copy of my instructions. However, you must know that the law is as I will give it to you from the bench; the written copy is merely a guide to assist you.

### Corporate Criminal Liability

\_\_\_\_\_The Defendant Southern Union Company is a corporation. A corporation is a legal entity that may act only through its agents. The agents of a corporation are those officers, directors, employees, agents, and other persons authorized or employed by the corporation to act on its behalf. A corporation may be found guilty or not guilty of an offense charged just as an individual personal defendant may be.

To sustain its burden of proof on all charges in the Indictment against Southern Union, the government must prove the following things beyond a reasonable doubt as to each of the essential elements of the 3 offenses charged, which I will shortly describe to you:

First, the act or failure to act was committed by an officer, director, employee, or agent of Southern Union;

Second, in acting or failing to act, the officer, director, employee, or agent of Southern Union were within the course and scope of their employment. Or, in other words, their actions involved some performance or duty that was generally entrusted to them as a corporate agent or employee. It is not necessary for the government to prove that some particular act or failure to act by a Southern Union agent or employee was authorized or directed by Southern Union; however, each of the acts or failures

must be of the type that the individual was authorized by Southern Union to perform.

Third, in acting or failing to act, the officer, director, employee, or agent of Southern Union acted or failed to act on behalf of and, at least in part, to benefit Southern Union.

If you find that an agent or employee was acting within the scope of his authority or employment in accordance with those requirements which I've just laid out for you, you may find Southern Union criminally liable for that individual's actions or omissions even if they are illegal, contrary to company instruction, or against company policy. It is not a defense that a Southern Union agent or employee acted in an illegal manner or against Southern Union's policy. However, in making this decision, you are free to consider the existence of Southern Union company policy or instruction, and the diligence of the company's efforts to enforce them.

### Presumption of Innocence

As I have previously told you during the course of this trial, the Defendant Southern Union as a corporation is presumed to be innocent of the accusations against it. This presumption of innocence remains with the Defendant unless and until the Government presents evidence satisfying you beyond a reasonable doubt that the Defendant is guilty.

The presumption of innocence is sufficient to require a not guilty verdict unless you find that such evidence has been presented.

If you find that the Government has proved the Defendant guilty beyond a reasonable doubt on a particular count, the presumption of innocence disappears and is of no further avail to the Defendant on that count. However, until that time, the presumption remains with the Defendant Southern Union.

### Proof of All Elements

I will shortly explain the 3 offenses with which the Defendant is charged and the elements the Government must prove in order to establish that the Defendant is guilty of each offense.

In order for the Government to prove the Defendant guilty of an offense, it must convince you, beyond a reasonable doubt, that it has proved each and every element of that offense. Possibilities or even probabilities are not sufficient.

If the Government fails to prove any one or more elements of an offense beyond a reasonable doubt, you must find the Defendant not guilty of that particular offense.

On the other hand, if you are convinced, beyond a reasonable doubt, that all elements of an offense with which the Defendant has been charged have been proved, then you should find the Defendant guilty of that offense.

Bear in mind that the requirement that the Government prove every element of an offense with which a Defendant is charged does not mean that the Government is required to prove every statement contained in the indictment.

What it means is that the Government must prove facts sufficient to prove all of the elements of the offense with which the Defendant is charged as I have explained them.

### Reasonable Doubt

As I have said, the burden is upon the government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion, conjecture, or speculation. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions—one that a defendant is guilty as charged, the other that the defendant is not guilty - you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute

certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against the defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.



### **Indictment - Effect**

You will have the Indictment with you in the jury room to help you remember the precise nature of the charges against the Defendant.

I remind you, once again, that an Indictment is nothing more than an accusation. It is not evidence of guilt, nor of any of the facts alleged. It may not even be the basis of an inference of guilt. All that it does is to bring this matter before you for determination. Beyond that, it has no significance, whatsoever. It merely sets forth the elements of the offenses which the Government must prove beyond a reasonable doubt.

The Defendant Southern Union is not on trial for any act or conduct not specifically alleged in the Indictment.

### Summary of the Charges

The Indictment contains three counts directed at the Defendant. Count I charges that on or about September 19, 2002 to October 19, 2004, Defendant knowingly storing a hazardous waste, liquid mercury, without a permit at the Tidewater facility in Pawtucket, under the Resource Conservation and Recovery Act, or RCRA. Count II charges that on October 19, 2004 up to and including October 20, 2004, the Defendant knowingly and willfully failing to immediately provide notice to the state emergency planning commission and to the local emergency planning committee of a release of mercury from the Tidewater facility, under the Emergency Planning & Community Right to Know Act, or EPCRA. Count III charges that from on or about March 25, 2003 until on or about October 19, 2004, Defendant knowingly storing a hazardous waste, mercury containing gas regulators, without a permit at the Tidewater facility under RCRA.

A separate offense is charged against the Defendant Southern Union in each of the three Counts that you will consider. You are to consider and decide each count separately and on its own merits. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control or have any bearing whatsoever on your finding as to any other offense charged in the Indictment.

Additionally, I am instructing you that this is not a case about negligent security. The level of security and the conditions at Tidewater are not elements of any of the charges against Southern Union. Later in these instructions, I will instruct you as to the purposes for which you may consider the level of security and the conditions at Tidewater.

**All Counts - Person**

The term person as that term as used in all of the Counts in the Indictment is defined to include corporations, as well as individuals.

**Definition of "On or About"**

You will note that the Indictment charges that some of the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

### **Overview of RCRA - Counts I and III**

Counts I and III of the Indictment in this case charge the Defendant Southern Union Company with storage of hazardous waste without a hazardous waste permit, in violation of the Resource Conservation and Recovery Act or RCRA. I will be giving you specific instruction as to each count; but generally RCRA is a federal law that regulates the transportation, treatment, storage, and disposal of hazardous waste. Under its provisions, anyone who stores hazardous waste in Rhode Island may be required to have a permit issued by the State of Rhode Island. The State of Rhode Island is authorized by the United States EPA to issue hazardous waste permits. Hazardous waste permits specify the requirements for the safe transportation, treatment, storage, and disposal of hazardous waste at permitted facilities.

**Overview of Count I - Hazardous Waste Storage Without A Permit:  
Liquid Mercury**

Count I of the Indictment charges that, from on or about September 19, 2002, until on or about October 19, 2004, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, Southern Union knowingly stored and caused to be stored a hazardous waste, namely waste liquid mercury, without a permit in violation of Title 42, United States Code, Section 6928(d)(2)(A).

Section 6928(d)(2)(A) provides, in part, that:

"Any person who

(2) knowingly treats, stores or disposes of any hazardous waste...

(A) without a permit. . . ."

shall be guilty of an offense against the United States.

For you to find the Defendant guilty of Count I, you must be convinced that the government has proven each of the following things beyond a reasonable doubt, as to the Defendant:

First, that the Defendant Southern Union knowingly stored a waste material, identified in the indictment as liquid mercury;

Second, that the waste material stored was listed or identified as a hazardous waste by the United States Environmental Protection Agency ("EPA") pursuant to RCRA;

Third, that the Defendant Southern Union was required to have a hazardous waste storage permit and that it had not

obtained a permit from the State of Rhode Island authorizing storage at the Tidewater location;

Fourth, that the Defendant Southern Union knew that the waste material was waste and that the waste had the substantial potential to be harmful to others or to the environment.



### **First Element of Count I - "Knowingly"**

The government must prove the Defendant Southern Union acted knowingly. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the Defendant knew that its acts or omissions were unlawful. The government is not required to prove that the Defendant knew that the material it stored was identified as hazardous waste pursuant to RCRA, or that it knew that it needed a permit to store such waste. The government also does not need to prove that the Defendant knew it was violating RCRA.

However, what the government must prove is that the Defendant knew it was storing material, knew that the material was waste, and knew that the material had the substantial potential to be harmful to others or the environment. You may consider evidence of the Defendant's words, acts, or omissions, along with all other evidence in deciding whether the defendant acted knowingly.

Determining whether the Defendant acted knowingly requires you to evaluate the Defendant's state of mind. Ordinarily, there is no way that a Defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking. But a Defendant's state of mind can be proved indirectly from the surrounding circumstances.

This includes things like what the Defendant said, what the Defendant did, how the Defendant acted, and any other facts or circumstances in evidence that show what was in the Defendant's mind. You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results.

So, if the Defendant's actions or inaction convinces you that the Defendant knew that it was storing a hazardous waste, the government has met its burden on this element. However, if you find that the Defendant intended that the liquid mercury was stored for eventual recycling, then the Defendant did not knowingly store a waste. In that case, the government has not met its burden on this element and you must find Southern Union not guilty of Count I. This, of course, is all for you to decide.

**First Element of Count I - Corporate Collective Knowledge**

In considering whether the government has proven the element of knowledge, you may consider the collective knowledge of Southern Union as a corporation. This means that you can consider the knowledge of its officers, employees, directors, and agents. Southern Union's knowledge can be the knowledge of one of its agents or employees or the sum of the knowledge of some or all of its employees, operating within the scope of their employment. For example, if Southern Union Employee A knows one thing, B knows something else, and C knows a third thing, then you may conclude that Southern Union knows them all. It is irrelevant whether information obtained by one employee was or was not acquired by another employee at Southern Union, because the corporation is considered to have the collective knowledge of all these employees. Likewise, it is irrelevant whether employees administering one component of an operation or job or location or department at Southern Union knew of the specific activities of employees administering a different aspect of the same thing. All of that collective knowledge is imputed to the corporation Southern Union.

**First Element of Count I - Storage**

The term "stores" under the statute means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste.

### First Element of Count I - Solid Waste

The government is required to prove that the material in this case was a hazardous waste. However, before you may conclude that the liquid mercury in this case was a hazardous waste, the Government must first prove that the liquid mercury was a solid waste. So, the first issue for you to decide is whether the liquid mercury was a solid waste.

A solid waste is defined as garbage, refuse, or any other discarded material, including solid, liquid, or semi-solid material resulting from industrial or commercial operations.

A material is considered discarded if it is

- (1) abandoned; or
- (2) if it is a spent material that is reclaimed, or accumulated, stored or treated before reclamation.

A material is abandoned if it is 1) disposed of, or 2) accumulated, stored, or treated (but not recycled) before or in lieu of being disposed of.

A spent material is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

A material is not considered discarded if it is a commercial chemical product that is 1) reclaimed, or 2) accumulated, stored or treated before reclamation. I will instruct you as to the definition of commercial chemical product in a moment.

A material is reclaimed if it is processed to recover a usable product, or if it is regenerated.

You may consider all the evidence in the case to determine the Defendant's actual intent concerning whether a material was intended for discard as a waste, in other words, was abandoned, or whether Southern Union's material was intended for use as a commercial chemical product, in other words, intended for recycling.

**First Element of Count I - Commercial Chemical Product**

Commercial chemical products are chemicals manufactured or formulated for commercial or manufacturing use. Commercial chemical products are pure or technical grades of a chemical that is produced or marketed, including all formulations in which the chemical is the sole active ingredient.

Commercial chemical products that are unused are not necessarily solid wastes. A commercial chemical product becomes a solid waste only if and when it is discarded or intended to be discarded. The meaning of the term "discarded" here is as I instructed previously.

### **First Element of Count I - Recycling**

As I have explained, materials are waste if they are discarded by being abandoned, or if they are spent material (even if intended for eventual recycling). A material is not waste if it is a commercial chemical product that is intended for recycling. Therefore, I need to give you some information about the meaning of recycling.

A material is recycled if it is used, reused, or reclaimed. Commercial chemical products that are used at one time, but remain a commercial chemical product after use, and can be directly used or reused, are not considered to be "discarded" and therefore are not solid wastes. These materials retain their status as a product. This is true even if the material or item the commercial chemical product is derived from is a solid waste. For example, commercial grade lead is a commercial chemical product even if it is derived from a used battery that is a solid waste.

In addition, commercial chemical products are not considered to be discarded, and are therefore not solid wastes, when they are recycled by being reclaimed. The act of reclamation involves materials that are processed to recover a usable product or that are regenerated. An example of reclamation is the recovery of mercury from a thermometer.



Also, a commercial chemical product that is speculatively accumulated prior to being recycled by being reclaimed or reused is not a discarded material and is not a solid waste. There is no law or regulation that limits the length of time one may store or accumulate a commercial chemical product prior to recycling it, provided that the intent is to recycle the material. The RCRA regulations do not regulate the conditions of storage for a commercial chemical product. Conversely, a company may not avoid its obligation to obtain a hazardous waste permit by claiming that it expects or intends to eventually recycle, without a legitimate expectation of doing so. You may consider the length of time and conditions in determining what the Defendant's intent was regarding the liquid mercury.

Thus, an entity that intends to have its commercial chemical product reclaimed or reused at some point in the future is not managing a solid waste unless and until the point in time when it makes the decision to discard the material rather than to recycle the material. In this case, it is your job to determine whether Southern Union intended to have the liquid mercury reclaimed or reused at some point in time, or whether at some point in time the liquid mercury was discarded by being abandoned.

If you find that the liquid mercury stored at Tidewater was an unused commercial chemical product, or that it was a used

commercial chemical product that Southern Union intended to recycle, then you must find Southern Union not guilty of Count I. Conversely, if you find that the liquid mercury was discarded by Southern Union by being abandoned, then the fact that the mercury may be of commercial grade is of no avail to Southern Union on Count I because it is determined to be waste.

## **Second Element of Count I - Hazardous Waste**

If you determine that the liquid mercury is a solid waste, the next question is whether it was hazardous.

A solid waste may be found to be a hazardous waste if it is listed as such in the EPA Regulations or exhibits one or more of several possible hazardous characteristics, including the characteristic of toxicity as defined in the following instruction. However, a commercial chemical product, as defined in these instructions, that is recycled or intended for recycling is not a hazardous waste.

## Second Element of Count I - Characteristics of Hazardous Waste

As I just described to you, the term hazardous waste can mean a solid waste that exhibits one of several possible hazardous characteristics, including the characteristic of toxicity. Having instructed you with respect to the definition of solid waste, I will now instruct you on the specific characteristics that solid waste must have for it to be hazardous waste.

The government is required to prove beyond a reasonable doubt is that Southern Union stored "hazardous waste" as defined under RCRA at Tidewater. The term "hazardous waste" as used in the statute means a solid waste that has been identified or listed as hazardous by the United States Environmental Protection Agency and the State of Rhode Island. A solid waste is a hazardous waste if it is either a "characteristic hazardous waste" or a "listed hazardous waste" under EPA and Rhode Island regulations.

Characteristic hazardous wastes are wastes that are hazardous because they exhibit one or more of the hazardous characteristics identified in the regulations, such as toxicity. A solid waste is a hazardous waste exhibiting the characteristic of toxicity if a liquid extract, using a test method set forth in the regulations called the "Toxicity Characteristic Leaching Procedure" (or "TCLP"), contains mercury at a concentration of

equal to, or in excess of 0.2 milligrams per liter.

The TCLP test is one way the government may show that mercury described in the Indictment exhibited the characteristic of toxicity, rendering it a hazardous waste under RCRA. You may consider all of the evidence in this case in determining whether the liquid mercury and mercury-containing regulators were toxic, or otherwise characteristic hazardous wastes.

Also, some materials are specifically named or listed as hazardous wastes in the EPA and State regulations. Mercury is a listed hazardous waste when it is discarded or intended to be discarded. I instructed you on the meaning of discarded when I gave you the definition of "solid waste."

### **Third Element Count I - Permit Requirement**

The third element of Count I requires the government to prove beyond a reasonable doubt that the liquid mercury was a hazardous waste stored without a storage permit authorized under RCRA, that the law required a permit, and that the Defendant did not have the required permit.

As mentioned earlier, the term stores means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste. The Government has charged the Defendant with storage of hazardous waste, not disposal.

The government need not show that the Defendant Southern Union knew that the law required a permit.

**Fourth Element of Count I - Substantial Potential for Harm**

The fourth element of Count I requires the government to prove beyond a reasonable doubt that the Defendant Southern Union knew the liquid mercury was hazardous and had a substantial potential to be harmful to others or the environment. The government is not required to prove that Southern Union knew that the material would be classified as "hazardous waste" if tested or that it was specifically listed or was a "hazardous waste" in the regulations.

**Overview of Count III - Hazardous Waste Storage Without A Permit:  
Mercury Containing Regulators**

Count III of the Indictment charges that, from on or about March 25, 2002, until on or about October 19, 2004, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, Southern Union knowingly stored and caused to be stored a hazardous waste, namely mercury containing regulators, without a permit in violation of Title 42, United States Code, Section 6928(d) (2) (A) .

The basic elements of Count III are as I instructed you with respect to the other RCRA count, Count I. That is, the government must prove the following beyond a reasonable doubt:

First, that the Defendant Southern Union knowingly stored a solid waste, alleged in the Indictment to be mercury containing gas regulators;

Second, that the mercury containing gas regulators were listed or identified as a hazardous waste by the United States Environmental Protection Agency ("EPA") pursuant to RCRA;

Third, that Southern Union was required to have a hazardous waste storage permit and that it had not obtained a permit from the State of Rhode Island authorizing storage of the mercury containing gas regulators at the Tidewater location;



Fourth, that Southern Union knew that the mercury containing gas regulators were waste and that they had the substantial potential to be harmful to others or to the environment.

My instructions regarding the first two elements of Count III -- knowledge and storage -- are exactly as I stated with respect to Count I under the same statute, and you should follow the same steps that are outlined under Count I in deciding whether the government has proved these elements. However, the alleged waste material in Count III, the mercury containing gas regulators, are a different type of material than liquid mercury and are subject to a separate regulatory program. This separate category is called "Universal Waste," and this separate scheme affects the third and fourth elements: that is, the requirement to have a permit and the requirement that Southern Union know that the mercury containing regulators were waste. Therefore, I will now provide you with some instructions about universal waste that apply only to Count III of the Indictment.

**RCRA Count III - Definition of Universal Waste**

Universal Waste includes "mercury containing devices." A mercury containing device is any electrical product or component, excluding batteries, lamps, and thermostats, which contain elemental mercury that is necessary for its operation and is housed within an outer metal, glass, or plastic casing.

I am instructing you that the mercury containing regulators at the Tidewater facility are Universal Waste. You must apply the particular regulations for Universal Waste to your analysis of whether Southern Union illegally stored the mercury containing regulators without a permit.

I will instruct you on those particular regulations now.

**RCRA Count III - Universal Waste "Handlers"**

Under the separate regulations applicable to Universal Waste, a "handler" of Universal Waste does not need a permit under RCRA for storage of such Universal Waste. In this case, you must decide based on the evidence whether the Defendant Southern Union qualifies as a "handler."

A Universal Waste "handler" is defined as a person who either:

- (1) generates the Universal Waste, or;
- (2) is an owner or operator at a facility that receives the Universal Waste, accumulates the Universal Waste, and sends the Universal Waste to another Universal Waste handler, to a destination facility, or to a foreign destination.

A generator is any person, by site, whose act or process produces hazardous waste, or whose act first causes a hazardous waste to become subject to regulation.

As I have stated, if you conclude that Southern Union was a handler of Universal Waste when it accumulated the mercury containing gas regulators, then it did not need a permit and you must find the Defendant not guilty as to Count III. The requirement that in order to be a handler one must send the mercury containing gas regulators to another handler or destination facility includes the future intent to send them to another handler or destination facility. I remind you that this

question requires you to assess Southern Union's state of mind, and you will recall that I gave you guidance on how you may assess the Defendant's state of mind earlier in these instructions. And finally, I remind you of the government's burden to prove that Southern Union was not a handler of the mercury containing gas regulators beyond a reasonable doubt.

**Fourth Element of Count III - Substantial Potential for Harm**

The fourth element of Count III, as like the fourth element of Count I, requires the government to prove beyond a reasonable doubt that the Defendant Southern Union knew the mercury containing gas regulators had a substantial potential to be harmful to others or the environment. The government is not required to prove that Southern Union knew that the material would be classified as "hazardous waste" if tested or that it was specifically listed or was a "hazardous waste" in the regulations.

**RCRA Counts I and III - Harm Not a Requirement**

\_\_\_\_\_The government is not required to prove that the storage or disposal of mercury in this case caused any damage or harm to the environment or any person in order to establish the offense charged.

**Count II**  
**(Emergency Planning and Community Right to Know Act - EPCRA)**

Now I will move on away from the two RCRA counts and on to Count II. Defendant is accused of violating EPCRA, or the Emergency Planning and Community Right to Know Act, title 42 of the United States Code Section 11045(b)(4). This statute, known as EPCRA, is a law that requires notification to certain authorities when there has been a triggering release of certain hazardous materials. For you to find the Defendant guilty of a crime under Count II, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that on or about October 19, 2004, at Tidewater there was a release into the environment of liquid mercury of greater than one pound;

Second, that the release was from a facility at which the liquid mercury was produced, used or stored;

Third, that Southern Union owned or operated the facility at which the release occurred;

Fourth, that after the release Southern Union knowingly and willfully failed to immediately notify both the state emergency planning commission and the local emergency planning committee.

I will now explain with more detail each of these elements to you.

### First Element of EPCRA Count II

The first element of Count II requires the government to prove beyond a reasonable doubt that there was a release of liquid mercury of greater than one pound. Under EPCRA, "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or toxic chemical. Under EPCRA, "environment" is defined as the water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.

The released substance (liquid mercury) under EPCRA does not need to be a "hazardous waste," as I have previously defined that term for you for the other two RCRA counts charged in this case. The reportable quantity designated under the statute is at least one pound or greater.



**Second Element of EPCRA Count II**

The second element of Count II requires the government to prove beyond a reasonable doubt that the release into the environment was from a facility at which the hazardous substance was produced, used or stored. Under EPCRA, "facility" means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites which are owned or operated by the same person.

### Third Element of EPCRA Count II

The third element of Count II requires the government to prove beyond a reasonable doubt that Southern Union was a person within the meaning of the statute and owned or operated the facility at which the release occurred. The term "person" as defined in the statute includes both individuals and corporations. An owner or operator means any person, including a corporation, who owns, leases, operates, controls, or supervises a facility.

The Indictment charges that the Defendant Southern Union failed to notify officials of a release from the Tidewater facility in Pawtucket, Rhode Island, from October 19, 2004 up to and including October 20, 2004. The Indictment does not allege a violation of EPCRA for any other release at any other location.

**Fourth Element of EPCRA Count II**

\_\_\_\_\_The next element of Count II requires the government to prove beyond a reasonable doubt that after the release, Southern Union knowingly and willfully failed to immediately notify both the state emergency planning commission and the local emergency planning committee.

The parties have stipulated that the state emergency planning commission for Rhode Island is the Rhode Island Fire Marshall, and that the Defendant Southern Union did not notify the Rhode Island Fire Marshall's office that there had been a release of mercury at the Tidewater facility.

A stipulation simply means that the government and the Defendant accept the truth of a particular proposition or fact. Since there is no disagreement as to that question, there is no need for evidence apart from the stipulation itself. You must accept the stipulation as fact, to be given whatever weight you choose. In addition, I instruct you that for the purposes of this case, the local emergency planning committee for Pawtucket, Rhode Island is the Pawtucket Fire Department.

There is no obligation under EPCRA, the only statute charged in Count II, for the Defendant to notify the local police department or any other police department, or to call 911 about the break-in at the Tidewater facility. By the same token, notification to the Rhode Island Dept. Of Environmental

Management ("DEM") or the National Response Center ("NRC") does not satisfy the EPCRA requirement for immediate notification. However, having said this, lack of notification to certain agencies and/or notification to other agencies may be considered by you in assessing the question of whether the Defendant's conduct in this case was a knowing and willful violation of its obligation under EPCRA.

**Knowingly - EPCRA Count II**

The next element of the EPCRA charge in Count II requires the government to prove that Southern Union acted knowingly. I have already instructed you about the meaning of "knowingly," and it has the same meaning for the EPCRA count as it does for the two RCRA counts I have already discussed. Namely, under EPCRA, to act knowingly means that Southern Union knew of a release into the environment of a reportable quantity of a hazardous substance. All of my prior instructions as to what you may consider to find knowledge apply to Count II as well.

In considering whether the government has proven the element of knowledge under Count II, as I have stated to you before you may consider the collective knowledge of Southern Union as a corporation.

## Willfully - EPCRA Count II

The final element of the EPCRA charge in Count II also requires the government to prove the Defendant Southern Union acted willfully in failing to make an immediate notification. Willfulness is different from knowledge, so I will explain that term to you in greater detail.

A "willful" act or failure to act means to act or fail to act voluntarily and intentionally, with the specific intent and bad purpose to disobey or disregard the law. A person who makes a mistake or performs an act (or fails to perform an act) by accident or negligence or through recklessness does not act willfully. Willfulness requires a general understanding that an act or failure to act would be unlawful. The government is not required to show that Southern Union knew the EPCRA statute made some act or failure to act illegal in this case. However, while the government is not required to prove specific knowledge of the EPCRA statute, you may consider evidence of such knowledge by Southern Union agents or employees in making your decision on this element of Count II. It is up to you to decide whether Southern Union acted or failed to act to disobey or disregard some law in general.

In considering whether the government has proven the element of willfulness under Count II, as I have stated to you before with respect to knowledge, you may consider the willfulness of

Southern Union as a corporation. Southern Union is deemed to have acted willfully if one or more of its agents or employees within the scope of his or her employment acted willfully. Keep in mind that willfulness rarely can be proven by direct evidence since it is a specific state of mind; it is usually established by drawing reasonable inferences from the available facts as you determine them to be. The law permits you to draw these reasonable inferences, but does not require it. On the other hand, you must recognize that willfulness is the specific intent and/or bad purpose to disobey the law, and that this required element of the offense charged in Count II must be proven beyond a reasonable doubt.

## Deliberate Ignorance - EPCRA Count II

As I have stated, to find Southern Union guilty of Count II, you must first consider whether it knew of a release into the environment of a reportable quantity of a hazardous substance from the Tidewater facility, and knowingly and willfully failed to immediately notify the state and local emergency planning agencies. In considering this issue, you are permitted, but not required to consider the question of whether Southern Union deliberately ignored or made itself "willfully blind" to facts that would have triggered the obligation to immediately notify, that is, that a release of a reportable quantity of a hazardous substance occurred from its Tidewater facility. The principle here is that no one can avoid a legal obligation by deliberately ignoring the obvious. If you find that Southern Union deliberately closed its eyes to what should have been clearly obvious to it, then you may conclude that Southern Union knew such a release occurred.

Now having said this, I emphasize to you that carelessness, mistake, negligence, or foolishness by Southern Union is not the same as knowledge and is not the same as deliberate ignorance. As I just stated previously, this is a criminal case and as such the law prohibits you from convicting Southern Union for carelessly or mistakenly or negligently or foolishly failing to notify the appropriate local officials under EPCRA. It is your



job to determine Southern Union's knowledge and intent and, indeed, as I have told you repeatedly, the government must prove all elements of the alleged crime beyond a reasonable doubt; and it would be a violation of your oath as jurors to hold the government to any lesser standard.

**Immediately - EPCRA Count II**

The final element of the EPCRA charge in Count II requires the government to prove that after the release, Southern Union failed to immediately provide notice to the two entities I have mentioned, the Rhode Island Fire Marshall's office and the Pawtucket Fire Department. The term "immediately" means prompt action without interval or lapse of time, and without delay. It is your job to determine what "immediately" means by reference to the circumstances and events in this case.

**Affirmative Defense - Exemption under EPCRA Count II**

Southern Union has asserted the affirmative defense that no notification was required under EPCRA because 1) the release into the environment at Tidewater resulted in exposure to persons solely within the Tidewater site, or 2) that on October 19, 2004 or October 20, 2004, Southern Union had no knowledge that there had been a mercury release into the environment at Tidewater which resulted in exposure to persons beyond those within the Tidewater facility. To assert an affirmative defense and qualify for this exemption under the EPCRA statute, Southern Union must provide some evidence that the defense applies to it. The government has the burden of proof beyond a reasonable doubt with respect to all of the elements I have instructed you about, but Southern Union must prove to you that the facts of this case come within the EPCRA exemption that I will now describe.

If you find 1) that the release into the environment at Tidewater resulted in exposure to persons solely within the Tidewater site, or 2) that Southern Union did not know that the release of mercury resulted in exposure to persons not within the Tidewater site, then the company was not required to make an immediate report under EPCRA. It is a complete defense to the charges in Count II of the Indictment that Southern Union was not required to make an immediate report.

I remind you that the burden of proof remains at all times with the government to show knowledge of a reportable release of a hazardous substance. Thus, before you convict on Count II, if you find that Southern Union has produced some evidence as to this affirmative defense, you must find beyond a reasonable doubt that the government has satisfied its burden of proving not only that Southern Union knowingly and willfully failed to make an immediate notification, but also that Southern Union was not exempt from the notification requirement as explained in this instruction.

Therefore, if you have a reasonable doubt about whether the release into the environment at Tidewater resulted in exposure to persons not within the Tidewater site, or reasonable doubt about whether on October 19, 2004 up through October 20, 2004 Southern Union knew of a release of a reportable quantity of mercury that resulted in exposure to persons not within the Tidewater site, then you must find Southern Union not guilty of Count II.

### Method of Assessing Evidence

Now I have explained to you what it is that the Government must prove as to each count, and I have already told you the standard of proof to be applied. The next question is how do you determine whether the Government has proved these things beyond a reasonable doubt?

Obviously, you must make your determination solely from the evidence properly before you and from all reasonable and legitimate inferences to be drawn from that evidence.

The evidence that is properly before you consists of:

1. The testimony of the witnesses;
2. The exhibits that I have admitted into evidence; and
3. Any stipulations among the attorneys in which they agree as to what the facts are.

From that evidence, you may draw whatever conclusions are reasonable under the circumstances.

The evidence that is properly before you does not include:

1. Comments or statements by the attorneys;
2. Answers given by witnesses which I ordered stricken and instructed you to disregard;
3. Documents, photographs or other items which may have been referred to but have not been admitted into evidence. Since they are not proper evidence, you should not speculate or guess as to what they might say

or show and you may not consider them except to the extent that, and for the purpose that, they may have been read or shown to you during the course of the trial; or

4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.

### Witnesses - Credibility - General Factors

As to the testimony of witnesses, your principal task is to determine the credibility of the witnesses and the weight you will give to the testimony of each. Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness if you find the witness not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

In making that determination, there are a number of factors that you may consider:

1. The opportunity or lack of opportunity the witness had to acquire knowledge of the facts about which the witnesses testified. In other words, was the witness in a position to have accurately perceived the facts that the witness related to you.
2. The reliability or unreliability of the witness's memory. In other words, did the witness have a clear recollection of what happened or was the witness's memory uncertain or unclear.

3. The witness's appearance on the stand. Did the witness appear to be a person who was telling the complete and unadulterated truth, or did it appear that the witness was slanting things one way or another either consciously or unconsciously.
4. The probability or improbability of the witness's testimony. Did what the witness had to say sound reasonable or plausible or did it appear to be highly unlikely or impossible.
5. Whether the witness had anything to gain or lose from the outcome of this case. In other words, was the witness totally impartial or did the witness have some stake in the outcome or some reason to favor one side or the other.



### **Witnesses - Credibility - Government Agents**

The fact that a witness may be employed by a governmental or law enforcement agency does not, by itself, mean that you should give that witness's testimony any greater or any lesser weight simply because of that fact. You should assess the credibility and testimony of such a witness by applying the same factors as you would with respect to any other witness.

### Testimony Requiring Specialized Knowledge or Skill

During this trial, you have heard testimony from witnesses who claim to have specialized knowledge in a technical field. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts.

Since they do have specialized knowledge, the opinions of these witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to testimony requiring specialized knowledge or skill, you should apply the same tests of credibility that apply to the testimony of any other witness. That is to say, you should consider such things as the witness':

- opportunity to have observed the facts about which he testified; and
- apparent candor or lack of candor.

In addition, you should take into account the witness':

- qualifications, especially in comparison to the qualifications of witnesses who may have expressed contrary opinions; and

-- the accuracy of the facts upon which the witness's opinions were based.

In short, you should carefully consider the opinions of these witnesses, but they are not necessarily conclusive.

### **Witnesses - Number - Weight of Testimony**

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses's testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses, nor does it matter who called the witness or

whether the testimony was given during direct or cross examination. Once again, it is the credibility or quality of the testimony that determines where the weight of the evidence lies.

## Exhibits

You have seen quite a few exhibits in this case. In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits which you will have with you in the jury room. Examine them and consider them carefully.

However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it will depend upon your evaluation of that exhibit in light of all the facts and circumstances of the case.

### Circumstantial Evidence

As I mentioned previously, you may consider only the evidence that is properly before you. However, that does not mean that, in determining the facts, you are limited to the statements of the witnesses or the contents of the exhibits.

In reaching your conclusions, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

Such evidence is sometimes called circumstantial evidence.

To put it another way, a fact may be proved either by direct evidence or by circumstantial evidence. Direct evidence includes such things as the testimony of an eyewitness who personally observed the fact in question or a photograph or document showing the actual thing described.

Circumstantial evidence consists of proof of a series of facts or circumstances from which the existence or nonexistence of another fact may be reasonably inferred.

The law makes no distinction between the weight to be given to direct and circumstantial evidence. However, it does require that any fact required to convict a Defendant be proved beyond a reasonable doubt.

Example of circumstantial evidence: rain on the driveway/grass.



### **Conduct of Court - General**

As I have said before, it is up to you to determine the facts in this case. You should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any such opinion and you should not be concerned about what my opinions might be regarding the facts. That is a matter for you to decide.

### Objections by Counsel

During this trial there have been occasions when the attorneys have objected to a question that was asked of a witness. You should not penalize an attorney, or more importantly, his or her client, for objecting. It is the attorney's right and duty to protect a client's interests by objecting to what the attorney may believe is evidence that does not satisfy the requirements of the rules of evidence.

If I sustained the objection, it is important that you not speculate about what the answer to the objected-to question might have been. By sustaining the objection, the court has determined that the evidence should not be considered by you.

### **The Government as a Party**

The mere fact that this case is brought in the name of the United States of America does not entitle the prosecution to any greater consideration than that accorded to the Defendant Southern Union. By the same token, it does not mean that the prosecution is entitled to any less consideration. All parties, whether Government, corporations or individuals, stand as equals at the bar of justice.

### **Bias and Prejudice**

Neither bias in favor of any person or cause, prejudice against any person or cause, nor sympathy of any kind should be permitted to influence you in the course of your deliberations.

All that any party here is entitled to, or, for that matter expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you and your application of the law as I have explained it to you.

### **Verdict - Unanimity Required**

In order to return a verdict in this case, all twelve of you must agree as to what that verdict will be. You cannot return a verdict of either guilty or not guilty with respect to any charge against the Defendant unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

### **Selection of Foreperson and Duty to Deliberate**

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

### **Communications with the Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

### **Jury Recollection Controls - Rehearing Testimony**

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. This has been a long trial, but your notes and collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.



### **Return of Verdict**

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

### **Copy of Instructions**

I have instructed you on the law that governs your deliberations. As I mentioned at the beginning, I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; the written copy is merely a guide to assist you.