

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA** :  
  
          **v.** :       **CRIMINAL NO. CCB-97-0086**  
  
**LEON "MAC" MCKEMY** :  
          **and** :  
**M & M FUEL COMPANY, INC.** :

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**JOINT REQUESTED INSTRUCTIONS TO THE JURY**

The United States of America, by its undersigned attorneys, and the defendants, Leon "Mac" McKemy and M & M Fuel Company, hereby requests the Court to instruct the jury in the above-captioned case in accordance with the proposed instructions attached hereto, in addition to, but not in limitation of, its usual instructions in a criminal case. The parties further request that, in accordance with Rule 30 of the Federal Rules of Criminal Procedure, the Court inform counsel of its proposed action upon the requested instructions prior to counsel's argument to the jury.

The Court has requested that the parties submit joint jury instructions. The following submission is divided into sections. The first section contains government and defense jury instructions that are not objected to by either party. The remaining two sections contain proposed jury instructions objected to by the

other party. Also attached is Mr. Seekford's letter explaining the bases for his objections.

Respectfully submitted,

Lynne A. Battaglia  
United States Attorney

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W. Warren Hamel  
Assistant U. S. Attorney

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William Seekford, Esq.  
Attorney for Defendants

PROPOSED INSTRUCTIONS OF GOVERNMENT AND DEFENSE

TO WHICH THERE IS NO OBJECTION

**GOVERNMENT'S REQUESTED INSTRUCTIONS NO. 1-20**

The government requests the following standard instructions from Sand, Siffert, Laughlin & Reiss, Modern Federal Jury

Instructions:

1. 2-6 Corporate Parties
2. 2-7 Corporate Responsibility
3. 2-11 Improper Considerations: Race, Religion, National Origin, Sex or Age
4. 2-12 Sympathy
5. 3-1 Indictment is not evidence
6. 3-8 Multiple counts -- Multiple defendants
7. 3-12 Variance -- Dates
8. 4-1 Presumption of Innocence and Burden of Proof
9. 5-2 Direct and Circumstantial Evidence
10. 5-4 Testimony, Exhibits, etc.
11. 5-5 Judicial Notice
12. 5-6 Stipulation of facts
13. 5-12 Charts and Summaries
14. 5-21 Defendant Does Not Testify (if appropriate)
15. 6-1 Inference Defined
16. 6-20 Guilty knowledge from failure to keep records
17. 7-1 Witness Credibility
18. 7-4 Defendant's Interests if Defendant Testifies

19. 7-21 Experts

20. 9-1 Punishment

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 21**

**INTRODUCTION - CLEAN WATER ACT COUNTS**

Counts One, Two and Three of the Indictment charge the defendants with violations of the Clean Water Act, namely, the unpermitted discharges of oil, a pollutant, into waters of the United States. The Clean Water Act was passed to restore and maintain the chemical, physical and biological well-being of the Nation's waters.

33 U.S.C. §1251

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 22**

**ELEMENTS OF VIOLATION OF CWA - NEGLIGENT DISCHARGE OF A POLLUTANT**

Count One of the Indictment charges the defendants with violating the Federal Water Pollution Control Act, Title 33, United States Code, Section 1319(c)(1)(A), commonly known as the Clean Water Act. Count One of the Indictment reads as follows:

[Read Count One of the Indictment]

Section 1319(c)(1)(A) provides, in relevant part, that "[a]ny person who negligently violates section 1311 . . . of this title" is guilty of an offense against the United States.

Section 1311(a) of the statute provides that "[e]xcept as in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person [is] unlawful."

Section 1342 of the statute establishes a permit system which requires that any person who discharges pollutants from a point source to a water of the United States must have a permit. Anyone who negligently discharges pollutants into waters of the United States without a permit is guilty of an offense against the United States.

In order to prove the defendant guilty of Count One of the Indictment, the government must prove, beyond a reasonable doubt, each of the following elements:

1. That on or about the dates set forth in the Indictment, the defendants negligently discharged or caused to be discharged a pollutant
2. from a point source
3. into waters of the United States
4. without a permit.

33 U.S.C. §§ 1311(a), 1319(c) (1) (A)



GOVERNMENT'S REQUESTED INSTRUCTION NO. 23

CWA - DEFINITION OF "DISCHARGE"

The term "discharge" as used in Section 1321(b)(3) "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping."

33 U.S.C. § 1321(a)(2)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 24**

**CWA - DEFINITION OF "DISCHARGE OF A POLLUTANT"**

The term "discharge of a pollutant" is defined in the Clean Water Act as "any addition of any pollutant to navigable waters [of the United States] from any point source."

33 U.S.C. § 1362(12)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 25**

**CWA - DEFINITION OF "POLLUTANT"**

The term "pollutant" is defined in the Clean Water Act as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into waters of the United States. The term "pollutant" includes oil and waste oil.

The government is not required to prove that a specific amount of pollutant has been discharged into the waters of the United States or that the alleged discharge of pollutants caused any damage or harm to the environment, in order to establish the offense charged under the Clean Water Act. This statute prohibits the discharge of any pollutants except in compliance with a permit.

33 U.S.C. § 1362(6)

United States v. Hamel, 551 F.2d 107 (6th Cir. 1977)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 28**

**CWA - DEFINITION OF "NAVIGABLE WATERS"**

**AND "WATERS OF THE UNITED STATES"**

The term "navigable waters" is defined to mean the waters of the United States, including territorial waters.

The term "waters of the United States" includes all waters which have, at any point, been used in interstate or foreign commerce, as well as interstate waters and all intrastate rivers and streams which are or could be used by interstate travelers for recreational or other purposes, as well as tributaries to interstate and all such intrastate waters.

33 U.S.C. § 1362(7)

40 C.F.R. § 122.2

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 29**

**CWA - DEFINITION OF "PERSON"**

The term "person" under the Clean Water Act specifically includes corporations and individual corporate officers. You are instructed that Leon "Mac" McKemy and M & M Fuel Company, Inc. are "persons" for purposes of the Clean Water Act.

33 U.S.C. § 1319(c)(5)

GOVERNMENT'S REQUESTED INSTRUCTION NO. 30

ELEMENTS OF VIOLATION OF CWA - NEGLIGENT DISCHARGE OF OIL

Count Two of the Indictment charges the defendants with negligently discharging a harmful amount of oil into the waters of the United States in violation of Sections 1319(c)(1)(A) and 1321(b)(3) of the Clean Water Act. Count Two reads as follows:

[Read Count Two of the Indictment]

Section 1321(b)(3) provides that "[t]he discharge of oil . . . into or upon the navigable waters of the United States . . . in such quantities as may be harmful . . . is prohibited." Anyone who negligently discharges oil into waters of the United States in a harmful quantity is guilty of an offense against the United States.

In order to prove the defendant guilty of Count Two of the Indictment, the government must prove, beyond a reasonable doubt,

each of the following elements:

1. That on or about the dates set forth in the Indictment,  
the defendants negligently
2. discharged oil

3. into waters of the United States

4. in a harmful quantity

33 U.S.C. §§ 1319(c)(2)(A), 1321(b)(3)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 31**

**CWA - DEFINITION OF "OIL"**

The term "oil" in Section 1321(b)(3) means "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil."



33 U.S.C. § 1321(a) (1)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 32**

**CWA - DEFINITION OF "HARMFUL QUANTITY"**

The term "harmful quantity" as used in Section 1321(b) (3) is that amount of water that "cause[s] a film or sheen upon . . . the surface of the water."

The term "sheen" means an iridescent appearance on the surface water.

40 C.F.R. §§ 110.1, 110.3

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 34**

**DEFINITION OF "ONSHORE FACILITY"**

An "onshore facility" is any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land with the United States other than submerged land.

33 U.S.C. § 1321(a)(9)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 36**

**CONSCIOUS AVOIDANCE: DELIBERATELY CLOSING EYES**

In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth then this element may be satisfied. However, guilty knowledge of the oil spill may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken.

It is entirely up to you whether you find that the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

Sand, et al., Modern Federal Jury Instructions, Ins. No. 3A-2  
(modified)

GOVERNMENT'S REQUESTED INSTRUCTION NO. 37

CWA AND CAA - HARM NOT AN ELEMENT

The Government is not required to prove that the unpermitted discharges of oil and pollutants to waters of the United States caused any damage or harm in order to establish the offenses charged.

United States v. Walsh, 8 F.3d 659 (9th Cir. 1993), cert. denied, 114 S.Ct. 1830 (1994);  
Minnehaha Creek Watershed District v. Hoffman, 597 F.2d. 617, 627 (8th Cir. 1979);  
United States v Ashland Oil, 504 F.2d 1317, 1329 (6th Cir. 1974).

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 38**

**CORPORATE LIABILITY**

One defendant, M & M Fuel Company, Inc., is a corporation. A corporation can act only through its agents, that is, its employees, officers, or other authorized representatives. Therefore, it is responsible for the acts of all its agents performed in the course of their employment.

You may find the corporation guilty only if you find that the government has proved beyond a reasonable doubt that the crime was committed by an agent of the corporation, and in addition one of the following elements:

1. That the agent or agents who committed the crime were authorized by the corporation to do the acts charged,  
or
2. That the agent or agents at the time were performing duties for the corporation even though the acts charged may not have been specifically authorized by the corporation.

New York Central and Hudson River Railroad v. United States, 212 U.S. 481 (1909); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 39**

**COLLECTIVE KNOWLEDGE**

In determining whether the corporate defendant knowingly committed the acts alleged in the Indictment, you must look at M & M Fuel Company, Inc., as a whole. As such, its knowledge is the sum of the knowledge of all of the employees and officers of the company. That is, the company's knowledge is the totality of what all of the employees and officers knew within the scope of their employment.

United States v. Bank of New England, 821 F.2d. 844, 855-56 (1st Cir.), cert. denied, 108 S.Ct. 328 (1987)

**GOVERNMENT'S REQUESTED JURY INSTRUCTION NO. 40**

**Aiding and Abetting**

The defendants have been charged in each count of the Indictment with aiding and abetting in the charged conduct. Under certain circumstances, in order to find a defendant guilty of a particular substantive offense -- such as, for example, the offense of negligently discharging a pollutant into the waters of the United States without a permit -- the law does not require the government to prove that the defendant himself personally engaged in each of the essential elements of the offense as I have just described them to you. Instead, under circumstances I will describe for you in a moment, a defendant may be found guilty of an offense if the jury finds that the defendant aided and abetted the commission of that offense. The aiding and abetting statute, Section 2(a) of Title 18 of the United States Code, provides that:

Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

This means that a person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find either of the defendants guilty of the offenses charged in any one of the counts of the



Indictment if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a

crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense.

If, on the other hand, your answers to this series of questions are "no," then the defendant is not an aider and abettor, and you must find him not guilty, unless, of course, you find beyond a reasonable doubt that the defendant himself engaged in each of the essential elements of the offense charged.

Sand, et al., Modern Federal Jury Instructions, Ins. 11-1 and 11-2 (consolidated and modified).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 7**

**THE THEORY OF THE DEFENSE - EXPLAINED**

The Defendant has pleaded "Not Guilty" to the charges contained in the indictment. This plea of not guilty puts in issue each of the essential elements of each offense as described in these instructions and imposes on the government the burden of establishing each of these elements by proof beyond reasonable doubt.

Defendant McKemy, moreover, contends that he is not guilty of the crime charged because a third party trespasser vandal deliberately opened the tanker valve and the discharge was complete when Defendant learned of it. It was also dispersed unseen under the snow and if it reached the Jones Creek, it occurred without Defendant's knowledge who took all reasonable efforts to contain and remove it where they observed it.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 14**

**DEFENDANT'S STATEMENTS**

Evidence has been received concerning a statement said to have been made by the Defendant. It is for you to determine whether the Defendant did in fact make the statement. If you find that the Defendant did make the statement, then you must determine what weight, if any, you feel the statement deserves. In determining what weight, if any should be given the statement, you should consider all matters in evidence having to do with the statement, including those concerning the Defendant's personal characteristics and the conditions under which the statement was made.

**GOVERNMENT' S PROPOSED INSTRUCTIONS  
OBJECTED TO BY THE DEFENDANT**

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 26**

**DEFINITION OF "NEGLIGENTLY"**

The term "negligently" as used in Section 1319(c)(1)(A) means doing some act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of the agencies under one's control.

In the present case, if you find that M & M Fuel Company or Leon "Mac" McKemy failed to exhibit the care in maintaining his equipment that a reasonable person would, then you should find him negligent. Or, if you find that he did not exercise the care a reasonable person would in responding to the oil spill to prevent it from entering the waters of the United States, then you should find that he acted negligently.

United States v. Wilson, Crim. No. 95-0390 (D. Md. 1996)

Maryland Pattern Jury Instructions 19:1 (modified)

Ninth Circuit Manual of Model Instructions 9.1.2 (Civil 1997)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 27**

**CLEAN WATER ACT - DEFINITION OF "POINT SOURCE"**

The term "point source" is defined in the Clean Water Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

33 U.S.C. §§ 1362(14), (5)

**GOVERNMENT'S REQUESTED INSTRUCTION NO. 33**

**ELEMENTS OF VIOLATION OF THE CWA - KNOWING FAILURE TO REPORT**

Count Three of the Indictment charges the defendants with violating the Federal Water Pollution Control Act, Title 33, United States Code, Section 1321(b)(5), also known as the Clean Water Act. Count Three of the Indictment reads:

[Read Count Three of the Indictment]

Section 1321(b)(5) provides, in relevant part, that "[a]ny person in charge of . . . an onshore facility shall, as soon as he has knowledge of any discharge of oil . . . immediately notify the appropriate agency of the United States Government of such discharge."

In order to prove the defendant guilty of Count Three of the Indictment, the government must prove, beyond a reasonable doubt, each of the following elements:

1. Leon "Mac" McKemy was the person in charge of an onshore facility
2. who had knowledge of a discharge of oil
3. and failed to report such discharge to the appropriate federal agency immediately.

33 U.S.C. § 1321(b)(5)



GOVERNMENT'S REQUESTED INSTRUCTION NO. 35

DEFINITION OF KNOWINGLY

The term "knowingly" means that an act was done voluntarily and intentionally and not because of mistake, accident, negligence or some other innocent reason.

For the purpose of the Count Three only, all the government must prove is that the defendants knew that oil had been discharged. The government does not have to show that the defendants knew the amount of the discharge or its cause.

The government is not required to prove a wrongful intent or awareness of wrongdoing. The question whether the defendant acted in good faith is not material.

Sand, et al., Model Federal Jury Instructions, Ins. Nos. 36-9, 36-15 and 3A-2 (modified).  
United States v. Buckley, 934 F.2d 84, 86 (6th Cir. 1991).  
United States v. Dee, 912 F.2d 741(4th Cir. 1990, cert. denied 499 U.S. 919 (1991)).  
United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993)  
United States v. Hopkins, 53 F.3d 533 (2d Cir. 199\_\_)  
United States v. International Minerals Corp., 401 U.S. 558, 563-65 (1971).

**DEFENDANT'S PROPOSED INSTRUCTIONS  
OBJECTED TO BY THE GOVERNMENT**

**DEFENDANT'S PROPOSED INSTRUCTION NO. 1**

**INDICTMENT OR INFORMATION NOT EVIDENCE**

An Indictment is the written accusation whereby a criminal action is instituted. The indictment in this case is not evidence of any facts charged, and it creates no presumption of the Defendant's guilt.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 2**

**PROVINCE OF COURT**

It is the exclusive province of the court to determine the admissibility of all evidence, to define the issues, and to instruct you as to the law to be applied in this case. You are not to be influenced by the disposition that the court has made of any motion during the trial, or by any rulings concerning the admission or exclusion of evidence, as that imports no opinion by the court as to the guilt or innocence of the Defendant. It is your duty to follow the law as stated to you by the court in these instructions, and to decide the case in accordance with these instructions.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 3**

**DUTY OF JURY TO DETERMINE FACTS**

You are instructed that you are the sole judges of the facts in issue in this case. It is the exclusive province of the jury to weigh and consider all evidence presented to it, to determine the credibility of all witnesses who have testified before it, and from such witnesses and evidence to determine the issues of act in the case.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 4**

**PRESUMPTION OF INNOCENCE**

The law presumes the Defendant to be innocent of the crime charged. The Defendant comes into court clothed with the presumption of innocence, and in considering this case you are bound to act and proceed on the presumption that the Defendant is an innocent person. The presumption of the Defendant's innocence is not an idle phrase and must not be taken lightly; it is an important fundamental right belonging to every person accused of crime and you are bound to entertain it conscientiously, sincerely, and ungrudgingly, without any mental reservation or evasion whatever, and to give the Defendant the full benefit of it. The presumption of innocence continues throughout the trial and the jury's deliberations, until overcome by the prosecution. It is legal proof of innocence, and is sufficient to acquit the Defendant unless, after careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt of the Defendant's guilt.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 5**

**DUTY OF ATTORNEY TO PROTECT  
INTERESTS OF CLIENT - JURY NOT TO  
BE INFLUENCED BY OBJECTIONS**

You must regard counsel for the Defendant and the prosecution as on a par, having equal standing in the law, and you must assume that both are discharging their duties in a manner provided for by law and by the canons of ethics applicable to the trial of criminal cases. In this regard, you are instructed that is not only the right but the duty of an attorney to protect the interest of his client by objecting to the introduction of, or moving to strike out, evidence he deems inadmissible or improper, as well as by offering evidence he believes competent for admission. The fact that counsel for the Defendant or the prosecution may have made such objections, motions, or offers, regardless of the court's rulings on them, must not prejudice you for or against the party represented by such attorney.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 6**

**BURDEN OF PROOF ON PROSECUTION**

The prosecution must prove beyond a reasonable doubt each and every fact essential to establish the Defendant's guilt of the crime charged in the indictment. The burden of establishing the Defendant's guilt beyond a reasonable doubt rests on the prosecution throughout the entire case, and the Defendant is not required to prove their innocence. If the prosecution does not prove to your satisfaction that the Defendant is guilty beyond a reasonable doubt, then you must acquit him or it.



**DEFENDANT'S PROPOSED INSTRUCTION NO. 8**

**NOTICE OF DISCHARGE  
UNDER Section 311 (b) (5)  
OF THE ACT**

Under Federal regulations, 33 CFR § 153, 201, and 202, the manner of notice required in Section 311(b) (5) of the Act and the list of government officials to receive such notice is governed by those regulations. Those regulations provide that "any person in charge of an onshore facility shall as soon as they have knowledge of such discharge from such facility in violation of the Act shall immediately notify the National Response Center."

If direct reporting to the NRC is not practical, reports may be made to the Coast Guard or EPA predesignated On-Scene Coordinator for the geographical area where the discharge occurred. Such reports must then be relayed to the NRC, or if not possible, then to the nearest Coast Guard Unit.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 9**

**PERSON**

The definition of person herein as it relates to Mr. McKemy as it relates to the Corporate Officers, a "person," in addition to a corporation **as** a corporation in 33 USC § 1362, includes "any responsible corporate officer" under 33 USC § 1319.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 10**

**PERSON**

Under 33 USC § 1321, it only requires that a person in charge of an on-shore facility as soon as he has knowledge of any discharge from such facility must immediately notify the appropriate agency of the Federal government.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 11**

**KNOWLEDGE**

You may not infer that a Defendant had knowledge, however, from proof of **a** mistake, negligence, carelessness, or a belief in an inaccurate proposition.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 12**

**NON-LIABILITY FOR ACT OR  
OMISSION OF THIRD PARTY**

Where the Defendants can prove that the discharge was caused solely by an act or omission of a third party, without regard to whether any such act or omission was or was not negligent, the Defendants are not criminally liable for such discharge, costs or clean-up.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 13**

**"KNOWINGLY" - DEFINED**

The term "knowingly", as used in these instructions to describe the alleged state of mind of the Defendant, means that he was conscious and aware of his omission, realized what he was doing or what was happening around him and did not fail to act because of ignorance, mistake, or accident.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 15**

**WEIGHING EXPERT TESTIMONY**

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in the light of all the evidence in this case.

Federal Criminal Jury Instructions of the Seventh Circuit,  
Instruction No. 3.27 (1980).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 16**

**EXPERT TESTIMONY**

"(1) You have heard the testimony of an expert witness.

An expert witness has special knowledge or experience that allows the witness to give an opinion. (2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witnesses's qualifications and how he reached his conclusions. (3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves."

Pattern Criminal Jury Instructions of the District Judges Association of the Sixth Circuit, Instruction No. 7.03 (1991).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 17**



**BURDEN AND DEGREE OF PROOF ON  
AFFIRMATIVE DEFENSE**

The Defendant has presented evidence tending to show that a third party vandal who was not an employee or agent and not acting under their direction, supervision, or contract trespassed and took possession of the tanker trailer and contents and illegally opened the drain valve discharging the contents and fuel oil onto the snow covered ground without the knowledge of the Defendants. The Defendant does not have the burden of the proof as to this defense. If this evidence, when considered with the other evidence, raises a reasonable doubt as to the Defendant's guilt, the Defendant is entitled to an acquittal. He is not obliged to establish the defense beyond a reasonable doubt, or even by a preponderance of the evidence. The prosecution must prove his guilt beyond a reasonable doubt.

**Certificate of Service**

I HEREBY CERTIFY that a copy of the foregoing Government's Proposed Jury Instructions was served by first-class mail, postage prepaid, on the date shown on William E. Seekford, the Penthouse-Suite 1302, 28 Allegheny Avenue, Towson, Maryland 21204, attorney for defendants.

\_\_\_\_\_  
Date

\_\_\_\_\_  
W. Warren Hamel  
Assistant U. S. Attorney