

**5200 STORING, TREATING, TRANSPORTING, OR DISPOSING OF  
HAZARDOUS WASTE WITHOUT A LICENSE — § 291.97(2)(b)****Statutory Definition of the Crime**

Section 291.97(2)(b) of the Wisconsin Statutes is violated by one who willfully stores, treats, transports, or disposes of any hazardous waste without a license required under section 291.23 or 291.25.<sup>1</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (stored) (treated) (transported) (disposed of) hazardous waste.

(Name of substance) is a hazardous waste.<sup>2</sup>

["Stored" means the containment of hazardous waste for a temporary period in a manner that does not constitute disposal.]<sup>3</sup>

["Treated" means using any method, technique or process, including neutralization, which follows generation and which is designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize the hazardous waste or so as to render the waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. It includes incineration.]<sup>4</sup>

["Transported" means moving hazardous wastes by air, rail, highway, water or other means (except for the movement of hazardous waste within the site at which the hazardous waste is generated or within a facility that is licensed)].<sup>5</sup>

["Disposed of" means the discharging, depositing, injecting, dumping, spilling, leaking or placing of any hazardous waste into or on any land or water in a manner which may permit the hazardous waste or any hazardous constituent to be emitted into the air, to be discharged into any waters of the state or otherwise to enter the environment. It does not include the generation, transportation, storage or treatment of hazardous waste.]<sup>6</sup>

2. The defendant did not have a license<sup>7</sup> for the (storage) (treatment) (transportation) (disposal) of hazardous waste as required by section (291.23) (291.25).

[Storage of hazardous waste at the generation site by the generator of that waste for a period less than 90 days does not require a license.]<sup>8</sup>

[Storage of hazardous waste for a period of less than 10 days in connection with the transporting or movement of the hazardous waste does not require a license.]<sup>9</sup>

3. The defendant (stored) (treated) (transported) (disposed of) hazardous waste willfully.

"Willfully" requires that the defendant intentionally (stored) (treated) (transported) (disposed of) hazardous waste<sup>10</sup> and knew that the material had the potential to be harmful to others or to the environment.<sup>11</sup>

[USE ANY OF THE FOLLOWING IF RAISED BY THE EVIDENCE.]

["Willfully" does not require that the defendant (knew that a license was required to carry on those activities)<sup>12</sup> (or) (knew that (he) (she) was violating any particular law) (or) (knew that the material was defined by law to be a hazardous waste)].<sup>13</sup>

### **Deciding About Intent and Knowledge**

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 5200 was originally published in 1993. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for violations of § 291.97(2)(b), which are Class H felonies and subject to a fine of not more than \$100,000. For a second or subsequent violation, the penalty increases to that for a Class F felony and a fine of not more than \$150,000. § 291.97(2)(c)2.

The maximum penalties double "[i]f a person commits a violation in connection with an enterprise, as defined under s. 948.82(2)." § 291.97(2)(e). The reference is to the definition of "enterprise" in the Wisconsin Organized Crime Control Act (the Wisconsin version of the federal "RICO" statute). Note that the § 946.82(2) definition does not require that there be any illegal purpose for the enterprise.

Each day of a continuing violation constitutes a separate offense. § 291.97(2)(d).

1. This instruction is drafted for one type of violation under § 291.97(b)2. That subsection applies not only to committing a prohibited act "without a license," but also to doing so "in violation of a rule promulgated or special order, plan approval or term or condition of a license or variance issued under s. 291.23, 291.25, 291.29, 291.31 or 291.87."

2. Section 291.01(7) provides that "'hazardous waste' or 'waste' means any solid waste identified by the department as hazardous under s. 291.05(1), (2), or (4)." Section 291.05(2) requires the Department of Natural Resources to promulgate by rule a list of hazardous wastes. The administrative rules relating to hazardous wastes are contained in Wis. Adm. Code sec. NR 661. Section 661.03 provides an extensive and highly detailed definition of "hazardous waste." To summarize, something is a "hazardous waste" if it is so labelled by the rules promulgated by the Department of Natural Resources. Further, whether a substance is a "hazardous waste" is a legal conclusion which the court may pass along to the jury. Whether the substance in the case actually was the substance defined by law as a "hazardous waste" is the factual issue that the jury must determine.

3. This is based on the definition of "storage" provided in § 291.01(18).

4. This is based on the definition of "treatment" provided in § 291.01(21).

5. This is based on the definition of "transport" provided in § 291.01(20).

6. This is based on the definition of "disposal" provided in § 291.01(3).

7. As described in note 1, supra, the instruction is drafted for the "without a license" violations covered by § 291.97(2)(b)2. Section 291.27(2)(b)2. refers to acts performed "without a license required under s. 291.23 or 291.25." Section 291.23 addresses licensing for the transportation of hazardous waste; § 291.25 addresses licensing for the treatment, storage or disposal of hazardous waste.

8. Section 291.25(1).

9. Section 291.25(1).

10. The mental element required for violations of § 291.97 [then § 144.72(2)(b)] was considered by the Wisconsin Court of Appeals in State v. Fetting, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992). The court concluded that the statute

... does not require proof that one who wilfully stores or disposes of hazardous wastes also must know that a license is required to carry on those activities. We hold that the word 'wilfully' reaches only to '[s]tores, treats, transports or disposes of;' consequently, the state need

prove only that any of those activities was done wilfully and that the person so acted without a license.

172 Wis.2d 428, 433.

11. This statement is based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.

12. See State v. Fettig, note 10, supra.

13. The last two statements in brackets are based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.