

of post-complaint events that could have been but were not incorporated into the state case through an amended complaint.

Each party shall bear its own costs of appeal.

*So ordered.*



UNITED STATES of America,  
Appellee,

v.

SOUTHERN UNION COMPANY,  
Defendant, Appellant.

No. 09–2403.

United States Court of Appeals,  
First Circuit.

Heard Oct. 6, 2010.

Decided Dec. 22, 2010.

**Background:** Defendant corporation was charged with knowingly storing hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA). Following corporation’s conviction by jury on such charge, and denial of corporation’s objection to pre-sentence report, 2009 WL 2032097, the United States District Court for the District of Rhode Island, William E. Smith, J., 643 F.Supp.2d 201, denied corporation’s motion for judgment of acquittal. Corporation appealed.

**Holdings:** The Court of Appeals, Lynch, Chief Judge, held that:

- (1) as matter of first impression, corporation was precluded, by statute governing judicial review of Environmental Protection Agency’s (EPA) authorization of state hazardous waste pro-

grams, from challenging in federal court EPA’s Immediate Final Rule authorizing Rhode Island’s RCRA regulations;

- (2) EPA had authority to promulgate Immediate Final Rule;
- (3) Final Rule was not unenforceable on ground that portion of Rule that discussed federal enforceability was mere preamble;
- (4) United States could enforce state rule that required conditionally exempt small quantity generators (CESQG) to obtain hazardous waste storage permits;
- (5) Immediate Final Rule was not irrationally inconsistent with prior pronouncements of EPA’s position;
- (6) corporation did not lack due notice, in violation of its due process rights, prior to being charged;
- (7) as matter of first impression, *Apprendi* does not apply to criminal fines; and
- (8) penalty of \$18 million was not substantively unreasonable.

Affirmed.

### 1. Criminal Law ⇌1139

The Court of Appeals reviews legal and constitutional questions de novo.

### 2. Environmental Law ⇌353, 430

The Resource Conservation and Recovery Act (RCRA) regulates the treatment, storage, and disposal of solid and hazardous waste in order to minimize the waste generated and the harm done by that waste. Resource Conservation and Recovery Act of 1976, § 2 et seq., 42 U.S.C.A. § 6901 et seq.

### 3. Environmental Law ⇌385, 746

The effect of the Resource Conservation and Recovery Act (RCRA) is that

there is federal enforcement, including federal criminal enforcement, of state rules that are part of federally authorized state plans under RCRA. Resource Conservation and Recovery Act of 1976, §§ 2(b), 2(d)(2)(A), 42 U.S.C.A. §§ 6926(b), 6928(d)(2)(A).

#### 4. Environmental Law ⇨747, 751

Defendant corporation, which, in prosecution for knowingly storing hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA), sought to assert defense that federal government lacked authority to enforce Rhode Island's regulations governing small quantity generators because they were broader in scope than federal RCRA program and therefore not part of federally approved and federally enforceable state program, was precluded, by statute governing judicial review of Environmental Protection Agency's (EPA) authorization of state hazardous waste programs, from challenging in federal court EPA's Immediate Final Rule authorizing Rhode Island's RCRA regulations; having failed to use statutory procedure for judicial review, corporation could not raise issue by collateral attack. Resource Conservation and Recovery Act of 1976, § 2(b), 2(d)(2)(A), 2(b), 42 U.S.C.A. §§ 6926(b), 6928(d)(2)(A) 6976(b); 40 C.F.R. § 271.1(i).

#### 5. Criminal Law ⇨1130(6)

Arguments initially made in a reply brief are usually deemed waived.

#### 6. Environmental Law ⇨353

Environmental Protection Agency (EPA) had authority to promulgate Immediate Final Rule authorizing Rhode Island's Resource Conservation and Recovery Act (RCRA) regulations, despite corporation's argument that EPA delegated only responsibility to authorize state RCRA programs, not to determine or expand breadth of federal enforcement authority, inasmuch as EPA had statutory duty to approve state programs to extent they met statutory and regulatory criteria, and EPA could not fulfill that duty without specifying which parts of a state's program fulfilled the criteria,

thereby becoming federally approved and enforceable. Resource Conservation and Recovery Act of 1976, § 2(b), 42 U.S.C.A. § 6926(b).

#### 7. Environmental Law ⇨353

Environmental Protection Agency's (EPA) Immediate Final Rule authorizing Rhode Island's Resource Conservation and Recovery Act (RCRA) regulations was not unenforceable on ground that portion of Rule that discussed federal enforceability was mere preamble; Rule was not divided into separate preamble and rule sections and did not portray any part of notice as "preamble," and EPA treated authorization as having binding legal force, promulgating it through formal notice-and-comment rulemaking, and stating in Rule itself that rule represented final agency action. Resource Conservation and Recovery Act of 1976, § 2(b), 42 U.S.C.A. § 6926(b).

#### 8. Environmental Law ⇨432

Under regulation governing federal authorization of state hazardous waste programs, promulgated by Environmental Protection Agency (EPA) pursuant to Resource Conservation and Recovery Act (RCRA), United States could enforce state rule that required conditionally exempt small quantity generators (CESQG) to obtain hazardous waste storage permits, even though baseline federal program did not require CESQGs to obtain such permits. Resource Conservation and Recovery Act of 1976, § 2 et seq., 42 U.S.C.A. § 6901 et seq.; 40 C.F.R. § 271.1(i).

#### 9. Administrative Law and Procedure ⇨390.1

Where an agency has expressed its interpretation in a legislative rule promulgated through notice-and-comment rulemaking, the agency's interpretation is binding unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or otherwise defective under the Administrative Procedure Act (APA). 5 U.S.C.A. § 706(2)(A).

#### 10. Environmental Law ⇨429, 453

Environmental Protection Agency's (EPA) Immediate Final Rule authorizing

Rhode Island's Resource Conservation and Recovery Act (RCRA) regulations was not irrationally inconsistent with prior pronouncements of EPA's position on regulation of conditionally exempt small quantity generators (CESQG) and on which state regulations would receive federal authorization, and Rule thus was not invalid, inasmuch as internal guidance documents relied on by corporation in arguing inconsistency had not been put forth as legally binding and were not promulgated through notice-and-comment rulemaking, and policy change over time was not irrational inconsistency. Resource Conservation and Recovery Act of 1976, § 2 et seq., 42 U.S.C.A. § 6901 et seq.

**11. Administrative Law and Procedure**  
↔390.1

For purposes of determining whether irrational inconsistency has rendered an agency's rules invalid, agencies may change their policies provided substantive changes in an agency's position are accomplished by notice-and-comment rulemaking, and accompanied by some indication that the shift is rational.

**12. Constitutional Law** ↔4509(1)  
**Environmental Law** ↔747

Defendant corporation did not lack due notice, in violation of its due process rights, prior to being charged with knowingly storing hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA), despite its argument that it lacked notice that it could be federally prosecuted for state crime, where corporation was in highly regulated natural gas industry, corporation's activities put it in violation of state law, and corporation had actual notice of Immediate Final Rule authorizing Rhode Island's RCRA regulations. U.S.C.A. Const. Amend. 5; Resource Conservation and Recovery Act of 1976, § 2(d)(2)(A), 42 U.S.C.A. § 6928(d)(2)(A); R.I.Gen.Laws 1956, § 23-19.1-18.

**13. Constitutional Law** ↔4509(1)  
**Environmental Law** ↔747

For purposes of a claim of a due process violation based on lack of notice that activity violates the Resource Conservation and Recovery Act (RCRA), the law embodies two commonsense notions in the face of protestations of innocence by reason of ignorance; one is that those who keep dangerous materials on hand know their activity is regulated, and the other is that those who manage highly regulated industries are not unsophisticated. U.S.C.A. Const.Amend. 5; Resource Conservation and Recovery Act of 1976, § 2 et seq., 42 U.S.C.A. § 6901 et seq.

**14. Constitutional Law** ↔92  
**Environmental Law** ↔149E

Although Environmental Protection Agency (EPA) had declined federal enforcement of conditionally exempt small quantity generators (CESQG) regulations in California in 1992 and District of Columbia in 2001, its enforcement decisions since 1999 were not irrational, in violation of due process, rather, save for the aberration of District of Columbia, EPA's enforcement decisions reflected rational shift toward policy of federal enforcement. U.S.C.A. Const.Amend. 5; Resource Conservation and Recovery Act of 1976, § 2 et seq., 42 U.S.C.A. § 6901 et seq.; 40 C.F.R. § 271.1(i).

**14. Jury** ↔34(6)

A judge may not mete out any punishment for which the jury has not found all the necessary facts.

**15. Courts** ↔92

The Court of Appeals is bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when a dictum is of recent vintage and not enfeebled by any subsequent statement.

**16. Fines** ↔1.5  
**Jury** ↔34(6)

*Apprendi*, which requires that any fact other than that of a prior conviction

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, does not apply to criminal fines.

#### 17. Criminal Law ⇨1177.3(3)

##### Fines ⇨1.5

##### Jury ⇨34(7)

Assuming that *Apprendi*, requiring that any fact other than that of prior conviction that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury, and proved beyond reasonable doubt, applied to criminal fines, error that occurred when judge, rather than jury, decided number of days of defendant corporation's violation for purposes of imposing fine under Resource Conservation and Recovery Act (RCRA) was not harmless, where jury did not necessarily find beyond reasonable doubt that corporation had violated RCRA during all or nearly all of date range in indictment. Resource Conservation and Recovery Act of 1976, § 2(d), 42 U.S.C.A. § 6928(d).

#### 18. Criminal Law ⇨1163(1)

Where an error is constitutional in nature, the government has the burden of proving beyond a reasonable doubt that the error did not affect the defendant's substantial rights.

#### 19. Criminal Law ⇨1177.3(3)

Error under *Apprendi*, which requires that any fact other than that of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, is harmless where the evidence overwhelmingly establishes the facts necessary to justify the statutory maximum under which the defendants were sentenced.

#### 20. Jury ⇨34(6)

##### Sentencing and Punishment ⇨2187

Restitution is exempt from *Apprendi*, which requires that any fact other than that of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

#### 21. Criminal Law ⇨1156.2

In reviewing the reasonableness of the sentence imposed, the Court of Appeals upholds the sentence unless the district court abused its discretion.

#### 22. Criminal Law ⇨1134.75

In reviewing the reasonableness of a sentence, the Court of Appeals first determines whether the district court considered the relevant statutory sentencing factors and adequately explained the sentence it chose, and, second, it considers whether the sentence is substantively reasonable under the totality of the circumstances, giving due deference to the district court's experience and familiarity with the facts of the case.

#### 23. Environmental Law ⇨761

Sentencing Guidelines on fines did not apply to fine imposed on defendant corporation under Resource Conservation and Recovery Act (RCRA), and district court thus was obliged to consider only the relevant RCRA provision, the factors set forth in the statute providing factors to be considered upon imposing sentence, and the factors set forth in the statute governing the imposition of fines. 18 U.S.C.A. §§ 3553, 3572; Resource Conservation and Recovery Act of 1976, § 2(d), 42 U.S.C.A. § 6928(d); U.S.S.G. § 8C2.1, 18 U.S.C.A.

#### 24. Environmental Law ⇨761

District court committed no procedural errors in applying statutory sentencing factors to imposition of fine under Re-

source Conservation and Recovery Act (RCRA), where court undertook methodical, detailed consideration of each sentencing factor. 18 U.S.C.A. §§ 3553, 3572; Resource Conservation and Recovery Act of 1976, § 2(d), 42 U.S.C.A. § 6928(d).

## 25. Environmental Law ⇌762

Penalty of \$18 million imposed on defendant corporation for knowingly storing hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA) was not substantively unreasonable, where district court noted, *inter alia*, that Congress measured seriousness of long-term RCRA violations by imposing high, per-day statutory maximum fine, and that corporation's willingness to put densely-populated residential community, local public safety employees, and its own employees at risk by storing hazardous waste under deplorable conditions in their midst indicated great culpability. Resource Conservation and Recovery Act of 1976, § 2(d)(2)(A), 42 U.S.C.A. § 6928(d)(2)(A).

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Gerald J. Petros, with whom Hinckley, Allen & Snyder LLP, John A. Tarantino, Patricia K. Rocha, Adler, Pollock & Sheehan, David E. Ross, Seth B. Davis, and Kasowitz, Benson, Torres & Friedman LLP were on brief, for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Peter F. Neronha, United States Attorney, Terrence P. Donnelly, Assistant United States Attorney, Dianne G. Chabot, Attorney, U.S. Environmental Protection Agency, and Kevin M. Cassidy, Attorney, Environment & Natural Resources Division, U.S. Department of Justice were on brief, for appellee.

Before LYNCH, Chief Judge, SELYA and THOMPSON, Circuit Judges.

LYNCH, Chief Judge.

This appeal by Southern Union, a natural gas company convicted by a jury of storing hazardous waste without a permit, raises two issues of initial impression. First, the case tests whether *federal* criminal enforcement may be used under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d), where certain federally approved *state* regulations as to hazardous waste storage have been violated. Second, the case also raises the important question of whether a criminal fine must be vacated under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where a judge, and not a jury, determined the facts as to the number of days of violation under a schedule of fines.

The hazardous waste at issue in this case is mercury, which can poison and kill those exposed to it. *See* 40 C.F.R. § 261.33(f) tbl. (listing mercury as hazardous waste due to toxicity). Here, 140 pounds of mercury became the play toy of young vandals who spread it about, including at their homes in a local apartment complex, after they spilled it around Southern Union's largely abandoned and ill-guarded Tidewater site in Pawtucket, Rhode Island.

We affirm the district court's rulings on Southern Union's conviction, as set forth in *United States v. Southern Union*, 643 F.Supp.2d 201 (D.R.I.2009) (*Southern Union I*). We conclude that:

(1) Southern Union is precluded by 42 U.S.C. § 6976(b) from challenging the EPA's 2002 Immediate Final Rule authorizing Rhode Island's RCRA regulations. Having failed to use the statutory procedure for judicial review, Southern Union

may not raise the issue by collateral attack;

(2) the 2002 Rule, in any event, is valid and was within the EPA's authority to adopt; and

(3) the conviction does not violate Southern Union's right to fair notice under the Due Process Clause.

We also affirm the fine imposed. The *Apprendi* issue is close but the Supreme Court's recent decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), leads us to hold that the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines. If, however, we were wrong in our assessment of the *Apprendi* issue, we would find that any error under *Apprendi* was not harmless and that the issue of the fine would need to be remanded. Finally, we also hold that the financial penalties imposed did not constitute an abuse of the district court's discretion.

#### I. SOUTHERN UNION'S MERCURY STORAGE AND RELEASE

Southern Union, a Texas-based natural gas distributor, began supplying natural gas to Rhode Island and Massachusetts customers in 2000 through a subsidiary, New England Gas Company, that it formed after acquiring several local gas companies. It stopped serving Rhode Island customers in 2006.

As part of the transactions in 2000, Southern Union acquired a twelve-acre complex, once used as a gas manufacturing plant, on Tidewater Street in Pawtucket, Rhode Island. Most of the complex sat unused, but Southern Union used a few buildings for automated monitoring and used outdoor spaces to store construction supplies and waste.

The Tidewater property was not maintained and had fallen into disrepair. The

perimeter fence was rusted, with gaps that were left unrepaired. There were no security cameras, and Southern Union had removed the single part-time security guard from the site by September 2004. Southern Union was aware that homeless people were staying in a tin shed on the property, and that the property was frequently vandalized.

In June 2001, Southern Union began removing outdated mercury-sealed gas regulators (MSRs) from customers' homes and replacing them with updated regulators. The old MSRs were taken to a brick building at the Tidewater facility. There, for about five months, an environmental firm removed the mercury from the regulators and shipped it to a recycling facility, leaving the regulators to be cleaned and scrapped. Southern Union stopped removing MSRs as a matter of course in November 2001, and its arrangement with the environmental firm ended in December 2001. However, Southern Union continued to remove MSRs whenever they malfunctioned, bringing them to Tidewater, where they were "stored" in doubled plastic bags placed in plastic kiddie pools on the floor of the brick building.

Employees were also encouraged to bring any loose mercury they found in their departments to Tidewater, where it was placed in the same building as the gas regulators. The loose mercury was stored in the various containers in which it arrived, including a milk jug, a paint can, glass jars, and plastic containers. Southern Union kept the containers in a locked wooden cabinet that was not designed for mercury storage. The brick building was in poor condition and had suffered break-in attempts and vandalism. It had many broken windows and its walls were covered in graffiti. Neither the cabinet nor the building itself contained any warning notice that hazardous substances were inside.

Southern Union had no use for any of the mercury it accumulated. By July 2004, when a Southern Union employee catalogued the contents of the brick building, it held 165 MSRs and approximately 1.25 gallons, or more than 140 pounds, of loose mercury (two tablespoons of mercury weigh just under one pound). That cataloging did not lead the company to arrange for recycling, to secure the building, or to secure a storage permit from the state.

Southern Union was well aware that the mercury was piling up and that it was kept in unsafe conditions. The Environmental Services Manager for its New England Gas Company division, who testified that he was concerned about the safety risk the mercury posed to the company's employees, drafted proposed Requests for Proposals (RFPs) in 2002, 2003, and 2004 to solicit bids to remove and dispose of or recycle the regulators "and associated wastes."

The 2002 draft was sent to Southern Union's Texas corporate headquarters for review by the Director of Environmental Services, where it died. Not only was the RFP not issued, but the New England Gas Company engineer who oversaw the environmental department became angry when he was repeatedly asked about it. The 2003 proposed RFP met the same fate, even though it specified the contents of a number of different containers of mercury. The draft, titled "Request for Proposals for Waste Segregation, Packaging, Transportation, and Disposal," sought a bid to "[r]emove liquid mercury from several small containers" and "[t]ransport and dispose (or recycle) of all *waste* generated" by this work (emphasis added). Nor did anything come of the 2004 proposed RFP, even though the environmental manager went outside his chain of command trying to get the RFP issued to vendors.

The safety risk posed by the conditions under which the mercury was stored was discussed at joint employee-management safety committee meetings in May, June, and September 2004. Indeed, the employee who brought a regulator in on September 20, 2004 was so concerned about the accumulating mercury that he raised the issue with his supervisor. No action was taken.

In late September 2004, youths from a nearby apartment complex broke into the brick building, broke open the wooden cabinet, found the mercury, and, playing with it, spilled some of it in and around the building. They also took some of the mercury back to their apartment complex, where they spilled more on the ground, dipped cigarettes in it, and tossed some in the air. Mercury was tracked into the residences when people walked through it and was found in several homes.

Southern Union discovered the break-in and spills on October 19, roughly three weeks later, when a worker found pancake-sized puddles of mercury around the brick building. Southern Union immediately called in a contractor to begin cleaning up the spills at Tidewater and the apartment complex.

A Southern Union employee also left a voicemail message that day for Jim Ball, the Emergency Response Coordinator at the state Department of Environmental Management. However, Southern Union did not contact the Pawtucket Fire Department or the state Fire Marshal, the designated points of contact for a release of more than a pound of mercury. The Fire Department did not arrive at Tidewater until the next day, after having found out about the spill from the Department of Environmental Management. By that time, the contractor had already removed the remaining mercury from the building and begun to ship it offsite.

Altogether, the company spent more than \$6 million remediating the two spill sites. All five buildings in the apartment complex were evacuated. Residents, 150 of them, were displaced for two months. Most were tested for mercury levels in their blood. While some had elevated levels, none met current standards for hazardous exposure.

## II. CHALLENGES TO THE CONVICTION

In 2007, a federal grand jury returned a three-count indictment against Southern Union. The indictment charged Southern Union with two counts of storing hazardous waste without a permit in violation of RCRA. *See* 42 U.S.C. § 6928(d)(2)(A). Count One of the indictment covered the loose liquid mercury, and Count Three covered the mercury-embedded gas regulators. Count Two of the indictment charged Southern Union with failing to properly report a mercury release of more than one pound, a violation of the Emergency Planning and Community Right-to-Know Act.<sup>1</sup> *See* 42 U.S.C. §§ 11004, 11045(b)(4).

Southern Union's prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle. Even if the mercury was not a commercial chemical product, the Company argued, it had not "knowingly stored a hazardous waste" because it believed the mercury was recyclable. After a nearly four-week trial, a jury convicted Southern Union on Count One only. *Southern Union I*, 643 F.Supp.2d at 207.

1. Fifty-five plaintiffs filed related civil litigation.
2. Southern Union also filed a Rule 33 motion for a new trial. The district court denied the

Just before trial, Southern Union filed a motion arguing that the federal government lacked authority to enforce Rhode Island's regulations governing small quantity generators, under which Southern Union was prosecuted, because they were "broader in scope" than the federal RCRA program and therefore not part of the federally approved and federally enforceable state program. The district court denied the motion, and Southern Union renewed it after the jury verdict in a motion for a judgment of acquittal.<sup>2</sup>

The district court denied the motion for acquittal in a published opinion issued July 22, 2009, finding Southern Union's challenge untimely under 42 U.S.C. § 6976(b), which governs judicial review of the EPA's authorization of state hazardous waste programs. *Southern Union I*, 643 F.Supp.2d at 209–10. The court highlighted the statute's specific prohibition against judicial review of such authorizations in "criminal proceedings for enforcement." *Id.* (quoting 42 U.S.C. § 6976(b)). The court in the alternative rejected Southern Union's challenge on the merits, finding that the authorization was a valid, binding legislative rule that authorized federal enforcement. *Id.* at 210–13.

[1] Southern Union challenges the district court's application of RCRA and the 2002 Rule and claims that the prosecution violated due process. We review legal and constitutional questions de novo. *United States v. Sampson*, 486 F.3d 13, 19 (1st Cir.2007). Southern Union does not challenge the district court's factual determinations pertinent to the issue. Both of Southern Union's claims of error fail.

motion, *United States v. Southern Union Co.*, 643 F.Supp.2d 201, 217 (D.R.I.2009) (*Southern Union I*), and Southern Union does not appeal the denial.

A. *Legal Structure*

[2] RCRA, 42 U.S.C. § 6901 *et seq.*, regulates the “treatment, storage, and disposal of solid and hazardous waste” in order to minimize the waste generated and the harm done by that waste. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). It is a federal crime to knowingly store hazardous waste, such as mercury waste, “without a permit under this subchapter,” that is, under 42 U.S.C. §§ 6921–6939f, inclusive. 42 U.S.C. § 6928(d)(2)(A); 40 C.F.R. § 261.33(f) tbl (listing mercury as hazardous waste). Within that subchapter, § 6926 directs the EPA to authorize states to enforce their own hazardous waste programs “in lieu of” the federal program, if the state programs are “equivalent to” and “consistent with” the baseline federal program. 42 U.S.C. § 6926(b).

[3] The effect of the statute is that there is federal enforcement, including federal criminal enforcement, of state rules that are part of federally authorized state plans under RCRA. This court so held in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991). Southern Union does not contest this proposition. Rather, it argues that the Rhode Island regulations enforced here are not part of a federally authorized state plan.

Under § 6926, the EPA has promulgated regulations governing federal approval of state programs, which provide that states may adopt and enforce requirements that are “more stringent” or have a “greater scope of coverage” than the fed-

eral baseline program. 40 C.F.R. § 271.1(i). However, for state programs with “a greater scope of coverage,” the “additional coverage” does not become part of the federally approved program. 40 C.F.R. § 271.1(i)(2). Southern Union argues that the Rhode Island regulations applicable here provide additional coverage.

Rhode Island has administered its own federally authorized hazardous waste program since 1986, and has secured federal approval of amendments from time to time. *See* 67 Fed.Reg. 51,765, 51,766 (Aug. 9, 2002). Pertinent here is the EPA’s authorization of further amendments to the state program on August 9, 2002. *Id.* at 51,765. On that date, the EPA published an “Immediate final rule” (the “2002 Rule”) in the Federal Register under which the authorization would automatically go into effect on October 8, 2002, unless the EPA received a comment in opposition to the authorization within thirty days. *Id.* at 51,765, 51,766.

The 2002 Rule explained that the major difference between the new Rhode Island program and the federal baseline program was that Rhode Island now regulated conditionally exempt small quantity generators (CESQGs) more stringently than did the federal regulations.<sup>3</sup> Under the federal baseline program, CESQGs are exempt from many requirements—including the permit requirement—that are imposed on generators of higher quantities of hazardous waste. 40 C.F.R. §§ 261.5(a)(2) (outlining limited regulation of CESQGs), 270.1(c) (generally requiring permits to store hazardous waste).

3. The federal program categorizes hazardous waste generators by the amount of hazardous waste they produce monthly. A hazardous waste generator qualifies as a conditionally exempt small quantity generator (CESQG) for a given month if it produces less than 100 kilograms of hazardous waste in that month

and has accumulated no more than 1000 kilograms on-site. 40 C.F.R. § 261.5(a), (g)(2). In addition to complying with these limits, CESQGs must comply with regulations governing the categorization, treatment, and disposal of hazardous wastes. *See* 40 C.F.R. §§ 261.5(g)(1), (3); 262.11.

Relying on the federal conditional exemption, Southern Union says it was a CESQG and therefore not required to have a permit. But the 2002 Rule made two things clear. One was that under Rhode Island law, Southern Union needed a permit. The second, tellingly, was that this tighter regulation was going to be federally enforced.<sup>4</sup>

Southern Union did not comment; in fact, the EPA received no comments from the public. Nor did Southern Union take any action to seek judicial review of the EPA's final determination.

#### B. *Southern Union's Challenge*

Southern Union argues that Rhode Island's regulation of CESQGs, under which it was prosecuted for storing loose mercury without a permit, cannot, merely by virtue of the 2002 Rule, be the basis for federal criminal prosecution. From this it argues that the district court erred in refusing to put the question of whether it was a CESQG under federal law to the jury. It argues that only the part of a state's hazardous waste program that is "required by federal law" becomes part of the state's federally authorized—and therefore federally enforceable—program. Southern Union has put the cart before the horse.

1. *Southern Union Is Precluded By 42 U.S.C. § 6976(b) from Attacking Federal Criminal Enforcement of the Federally Authorized State Rule*

[4] In enacting RCRA, Congress clearly channeled and limited the mechanism for judicial review of EPA authorizations:

4. The Rule also made it clear that a different part of the regulation, not at issue here, would not be federally enforced, indicating that the EPA did not simply assume all addi-

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 of this title . . . or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. *Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.* Such review shall be in accordance with sections 701 through 706 of Title 5.

42 U.S.C. § 6976(b) (emphasis added).

Two of the statute's mechanisms are involved here. First, under § 6976(b), judicial review of the EPA Administrator's actions in granting authorization (or interim authorization) to state programs under RCRA may be had in the pertinent federal court of appeals within ninety days of issuance of the authorization. Such review is to be in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701–706. It is undisputed that Southern Union failed to challenge the 2002 Rule in this manner. Second, when review of the Administrator's actions could have been obtained under § 6976, the statute denies judicial review of the Administrator's action in "civil or criminal proceedings for enforcement."<sup>5</sup>

tional state requirements were federally enforceable.

5. The extension of time for challenging actions of the Administrator on grounds that

[5] This congressional channeling of the forum, method, and timing of judicial review and exclusion of collateral attacks is not unusual. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has a similar provision, *see* 42 U.S.C. § 9613(a), as do several other environmental statutes, *see* 33 U.S.C. §§ 1369(b), 2717(a); 42 U.S.C. §§ 300j-7, 4915(a), 7607(b). Courts have upheld such channeling. *See, e.g., United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (“[T]here is nothing to prevent Congress from providing a single national forum for the litigation of [asbestos removal] standards [under 42 U.S.C. § 7607(b)].”); *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-14 (D.C.Cir.1979) (applying 42 U.S.C. § 4915). The CERCLA provision, to take one example, was enforced in a cost-recovery action to preclude the corporate defendant’s collateral attack on a Superfund site listing. *See United States v. Asarco, Inc.*, 214 F.3d 1104, 1107 (9th Cir.2000).<sup>6</sup> Southern Union has not argued that § 6976(b) is itself unconstitutional.

The federal circuit courts construing § 6976(b) and the similar review provision in § 6976(a) have unanimously rejected later collateral attacks on the Administrator’s decisions. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267 (D.C.Cir. 2003) (rejecting, under § 6976(a), an “impermissible ‘back-door’ challenge” to rule-making); *Chem. Weapons Working Grp., Inc. v. U.S. Dep’t of the Army*, 111 F.3d 1485, 1491-93 (10th Cir.1997); *Greenpeace,*

arise after the ninetieth day is not applicable here.

6. Southern Union’s argument about § 6976(b) is presented in its reply brief. Arguments initially made in a reply brief are usually deemed waived. *See United States v. Hall*, 557 F.3d 15, 20 n. 3 (1st Cir.2009). But we bypass any issue of waiver and resolve the preclusion issue on the merits.

*Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1180-82 (6th Cir.1993); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-62 (4th Cir.1993).

In its reply brief, Southern Union argues that there is a distinction between a challenge to an authorization and “a challenge to the [federal] [g]overnment’s authority to enforce Rhode Island’s CESQG permit requirement.” There is no such distinction. It is the Administrator’s authorization in the 2002 Rule that is under attack. Once that authorization is given through the Administrator’s findings under 40 C.F.R. Part 271, which provides the requirements for federal authorization of state programs, federal enforcement follows automatically as a matter of law. *MacDonald*, 933 F.2d at 44. As Judge Wilkinson noted in *Palumbo*, the defendant’s position “[a]t bottom . . . is nothing more than a collateral attack on the prior . . . decisions of the federal EPA. The RCRA judicial review provision plainly forbids such an attack, in place of a direct appeal.” *Palumbo*, 989 F.2d at 159.

We wish to be clear: whether or not Southern Union had filed an action within ninety days of October 8, 2002 challenging the 2002 Rule, we may not under § 6976 review a defense in a criminal proceeding that the EPA’s action was legally in error.<sup>7</sup>

Nonetheless, in an abundance of caution we go on to examine the legality of the EPA’s actions and conclude in an alternate

7. In its reply brief Southern Union attempts to argue that it could not have challenged the 2002 Rule within ninety days because there was no final agency action to challenge. That, it argues, is because the operative language was a mere “preamble.” It then merges this into an attack on the merits of the regulation, arguing that it is not a “binding” or “enforceable” determination by the Administrator. We address this argument below.

holding that those actions withstand challenge.

2. *Southern Union's Attack on the Legality of the Federal Authorization of Rhode Island's Regulation of CESQGs Fails*

Southern Union's arguments fall into several general categories. It argues (1) that the 2002 Rule is not a binding legislative rule on its face for several reasons; (2) that the agency erred in its interpretation of the requirements in 40 C.F.R. § 271.1(i), because the state rule provides a "greater scope of coverage" and so cannot be within federal enforcement authority; and (3) that the 2002 Rule is invalid because it is inconsistent with prior EPA practice and that inconsistency has not been adequately explained or justified.

[6] First, Southern Union challenges the authority under which the 2002 Rule was promulgated and the legal force of the Rule's statement that Rhode Island's regulation of CESQGs is federally enforceable. Southern Union claims, without citing authority, that the "EPA delegated to the Regions only the responsibility to authorize state RCRA programs under Section 6926(b)," not "to determine or expand the breadth of federal enforcement authority." But the EPA has a statutory duty to approve state programs to the extent they meet the statutory and regulatory criteria. Southern Union does not explain how the EPA—including the regional administrators exercising their delegated authorization responsibilities—can fulfill that duty without specifying which parts of a state's program fulfill the criteria, thereby becoming federally approved and enforceable.

8. Compare *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 565 (D.C.Cir.2009) with 72 Fed.Reg. 13,560, 13,560, 13,580 (Mar. 2, 2007) (Federal Register notice at issue in *Natural Res. Def. Council*); compare *Florida*

[7] Still pursuing its attack on the legal force of the 2002 Rule, Southern Union argues that the portion of the Rule that discusses federal enforceability is a mere unenforceable preamble. Cf. *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418–20 (D.C.Cir.1998) (describing preamble to a proposed rule as not a final action for purposes of 42 U.S.C. § 6976(a)). It argues that the 2002 Rule neither purports to be a binding rule nor can be one, since it was not simultaneously codified in the Code of Federal Regulations. Cf. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538–39 (D.C.Cir.1986) (characterizing publication in Federal Register as minimum threshold requirement for status as regulation, *id.* at 538, but stating "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations," *id.* at 539).

As a threshold matter, Southern Union's preamble argument is factually wrong. Unlike the Federal Register notices in the cases Southern Union cites, the 2002 Rule was not divided into separate preamble and rule sections and did not portray *any* part of the notice as "preamble."<sup>8</sup> Southern Union mischaracterizes other salient features of the 2002 Rule as well. The EPA authorization expressly stated that the action the EPA was taking was an "[i]mmediate final rule," 67 Fed.Reg. at 51,765; that it was a "final authorization" under 42 U.S.C. § 6926, 67 Fed.Reg. at 51,765, 51,768; and that the rule would later be codified in the Code of Federal Regulations, *id.* at 51,768. Moreover, the EPA clearly treated the 2002 authorization as having binding legal force, promulgat-

*Power & Light Co. v. EPA*, 145 F.3d 1414, 1414–18 (D.C.Cir.1998), with 59 Fed.Reg. 55,778, 55,778, 55,792 (Nov. 4, 1994) (Federal Register notice at issue in *Florida Power & Light*).

ing it through formal notice-and-comment rulemaking, and stating in the rule itself that the rule represented final agency action.<sup>9</sup>

[8] Second, Southern Union presents an argument construing the relevant federal regulation. It argues that since the baseline federal program does not require CESQGs to obtain hazardous waste storage permits, the United States cannot enforce state rules that do. We reject this strained interpretation of 40 C.F.R. § 271.1(i), which governs federal authorization of state hazardous waste programs. The provision reads as follows:

(i) Except as provided in § 271.4, nothing in this subpart<sup>10</sup> precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;

(2) Operating a program with a greater scope of coverage than that required under this subpart. Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

On Southern Union's interpretation of the regulation, any state rule that is not "required" by the federal baseline program necessarily imposes "a greater scope of coverage," and so the district court erred when it held that "more stringent" requirements are federally approved while

only greater-in-scope requirements are not. We reject Southern Union's interpretation because it vitiates the clear distinction between "more stringent" and "greater in scope," collapsing the two terms into one.

[9] Beyond that, if there were any ambiguity, we would "afford[ ] 'considerable deference' to the agency's interpretation of regulations promulgated under [its statutory] authority." *Rhode Island Hosp. v. Leavitt*, 548 F.3d 29, 34 (1st Cir.2008); see also *Martex Farms, S.E. v. EPA*, 559 F.3d 29, 32 (1st Cir.2009). Here, where the agency has expressed that interpretation in a legislative rule promulgated through notice-and-comment rulemaking, the agency's interpretation is binding unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or otherwise defective under the APA. See *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir.1983); see also *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed.Cir.2006) (stating that a substantive rule has the force and effect of law).

Southern Union offers no argument that the EPA's interpretation is arbitrary or capricious, or that the agency somehow exceeded its statutory authority. It argues only that its own reading is better on the plain language of the regulation. We do not agree about the reading and in any event this is not enough. The EPA's in-

9. In applying the similar review provision in § 6976(a), the D.C. Circuit examines three factors to determine whether the EPA has issued a "final regulation" under RCRA: (1) EPA's characterization of the action, (2) whether the action was published in the Federal Register or the Code of Federal Regulations, and (3) most importantly, whether the action has a binding effect on either private parties or the EPA. *E.g., Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226–27

(D.C.Cir.2007); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C.Cir.2004) (stating third factor most important). We need not address whether this circuit would take a similar view.

10. This subpart includes 40 C.F.R. §§ 271.1–271.27 inclusive, all of which sections specify requirements for federal authorization of state programs.

terpretation of 40 C.F.R. § 271.1(i) to permit federal enforcement of “more stringent” state regulations is a reasonable one based on the text and structure of the regulation.<sup>11</sup>

Southern Union argues in the alternative that even if “more stringent” requirements are federally authorized, a state’s regulation of CESQGs is “additional coverage” rather than merely a “more stringent” requirement because it expands the universe of regulated entities to include entities that would not otherwise be covered by RCRA.

Southern Union’s argument is based on its misreading of 40 C.F.R. § 261.5. This federal regulation clearly regulates CESQGs, governing how they categorize their waste, where they may store it, and how they may dispose of it. 40 C.F.R. § 261.5(c), (g). This is in addition to the eligibility requirements for categorization as a CESQG in a given month. 40 C.F.R. § 261.5(a), (g)(2). Further, because the eligibility requirements are based on the amount of hazardous waste generated or stored in a particular month, CESQG status is transient, so that some generators will be CESQGs only some of the time. It does not expand the universe of regulated entities to subject already-regulated entities to fuller regulation in Rhode Island.

[10] Third, and finally, Southern Union strongly urges that the 2002 Rule is invalid because it is irrationally inconsistent with prior pronouncements of the EPA’s position on the regulation of CESQGs and on which state regulations will receive federal authorization. Southern Union’s argument relies primarily on various nonbinding EPA guidance documents stemming from the agency’s interpretations, in the 1980s, that state regulation of CESQGs was not

federally enforceable. However, these internal guidance documents have not been put forth as legally binding and were not promulgated through notice-and-comment rulemaking, and therefore cannot trump the agency’s formal regulatory promulgations. *Cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Southern Union also points in passing to prior formal EPA authorizations of state programs—in 1992 as to California and in 2001 as to the District of Columbia—determining that state regulation of CESQGs was not then, in the EPA’s view, federally enforceable. *See* 66 Fed.Reg. 46,961, 46,965 (Sept. 10, 2001) (District of Columbia); 57 Fed.Reg. 32,726, 32,729 (July 23, 1992) (California). Southern Union argues the 2002 EPA Rule authorizing Rhode Island’s program cannot be binding on the regulated community because it is inconsistent with these prior determinations.

We briefly explain why the 2002 Rule is not subject to attack on grounds of irrational inconsistency with other EPA authorizations of state programs. The facts show that Southern Union overstates the supposed conflict. Since 1999, with the sole exception of the District of Columbia in 2001, EPA has consistently characterized state regulation of CESQGs as federally enforceable. *See* 72 Fed.Reg. 12,568, 12,570 (Mar. 16, 2007) (Vermont); 71 Fed.Reg. 9727, 9732, 9733 (Feb. 27, 2006) (New Hampshire); 69 Fed.Reg. 57,842, 57,856 (Sept. 28, 2004) (Connecticut); 64 Fed.Reg. 48,099, 48,101 (Sept. 2, 1999) (Louisiana). The District of Columbia decision in 2001 demonstrates, at worst, an aberration, and the agency has maintained a consistent position ever since. In this vein, EPA has issued a proposed rule making California’s CESQG regulations feder-

11. Southern Union does not challenge the validity of 40 C.F.R. § 271.1(i) itself (nor

could it, since such a challenge would be untimely under 42 U.S.C. § 6976(a)).

ally enforceable. 75 Fed.Reg. 60,398, 60,-401-02 (Sept. 20, 2010).

[11] Policy change over time is not irrational inconsistency. Agencies may change their policies provided substantive changes in an agency's position are accomplished by notice-and-comment rulemaking, *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C.Cir.2005), and accompanied by "some indication that the shift is rational," *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir.1995) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (stating agency's rationale must be clear "so that the reviewing court may understand the basis of the agency's action.")). These conditions are met here. Each state program authorization has been promulgated through notice-and-comment rulemaking. And the change was clearly rational; the EPA's "reasoned basis" for deciding state CESQG regulations are federally enforceable is clearly discernible from the very text and structure of the regulation. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

C. *Southern Union's Due Process Claim*

[12] There was no lack of due notice to Southern Union that its behavior could lead to criminal prosecution.

[13] The law embodies two common-sense notions in the face of protestations of innocence by reason of ignorance. One is that those who keep dangerous materials on hand know their activity is regulated. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) ("[W]here . . .

obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."). The other is that those who manage companies in highly regulated industries are not unsophisticated. Southern Union is in the natural gas industry, which is highly regulated both federally and locally. It is part of its business to keep abreast of government regulation. *See United States v. Lachman*, 387 F.3d 42, 56-57 (1st Cir.2004) (stating that companies in highly regulated industries are presumed to be on notice of applicable regulatory regime).

Further, the company's activities put it in violation of state law. R.I. Gen. Laws § 23-19.1-18 (making violation of state hazardous waste rules a felony punishable by imprisonment, \$25,000 fine for each day's violation, and remediation costs). Southern Union does not argue it lacked notice of that. Rather, it argues it lacked notice that it could be federally prosecuted for activity it acknowledges was a state crime. We have held in a parallel situation that notice that conduct violates state law constitutes fair notice of a counterpart federal violation. *United States v. Gagnon*, 621 F.3d 30, 33 (1st Cir.2010).

In any event, the Environmental Services Manager for Southern Union's New England Gas Company subsidiary received a letter in July 2002 explaining that the EPA would soon authorize revisions to Rhode Island's hazardous waste program and inviting the company to comment. The company had actual notice of the publication of a Final Rule. The ensuing federal 2002 Rule was crystal clear on its face that the state standards would be federally enforced. It became effective twenty-three months before the event which led to the prosecution of Southern Union. There

was no trap for the unwitting here. Obliviousness is not a defense.

[14] Southern Union also claims that because in 1992 and 2001 the EPA declined federal enforcement of CESQG regulations in California and the District of Columbia, respectively, federal enforcement of Rhode Island's CESQG regulations is so irrational as to violate due process. As we have noted, the EPA has proposed federal enforcement in California, and all enforcement decisions since 1999, save for the aberration of the District of Columbia, have been consistent with the Rhode Island enforcement decision. Southern Union has failed to show meaningful inconsistency, much less irrational inconsistency. Our conclusion above that the EPA has over time engaged in a rational shift toward a policy of federal enforcement disposes of this due process argument as well.

### III. CHALLENGES TO THE FINE

The statutory fine for knowing storage of hazardous waste without a permit is "not more than \$50,000 for each day of violation." 42 U.S.C. § 6928(d). The district court imposed a \$6 million fine and a \$12 million "community service obligation." Southern Union adequately preserved an objection to these penalties on the grounds that the \$38.1 million maximum fine calculated in the pre-sentence report violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).<sup>12</sup>

*Apprendi* requires that "any fact" other than that of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. Southern Union argued at sentencing that the court could not impose a fine greater than \$50,000, the maximum fine for a one-day violation. That was because Southern Union presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the loose mercury as a recyclable resource rather than as waste. The jury, it notes, was not asked to determine the number of days of violation, but only "to determine whether . . . at some point in time the liquid mercury was discarded by being abandoned" (emphasis added).

The prosecution argued that the *Apprendi* rule against judicial factfinding does not apply in the context of criminal fines. The district court held that *Apprendi* does apply, but found it implicit in the jury verdict and the indictment on which the verdict form was based that Southern Union had violated RCRA for the full 762 days charged in the indictment. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at \*3-4 (D.R.I. July 9, 2009) (*Southern Union II*). It then used that information to calculate the maximum fine of \$38.1 million. *Id.* at \*4. The indictment charged conduct "[f]rom on or about September 19, 2002 until on or about October 19, 2004," and the verdict form encompassed Southern Union's conduct "[a]s to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004." From these, the court concluded that the jury had found beyond a reasonable doubt that Southern Union violated RCRA during the entire period from approximately September 19, 2002 until October 19, 2004. *Southern Union II*, 2009 WL 2032097, at \*3.

<sup>12</sup> The district court found Southern Union had waived the *Apprendi* argument by failing to raise the issue during discussions about the structure of the jury verdict form, and raising the issue for the first time in objecting to the presentence report. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at \*2 (D.R.I. July 9, 2009) (*Southern Union II*). Southern Union disagrees that there was

waiver, given that in *United States v. Pérez-Ruiz*, 353 F.3d 1, 14 (1st Cir.2003), we found that "[i]n order to preserve a claim of *Apprendi* error for appeal, it is enough that a defendant offer a timely objection at sentencing." *Id.* The prosecution did not seek the district court's waiver ruling and does not press it on appeal.

On appeal, Southern Union makes two arguments challenging the fine. First, it argues that where the statute of conviction sets a maximum fine of \$50,000 “for each day of violation,” 42 U.S.C. § 6928(d), then the issue of the number of days of violation must be submitted to the jury under *Apprendi*. Second, it argues that the penalties imposed constituted an abuse of discretion. While we disagree with the district court on the *Apprendi* issue, we also reject Southern Union’s arguments.

A. *Apprendi Does Not Apply to Criminal Fines*

We start with the *Apprendi* argument, which presents a pure issue of law, reviewed de novo. *United States v. González-Vélez*, 466 F.3d 27, 40 (1st Cir.2006). It is an open question in this circuit whether *Apprendi* applies to criminal fines, though we have assumed that criminal fines are subject to the rule of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a post-*Apprendi* case on the Federal Sentencing Guidelines. *United States v. Bevilacqua*, 447 F.3d 124, 127 (1st Cir.2006); see also *United States v. Uribe-Londoño*, 409 F.3d 1, 5 n. 5 (1st Cir.2005).

Southern Union argues that the question of whether *Apprendi* applies is resolved by the plain language of the Supreme Court’s opinion in that case, which states that the rule covers “any fact that increases the penalty for a crime” beyond the statutory maximum. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added). If *Apprendi* applies only to facts increasing terms of incarceration, and not to criminal fines, Southern Union argues, the Court’s use of the broad word “penalty” becomes superfluous, and corporations, which cannot be incarcerated, are left outside *Apprendi*’s protection.

[15] The Supreme Court extended the *Apprendi* rule to new contexts in several post-*Apprendi* decisions. See *Ring v. Ari-*

*zona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (applying rule to statute authorizing death penalty upon judge’s finding of aggravating factor); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (applying rule to statute authorizing “exceptional sentence” upon judge’s finding of aggravating factor); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (applying rule to mandatory Federal Sentencing Guidelines enhancements); *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (applying rule to scheme authorizing schedule of longer prison terms if judge finds aggravating circumstance). Under these decisions, a judge may not mete out any “punishment” for which the jury has not found all the necessary “facts.” *Blakely*, 542 U.S. at 304, 124 S.Ct. 2531. This has been called a “bright-line rule.” *Cunningham*, 549 U.S. at 288, 127 S.Ct. 856. These cases do not distinguish among types of “penalties” or “punishment,” leaving the broad language un glossed. From this one might conclude that a fine is like all other penalties, or one could reach a different conclusion. What is clear is that none of these cases deals with the question of whether the imposition of a fine falls under the *Apprendi* rule.

The prosecution argues that both the reasoning and the express language in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), mean that *Apprendi* does not apply to criminal fines, which have historically been within the discretion of judges, and not assigned to juries for determination. In *Ice*, the Court upheld a state sentencing regime that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration. *Id.* at 720.

The Court characterized its decisions under *Apprendi* as curtailing any “legislative attempt to ‘remove from the [province of the] jury’ the determination of facts that warrant punishment for a specific statutory offense.” *Id.* at 718 (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348) (alteration in original). The Court, reasoning from historical practice, cautioned that “preservation of the jury’s historic role as a bulwark between the State and the accused at the trial for an alleged offense” is the “animating principle” in which the *Apprendi* rule must remain rooted. *Id.* at 717. The Court expressly considered the history at common law of the practice *Ice* challenged. Finding that at the time of the Founding, it was judges who chose whether to impose sentences concurrently or consecutively, and that therefore no traditional jury function had been curtailed by Oregon’s scheme, the Court declined to extend the *Apprendi* rule to this determination.<sup>13</sup> *Id.* at 717–18. The logic and method of *Ice* alter any previous broad understanding of *Apprendi*.

The prosecution argues that we should follow not only the method of historical analysis endorsed by *Ice* but also the opinion’s express language about criminal fines. The Court made an express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines. Observing that many states permit judicial factfinding on matters “other than the length of incarceration,” the Court ex-

plained that “[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution.”<sup>14</sup> *Id.* at 719. The Court warned that applying *Apprendi* to these types of determinations “surely would cut the rule loose from its moorings.” *Id.*

[16] We agree that we must give this language great weight. We do not discount the Supreme Court’s language merely because it was used in dicta. We “are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement.” *Rossiter v. Potter*, 357 F.3d 26, 31 n. 3 (1st Cir.2004) (alteration in original) (quoting *McCoy v. MIT*, 950 F.2d 13, 19 (1st Cir. 1991)) (internal quotation mark omitted).

[17] Turning again to the method of reasoning the Court used in *Ice*, we agree with the prosecution that we must follow the logic of *Ice*’s reasoning, which further supports the conclusion that *Apprendi* does not apply to criminal fines. As the Supreme Court recently stated, “[a] holding . . . can extend through its logic beyond the specific facts of the particular

13. The Court explained that its decision was also justified by states’ sovereign interest in maintaining authority over their criminal justice systems and by the administrative difficulties the contrary rule, which could necessitate bifurcated or trifurcated trials, would place on state court systems. *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 718–19, 172 L.Ed.2d 517 (2009). The prosecution has provided a long list of state statutes that impose fines per day of violation, urging this court to consider the impact on state sovereignty that the application of *Apprendi* to fines could have on these statutes. Because we find ample reason not to extend the rule here, we need not decide the merits of this argument.

14. We have previously held that orders of restitution are not subject to the *Apprendi* rule. See *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir.2006). There, we explained that the statutory scheme for restitution, under which the court determines the victim’s losses by a preponderance of the evidence, *id.* at 403, does not trigger the principles underlying *Apprendi* because the jury’s verdict of guilt automatically authorizes restitution in the full amount of the victim’s losses, *id.* at 404. We reached this result despite noting that a “literal application of the Supreme Court’s language might suggest” that the *Apprendi* rule does apply, *id.* at 403, indicating that even before *Ice* the Supreme Court’s *Apprendi* line of cases tolerated nuanced application despite the cases’ broad language.

case.” *Los Angeles County v. Humphries*, — U.S. —, 131 S.Ct. 447, 453, 178 L.Ed.2d 460 (2010).

Applying *Ice*’s reasoning and logic to the issue in this case, it is now highly relevant that, historically, judges assessed fines without input from the jury.<sup>15</sup> Judges had discretion to determine the amount of any fine imposed, and “[t]he range was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid.” Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982). This is in direct contrast with the Supreme Court’s reasoning in the *Apprendi* context that the “English trial judge of the later eighteenth century had very little explicit discretion in sentencing.” *Apprendi*, 530 U.S. at 479, 120 S.Ct. 2348 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *The Trial Jury in England, France, Germany 1700–1900*, at 13, 36–37 (A. Schiappa ed., 1987)). Judicial discretion was limited in this context because the jury decided what level of crime the defendant had committed, which in turn largely determined the sentence. *Id.* at 479–80, 120 S.Ct. 2348.

Southern Union’s main rejoinder is that historical practices do not speak to the specific issue here, the determination of the duration of an offense on which a fine is determined.<sup>16</sup> Even assuming fines are similar to sentences of incarceration, this argument misses the point of the analogy

and the flow of the logic used by the *Ice* majority. The historical record presented in *Ice* showed that at common law, judges chose within their unfettered discretion whether to impose consecutive or concurrent sentences, and consecutive sentences were the default rule. *Ice*, 129 S.Ct. at 717. The prosecution here presents strong evidence of historic practice that at common law, judges’ discretion in imposing fines was largely unfettered. The Court in *Ice* specifically cautioned that it would be senseless to use *Apprendi* to nullify sentencing schemes in which legislatures have *curtailed* the discretion judges had at common law. *Id.* at 719.

Our view that *Ice* has effected a change in the application of the *Apprendi* rule to the issue in this case is directly supported by the dissent in *Ice*. The four dissenting Justices stated that the majority opinion had altered the method of analysis underlying *Apprendi* in at least five different ways. *Id.* at 721–22 (Scalia, J., dissenting). They protested that the majority had constructed formal limits narrowing the broad, “nonformalistic rule” originally set forth in *Apprendi*. *Id.* at 720. The dissent stated that the *Ice* majority had accepted arguments the Court had previously rejected under *Apprendi* about the relevance of common-law sentencing practices to the constitutionality of modern legislative sentencing schemes. *Id.* at 720–22. The dissent, colorfully accusing the majority of giving life to arguments previously

15. Before incarceration became widely used, “the two main forms of noncapital punishment were whippings and fines, and in both cases, the judge could set the amount or even elect between the two, depending on the nature of the defendant and the crime.” Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L.Rev. 621, 641 (2004).

16. Southern Union also argues that there is evidence that ten states allowed juries to determine fines at the turn of the twentieth century. Such evidence, however, is of little utility where the inquiry concerns the role of the jury at common law. *See Ice*, 129 S.Ct. at 717 (“Our application of *Apprendi*’s rule must honor the ‘longstanding common-law practice’ in which the rule is rooted.”) (quoting *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)).

“dead and buried,” insisted that the Court’s opinion in *Ice* “gives cause to doubt whether the Court is willing to stand by” the *Apprendi* rule. *Id.* at 723.

Our holding is based on the Supreme Court’s language in *Ice* that “[i]ntruding *Apprendi*’s rule into” decisions such as “the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings.” *Id.* at 719 (majority opinion). To the extent that excluding criminal fines from *Apprendi* requires a more restrained view of the rule’s scope than did the Court’s previous *Apprendi*—line decisions, it is the Supreme Court in *Ice* that has imposed the restraint. *See id.* (“Members of this Court have warned against ‘wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.’”) (quoting *Cunningham*, 549 U.S. at 295, 127 S.Ct. 856 (Kennedy, J., dissenting)).<sup>17</sup>

[18] In the interest of judicial economy and efficiency we reach an additional issue. We hold that if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing. The district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment. *Southern Union II*, 2009 WL 2032097, at \*3. The court reasoned that the indictment’s description of the date range—from “on or about September 19, 2002 to October 19, 2004”—was “listed on

17. We recognize that two circuits, which could not or did not discuss *Ice*, have applied *Apprendi* to criminal fines. *See United States v. Pfaff*, 619 F.3d 172 (2d Cir.2010); *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585 (7th Cir.2006). In *LaGrou*, which was decided before the Supreme Court’s decision in *Ice*, the Seventh Circuit simply quoted the rule in *Apprendi* and held that the fine

the verdict form and found by the jury beyond a reasonable doubt.” *Id.* From this date range the court calculated a period of violation of 762 days, resulting in a statutory maximum fine of \$38.1 million, reduced a bit at the margin due to the “on or about” language in the verdict form. *Id.*

The prosecution essentially concedes and we agree that if *Apprendi* did apply to criminal fines, the jury did not necessarily determine the number of days of violation. The jury did not need to find that Southern Union began to violate RCRA “on or about” September 19, 2002 in order to convict Southern Union on Count 1. As the court instructed the jury, the jury needed only to “determine . . . whether *at some point* in time the liquid mercury was discarded by being abandoned” and therefore ceased to be legally held for future recycling and began to be stored as waste (emphasis added). Southern Union produced evidence that at several points throughout the indictment period, and as late as the summer of 2004, Southern Union employees discussed a potential mercury recycling project. The district court could not conclude from the verdict form the number of days of violation the jury had necessarily found.

[19, 20] Where an error is constitutional in nature, “the government has the burden of proving beyond a reasonable doubt that the error did not affect the defendant’s substantial rights.” *United States v. Sepúlveda-Contreras*, 466 F.3d 166, 171

imposed in that case violated the rule. *LaGrou*, 466 F.3d at 594. In *Pfaff*, the Second Circuit cited to *LaGrou* without adding analysis of its own, other than to distinguish criminal fines from restitution on the stated grounds that only criminal fines are subject to statutory maximums. *Pfaff*, 619 F.3d at 174–75.

(1st Cir.2006). *Apprendi* error is harmless “where the evidence overwhelmingly establishes” the facts necessary “to justify the statutory maximum under which the defendants were sentenced.” *United States v. Soto-Beníquez*, 356 F.3d 1, 46 (1st Cir.2004). That is not this case. We reject the prosecution’s suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment.

If, then, we are wrong about whether the *Apprendi* rule applies to criminal fines, the case would need to be remanded to the district court for resentencing. The district court would need to address several issues that we mention but do not resolve here.

First, it would need to address the prosecution’s argument at sentencing that even if *Apprendi* applied, Southern Union could be assessed a \$500,000 fine under the alternative fine statute. *See* 18 U.S.C. § 3571(c).

Second, it may need to clarify the nature of the financial penalties it imposed. At sentencing, after determining that the statute “yields a maximum fine . . . of \$38.1 million,” the district court characterized the \$18 million in financial penalties it imposed as two separate pools of funds, including a “fine” of \$6 million and a “community service obligation,” listed in the court’s judgment as a special condition of probation, of \$12 million.<sup>18</sup> In describing the community service obligation, the court did not use the term “restitution,” but

neither did the court specify that it was part of a total fine.

[21] The prosecution argues that the district court should be “permitted to clarify the status of the \$12 million” it assessed in community service obligations as “restitution.” Restitution is exempt from *Apprendi* under our circuit law. *United States v. Milkiewicz*, 470 F.3d 390, 402–04 (1st Cir.2006).

Southern Union, in its opening brief, ignored the district court’s treatment of the financial penalties as having two separate components, and described its obligations as a single \$18 million penalty. In its reply brief, it argues that the district court cannot recharacterize the community service obligations as restitution because it did not invoke the statutory restitution procedure before sentencing. *See* 18 U.S.C. § 3664. If a remand were necessary, the district court may need to address these issues in the first instance and determine which arguments Southern Union has preserved.

B. *The Fine Imposed Was Reasonable*

[22, 23] We review the reasonableness of the sentence imposed, upholding the sentence unless the district court abused its discretion. *United States v. Carrasco-De-Jesús*, 589 F.3d 22, 26 (1st Cir.2009); *United States v. Thurston*, 544 F.3d 22, 24–25 (1st Cir.2008). First, we determine whether the district court considered the relevant statutory sentencing factors and adequately explained the sentence it chose.<sup>19</sup> *See United States v. Martin*, 520

18. \$1 million of the \$12 million obligation is designated for the following recipients: \$200,000 each for the Rhode Island Chapter of the American Red Cross, the Rhode Island Environmental Response Fund, the Hasbro Children’s Hospital in Providence, the state Distressed Communities Recreation and Acquisition Fund, and the Pawtucket Fire De-

partment. The remaining \$11 million is designated to endow a grantmaking fund, to be managed by the Rhode Island Foundation, in order to fund grants in environmental education, remediation, conservation, and children’s health issues related to toxic waste.

19. Southern Union does not challenge the district court’s pertinent findings of fact.

F.3d 87, 92 (1st Cir.2008) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Second, we consider whether the sentence is substantively reasonable under the totality of the circumstances, giving due deference to the district court's experience and familiarity with the facts of the case. *Id.*

[24] The Sentencing Guidelines on fines do not apply here, and so in addition to the relevant RCRA provision, 42 U.S.C. § 6928(d), the district court was obliged to consider only the sentencing factors in 18 U.S.C. §§ 3553 and 3572. U.S.S.G. §§ 8C2.1 cmt. background, 8C2.10 (2009); see also *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310–11 (2d Cir.2009) (explaining review of fine imposed when Sentencing Guidelines do not apply). Even assuming arguendo that the \$12 million community service obligation was a fine, the financial penalties imposed were within the discretion of the district court.

[25] Southern Union argues that the district court misapplied the statutory sentencing factors, placing too much emphasis on factors likely to increase the fine, such as the company's profitability, and too little on mitigating factors, such as its prior history as a clean, responsible corporate citizen and its outlays in remediating the damage from the mercury distribution. The prosecution urges us to review these claims only for plain error, because Southern Union failed to present them to the district court despite clear opportunity to do so after the court announced the sentence. See *United States v. Almenas*, 553 F.3d 27, 36 (1st Cir.2009) (applying plain error review); *United States v. Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir.2007) (same). In any event we hold there was

no procedural error, let alone plain error, in the district court's methodical, detailed consideration of each sentencing factor.

[26] Southern Union also claims the \$18 million penalty was substantively unreasonable, arguing that it was grossly excessive in comparison to the penalties of \$75,000–\$250,000 imposed in what it describes as cases of more egregious RCRA violations. See 18 U.S.C. § 3553(a)(6) (requiring courts to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”). But the district court made “an individualized assessment based on the facts presented,” and “adequately explain[ed] the chosen sentence.” *Gall*, 552 U.S. at 50, 128 S.Ct. 586.

The district court explained why the statutory factors justified the penalties, noting that Congress measured the seriousness of long-term RCRA violations by imposing a high, per-day statutory maximum fine; that Southern Union's willingness to put a densely-populated residential community, local public safety employees, and its own employees at risk by storing hazardous waste under deplorable conditions in their midst indicated great culpability; and that there was a need for a penalty substantial enough to attract the attention of large corporations, thereby achieving not only specific, but also general, deterrence. Further, the district court specifically acknowledged the need to avoid creating unwarranted disparities, but explained that it had concluded that “sentencing in criminal environmental matters is a very individualistic task” in which case-to-case comparisons are difficult to make.<sup>20</sup> Reviewing the totality of the cir-

20. Based on the five cases Southern Union encourages us to consider, the court's conclusion was warranted. Four were resolved by plea agreements. The fifth, *United States v.*

*Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir.1998), upheld an RCRA conviction for which a \$225,000 fine was imposed. *Id.* at 444. Kelley's sentence was not at issue on

cumstances, we find no abuse of discretion in the sentence imposed by the district court.

IV.

In this case each side has been well represented by able counsel.

For the reasons stated above, we affirm Southern Union's conviction as well as the sentence and financial penalties imposed.

*So ordered.*



UNITED STATES of America,  
Appellee,

v.

Ricardo RODRIGUEZ, Defendant,  
Appellant.

No. 09–1429.

United States Court of Appeals,  
First Circuit.

Heard July 29, 2010.

Decided Dec. 28, 2010.

**Background:** Defendant was convicted upon his plea of guilty in the United States District Court for the District of Massachusetts, F. Dennis Saylor IV, J., of multiple firearm offenses, and he appealed.

**Holding:** The Court of Appeals, Thompson, Circuit Judge, held that district court's error in applying Sentencing

appeal, and the opinion lacks information necessary to any reasoned comparison—for instance, whether Kelley's manufacturing plants were in a populated area, or how large or profitable Kelley was. See *id.* at 435–36. Further, the Sixth Circuit affirmed the conviction of Kelley's vice president and his sen-

Guideline in effect at time of sentencing was plain error.

Vacated and remanded.

1. Criminal Law ⇨1030(1)

Under the plain error standard of review, a defendant must show an error that was obvious and that not only likely affected the result in the lower court but also threatens a miscarriage of justice if not corrected.

2. Sentencing and Punishment ⇨651, 661.5

The Sentencing Guidelines are no longer binding, and district judges can choose sentences that differ from the Sentencing Commission's recommendations, provided they stay within the range set by the statutes of conviction. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

3. Sentencing and Punishment ⇨651

*Post-Booker*, a judge sentencing a defendant still must start out by calculating the proper Guidelines range. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

4. Sentencing and Punishment ⇨34, 40, 651

After calculating the proper Guidelines range, judges can sentence inside or outside the advisory range, as long as they stay within the statutory range and consider the statutory sentencing factors, which include the nature of the offense, the background of the defendant, the seriousness of the crime, the need to deter criminal conduct, and the need to protect the public

tence to a fine and imprisonment, *id.* at 443–44—a substantial penalty imposing individual responsibility that is completely absent in Southern Union's case since, as the district court noted, there is no evidence of any individual shouldering any responsibility for the company's RCRA violation.