

70 Fed. Reg. 19992, 20009–10 (Apr. 15, 2005) (emphasis added). EPA’s reasoning was clear; this “allows the new requirements to be incorporated into the considerations of design and operation of the new source.” *Id.* at 20010. The same logic also must be applied to the current Proposed Rule.

The Portland cement manufacturing rule from 2000 provides another example of EPA’s practice of treating only facilities built *after* a new rule is proposed as “new sources.” EPA originally promulgated new emissions standards in 2000, but the D.C. Circuit Court remanded because EPA failed to set standards for certain HAPs. *See generally Nat’l Lime Ass’n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000). Following the remand, EPA promulgated revised standards in 2006: *National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, Final Rule*, 71 Fed. Reg. 76518 (Dec. 20, 2006). EPA applied the revised standards only to those sources constructed after 2005. In doing so, EPA expressly rejected comments seeking to apply the revised standards to sources constructed after 1999, when the original, remanded standards were proposed. 71 Fed. Reg. at 76518.²⁰

In defending its interpretation, EPA reasoned:

The whole premise of new source standards being potentially more strict than for existing sources . . . is that *these sources are being newly constructed and hence can immediately install the best pollution controls without incurring the time or expense of retrofitting*. Put another way, *new sources know from the beginning of the construction effort what controls will be required*, and do not have to incur the higher costs and the time-consuming disruptions normally associated with control retrofits. If we were to require ‘new sources’ that commenced construction prior to [2005] to retroactively install controls because we have changed rule requirements, then these particular sources would have to bear retrofit costs that we do not believe were intended by the CAA.

71 Fed. Reg. at 76541 (emphasis added). EPA further defended its refusal to retroactively apply the standards to sources constructed as early as 2000 by stating, “This reading makes no sense in the context of a court action which essentially required EPA to reexamine the entire issue, and re-determine what the standard should be. Under such circumstances, *the only reasonable date for determining new source applicability for a resulting standard would be the date EPA proposes it.*” *Id.* (emphasis added).

The only reasonable date for determining new source applicability, therefore, is the date EPA proposes the new amendments. A logical reading of the CAA and EPA’s own history of practices and enforcement support the conclusion that all SunCoke facilities must be considered “existing sources.”

²⁰ *See also National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, Proposed Rule*, 70 Fed. Reg. 72330, 72336 (Dec. 2, 2005) (“The underlying principle for having new sources meet stricter standards . . . is that such sources are essentially starting from scratch and, therefore, can most efficiently utilize the best means of pollution control. They will not need to retrofit. Sources classified as new under the [original standard] are not in this position. They have already commenced construction (and most likely started operating) and so are not in the position of a source starting *de novo*.”).