

NATIONAL GREENHOUSE AND ENERGY REPORTING ACT 2007

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NATIONAL GREENHOUSE AND ENERGY REPORTING  
(SAFEGUARD MECHANISM) AMENDMENT (EXTENDED  
TRANSITION) RULE 2020

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EXPLANATORY STATEMENT

(Issued by the authority of the Minister for Energy and Emissions Reduction)

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# *Contents*

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General outline and statements .....	3
Background .....	3
Purpose .....	4
Authority .....	5
Consultation .....	5
Regulatory impact analysis .....	5
Safeguard Rule details.....	5
Statement of Compatibility with Human Rights .....	6
Details of the sections in the Amendment Rule.....	7
Schedule 1 – Amendments.....	7
Statement of Compatibility with Human Rights .....	11

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## *General outline and statements*

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### **Background**

The *National Greenhouse and Energy Reporting Act 2007* (the Act) establishes a single national framework for reporting and disseminating company information about greenhouse gas emissions, energy production, energy consumption and other information. The Safeguard Mechanism is part of the Act. Together with the reporting obligations under the Act, the Safeguard Mechanism provides a framework for Australia's largest emitters to measure, report and manage their emissions.

Section 22XS of the Act empowers the Minister to make legislative rules to implement the Safeguard Mechanism. The Safeguard Mechanism was established through the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the Principal Rule). The Principal Rule specifies the administrative detail of how safeguard provisions are implemented and the administrative processes for demonstrating compliance with Safeguard obligations.

Amendments were made to the Principal Rule in March 2019 to:

1. Bring baselines up-to-date by transitioning all facilities to calculated or production adjusted baselines over 2018-19 and 2019-20;
2. Simplify calculated baseline applications by giving businesses the option to use Government-determined *prescribed production variables* and *default emissions intensity* values for calculating baselines; and
3. Update baselines annually for actual production where facilities use eligible production variables, so they continue to reflect facility circumstances.

The March 2019 amendments established a transition period that covered the 2018-19 and 2019-20 compliance years. All facilities could apply for a transitional calculated baseline during this period where they have the option to use either:

- **default values:** Government-determined prescribed production variables and default emissions intensity values (collectively referred to as 'default values'); or
- **estimated (site-specific) values:** which take account of individual facility circumstances, either as a site-specific production variable or a site-specific 'estimated' emissions intensity value.

The March 2019 amendments established that at the end of the transition period (1 July 2020), reported (historical) baselines expire for all facilities except grid-connected electricity generators.

In September 2019, the Principal Rule was amended to extend the application deadline for calculated-emissions baselines starting in the 2018-19 compliance year in certain circumstances. The September 2019 amendment provided facilities with greater access to the new framework established in the March 2019 amendment.

In March 2020, the Principal Rule was amended to insert Government-determined prescribed production variables and corresponding default emissions intensity values into Schedules 2 and 3 of the Principal Rule to give effect to the amendments made to the Principal Rule in March 2019.

## **Purpose**

*The National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020* (the Amendment Rule) was developed in response to the coronavirus (COVID-19) pandemic. The pandemic is causing significant and widespread workforce disruptions at Safeguard facilities, and some facilities are rapidly changing their processes and product mixes as they implement their pandemic management plans. This is negatively affecting facilities' ability to develop baseline applications, access independent third parties to audit baseline applications, and engage in the development of default values and benchmark emissions intensity values for use in baseline applications. Safeguard facilities are impacted by both domestic and global impacts of the pandemic.

The Amendment Rule implements a number of administrative timing changes to the Principal Rule to delay the requirement to apply for new baselines during the unfolding COVID-19 pandemic. Facilities could have remained on reported baselines for the 2019-20 year under the Principal Rule, however many would have chosen to move to new baselines that commence at the start of the 2019-20 year in order to access estimated (site-specific) values in that year. The primary effect of the Amendment Rule is to extend the transition period by one year, including allowing facilities to continue to be subject to their existing reported baselines for an additional year.

In summary, the Amendment Rule:

- allows facilities to remain on reported baselines for both the 2019-20 year and the 2020-21 year (noting that a transitional calculated baseline would need to commence no later than the start of the 2020-21 year for site-specific production variables and emissions intensity values to be used<sup>1</sup>);
- allows facilities with calculated baselines that expired on 30 June 2019 to continue to be subject to those baselines for the 2019-20 year;

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<sup>1</sup> Unless covered by the inherent emissions variability criteria.

- provides facilities with access to estimated (or site-specific) production variables and default emissions intensity values for calculated baselines that commence in the 2020-21 year;
- delays the application of benchmark baselines by one year, to 1 July 2021; and
- allows facilities to apply to the Clean Energy Regulator to extend *multi-year period declarations* (commonly called multi-year monitoring periods) that are due to expire on 30 June 2020 by one year. This delays the requirement for some facilities to source and surrender Australian Carbon Credit Units for the 2019-20 compliance year.

The Amendment Rule does not remove compliance obligations for Safeguard facilities. They continue to be required to keep net emissions below baseline levels. The amendments primarily have the effect of extending the existing two year transition period by an additional year—the 2020-21 year. This delays the full transition to the new Safeguard Mechanism framework, established in the March 2019 amendments, by one year.

As a result of the Amendment Rule, facilities are able to apply for new transitional calculated baselines that use either default values or estimated (site-specific) values in the 2020-21 year. Facilities are still able to apply for such a baseline to commence in the 2019-20 year should they choose to.

## **Authority**

Section 22XS of the Act empowers the Minister to make legislative rules to implement the Safeguard Mechanism.

## **Consultation**

The Government consulted Safeguard facilities on the changes in the Amendment Rule in April 2020. Affected facilities supported the proposed amendments, and indicated that it allowed for an orderly transition to the new baseline setting framework established in March 2019. Specific feedback was received on the need to ensure equal treatment of facilities on reported baselines and expired initial calculated baselines. Minor technical recommendations were suggested for this Explanatory Statement.

## **Regulatory impact analysis**

The Office of Best Practice Regulation has been consulted, and no Regulation Impact Statement is required for the Amendment Rule (OBPR ID 26446).

## **Safeguard Rule details**

The Principal Rule and the Amendment Rule are legislative instruments within the meaning of the *Legislation Act 2003*. The Principal Rule commenced on 1 July 2016. The Amendment

Rule will commence on the day after registration. The ordinary repeal arrangements for amending instruments apply. Details of the amendments are set out in the following sections.

## **Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights, prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, is at Attachment A of the Explanatory Statement.

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## ***Details of the sections in the Amendment Rule***

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### **1 Name**

The name of the Amendment Rule is the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020*.

### **2 Commencement**

The Amendment Rule commences the day after it is registered.

### **3 Authority**

The Amendment Rule is made under subsection 22XS(1) of the *National Greenhouse and Energy Reporting Act 2007*. The power to make rules under this subsection includes the power to amend or revoke rules that have already been made, with any doubt about this resolved by subsection 33(3) of the *Acts Interpretation Act 1901*.

### **4 Schedules**

This section provides for the Principal Rule to be amended by each of the items in Schedule 1. The intent of changes made through the Amendment Rule is set out below.

## **Schedule 1 – Amendments**

### **Item 1 - Section 4 (subparagraphs (a)(i) and (ii) of the definition of *production variable*)**

Section 4 of the Principal Rule establishes different definitions of the term ‘production variable’ for different circumstances.

Item 1 amends the definition of a production variable in contexts where the facility can choose to use a production variable defined in accordance with section 5 of the Principal Rule (as opposed to a prescribed production variable from Schedules 2 or 3 of the Principal Rule). Section 5-defined production variables are sometimes referred to as site-specific production variables. It changes the references “2020” to “2021”.

The amendment provides for a facility to use a Section 5-defined production variable in a calculated-emissions baseline that commences before 1 July 2021 (formerly 1 July 2020), or is made on the basis of the inherent emissions variability criteria. [*subparagraph (a)(i) of the definition of production variable*]

The item also provides for Section 5-defined production variables that are established in a calculated-emissions baseline determination that commences before 1 July 2021 (formerly 1 July 2020) to continue to be used in a production-adjusted baseline determination that follows

or replaces the calculated-emissions baseline determination. *[subparagraph (a)(ii) of the definition of production variable]*

**Item 2 - Section 4 (subparagraphs (c)(i) and (ii) of the definition of production variable)**

This item changes the references “2020” to “2021”. It establishes that where a calculated-emissions baseline commences on or after 1 July 2021 (formerly 1 July 2020), it must use a Schedule 2 or 3 prescribed production variable, unless it is made on the basis of the inherent emissions variability criteria. *[subparagraph (c)(i) of the definition of production variable]*

The item also establishes that only Schedule 2 or 3 prescribed production variables can be used in a production-adjusted baseline determination that follows or replaces a calculated-emissions baseline determination that commenced on or after 1 July 2021 (formerly 1 July 2020). *[subparagraph (c)(ii) of the definition of production variable]*

**Item 3 - Paragraph 14(2)(a)**

This item changes the reference “2020” to “2021”. It extends by one year, to 1 July 2021, the period in which the Clean Energy Regulator must make a reported-emissions baseline determination for an inter-state transport facility for which both the national facility definition applies and the requirements of paragraphs (2)(a)(i) and (ii) are met. This allows for the consolidation of separate baselines for State and Territory transport facilities into a single national baseline. This change reflects the new expiry date for reported-emissions baselines.

**Item 4 - Paragraphs 18(3)(c) and (d)**

This item changes the references “2020” to “2021”. It changes the date on which reported-emissions baseline determinations expire. Under the Principal Rule, reported-emissions baseline determinations expire on 1 July 2020. This item in the Amendment Rule changes the expiry date to 1 July 2021.

This item, in combination with the amendments to the definition of ‘production variable’ in section 4, allows facilities to remain on a reported baseline for the 2019-20 compliance year, before moving to a new baseline in the 2020-21 year that is set in accordance with the transition period arrangements.

In the absence of the Amendment Rule, many facilities would have chosen to move to a new transitional calculated baseline to commence on 1 July 2019 in order to access estimated (site-specific) values. Under the Amendment Rule, facilities are able to use estimated (site-specific) production variables and emissions intensity values in baseline applications for transitional calculated baselines that commence at the start of the 2020-21 compliance year, but not later years.

Estimated (site-specific) emissions intensity values can only continue to be used in calculated baseline applications that relate to compliance years that follow the 2020-21 year where the provisions in section 25 apply.

**Item 5 - Subsection 23(7)**



Subsection 23(7) is amended to include reference to “1 July 2020” to allow a calculated-emissions baseline determination established under the new facility criteria to commence on 1 July 2020 at the latest (formerly 1 July 2019).

#### **Item 6 - Paragraph 26A(2)(b)**

This item includes a reference to “1 July 2020” to establish that a baseline application can meet the transitional-calculated baseline criteria in circumstances where an existing calculated-emissions baseline determination commences on 1 July 2020 at the latest (formerly 1 July 2019), and the new baseline application uses one or more prescribed production variables not used in the first determination.

This paragraph allows a facility to apply for a transitional-calculated baseline in advance of prescribed production variables being made available in Schedules 2 and 3 of the Principal Rule, and then apply for a new transitional-calculated baseline that picks up one or more newly-established prescribed production variables.

#### **Item 7 - Subsection 26A(5)**

This item changes the reference to “2020” to “2021”. Subsection 26A(5) in the Principal Rule established that where a facility applies for a calculated-emissions baseline determination to commence on 1 July 2020, one or more prescribed production variables must be applicable to the facility in accordance with any requirements in Schedule 2 or 3. Item 7 amends the Principal Rule to delay the 1 July 2020 date to 1 July 2021.

#### **Item 8 - Subsection 26A(6)**

This item changes the reference to “2020” to “2021”. It amends subsection 26A(6) to delay by one year (to 1 July 2021) the date on which a commencing calculated-emissions baseline determination must meet the criteria in paragraphs 26A(6)(a) and (b).

#### **Item 9 - Subparagraph 27(1)(d)(i)**

This item changes the reference to “2020” to “2021”. Section 27 deals with information that is required to be included in a calculated-emissions baseline application. The amendment to subparagraph 27(1)(d)(i) establishes that where a calculated-emissions baseline is to commence before 1 July 2021 (formerly 1 July 2020), or is made on the basis of the inherent emissions variability criteria, the application for the baseline must include the information at sub-subparagraphs 27(1)(d)(i)(A) and (B). These sub-subparagraphs allow a facility to nominate the use of either an estimated (site-specific) emissions intensity value, or a default emissions intensity value.

#### **Item 10 - Paragraph 30(2)(e)**

This item changes the reference to “2020” to “2021”. Paragraph 30(2)(e) establishes the date beyond which a commencing calculated-emissions baseline determination (excluding those made on the basis of the inherent emissions variability criteria) must use only prescribed

production variables and default emissions-intensities. This date is amended to be 1 July 2021.

#### **Item 11 - Paragraph 31(5)(b)**

This item changes the reference to “4 financial years” to “5 financial years”. It amends paragraph 31(5)(b) to ensure consistency with the amendment in item 12, below and reflects the new transition date of 1 July 2021.

#### **Item 12 - Subsection 31(5)**

This item changes the reference to “2020” to “2021”. It amends the subsection to establish that a calculated-emissions baseline determination that was made on the basis of the new facility criteria expires on 1 July 2021 (formerly 1 July 2020) wherever the covered emissions from the facility were not over 100,000 t CO<sub>2</sub>-e in any of the five financial years starting on 1 July 2016.

#### **Item 13 - Subsection 33(6)**

This item changes the reference to “2020” to “2021”. It delays the application of benchmark-emissions baseline determinations by one year, to 1 July 2021.

#### **Item 14 - Subsection 34(9)**

This item changes the reference to “2020” to “2021”. It establishes that a benchmark-emissions baseline determination made under the significant expansion criteria can only commence on or after 1 July 2021 (formerly 1 July 2020).

#### **Item 15 - After paragraph 68(1)(a)**

This item adds a new paragraph to subsection 68(1) to establish that a responsible emitter can apply to the Clean Energy Regulator to extend by one year the end date of a declared multi-year period ending on 30 June 2020.

This amendment allows greater flexibility for some facilities to manage Safeguard Mechanism compliance while managing the immediate impacts of the COVID-19 pandemic. This amendment does not remove the obligation to keep net emissions below baseline levels.

#### **Item 16 – After section 80**

This item adds a new Division 2 to Part 6 of the Principal Rule. It allows for a facility to remain on a calculated emissions baseline that expired on 30 June for the 2019-20 year. This ensures such facilities are treated consistently with facilities on reported emissions baselines. The transitional provision does not create a new baseline determination for the facility, but deems the baseline emissions number to equal the previous baseline emissions number under the expired calculated emissions baseline determination.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020*

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Disallowable Legislative Instrument**

The Safeguard Mechanism provides a framework for Australia's largest emitters to measure, report and manage their emissions. It places emissions limits, called baselines, on large facilities that emit more than 100,000 tonnes of carbon dioxide equivalent a year, giving covered businesses a legislated obligation to keep net emissions below their baseline.

Amendments were made to the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the Principal Rule) in March 2019, including bringing baselines up-to-date by transitioning all facilities to calculated or production adjusted baselines over 2018-19 and 2019-20.

The *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020* (the Amendment Rule) amends the Principal Rule to extend the two year transition period by one year. It is intended to reduce baseline application pressure on Safeguard Facilities caused by the impacts of the COVID-19 pandemic. The Amendment Rule:

- allows facilities to retain their current baselines (as well as calculated baselines that expired at the end of the 2019-20 year) for an additional year;
- delays the application of benchmark baselines by one year to 1 July 2021; and
- allows facilities to apply to the Clean Energy Regulator to extend by one year certain multi-year period declarations.

#### **Human rights implications**

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon. Angus Taylor MP**

**Minister for Energy and Emissions Reduction**