

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 350 GREENHOUSE GAS CAP-AND-TRADE PROVISIONS

20.2.350.1 ISSUING AGENCY: Environmental Improvement Board.
[20.2.350.1 NMAC - N, 01/01/11]

20.2.350.2 SCOPE: All persons who:
A. own or operate a cap facility, as defined in 20.2.350.7 NMAC, in the geographic area within the jurisdiction of the environmental improvement board; or
B. are authorized account representatives pursuant to this part.
[20.2.350.2 NMAC - N, 01/01/11]

20.2.350.3 STATUTORY AUTHORITY: Environmental Improvement Act, NMSA 1978, Section 74-1-8(A)(4), and Air Quality Control Act, NMSA 1978, Sections 74-2-1 et seq., including specifically Section 74-2-5(B)(1).
[20.2.350.3 NMAC - N, 01/01/11]

20.2.350.4 DURATION: Permanent.
[20.2.350.4 NMAC - N, 01/01/11]

20.2.350.5 EFFECTIVE DATE: January 1, 2011 except where a later date is cited at the end of a section.
[20.2.350.5 NMAC - N, 01/01/11]

20.2.350.6 OBJECTIVE: The objective of this part is to establish requirements for participation in a greenhouse gas emissions cap-and-trade market.
[20.2.350.6 NMAC - N, 01/01/11]

20.2.350.7 DEFINITIONS: The following definitions apply to this part. The definitions included in 20.2.2 NMAC and 20.2.300 NMAC shall apply to the terms used in this part, unless such term is defined in this part.

A. Allocation year of an allowance means the calendar year in which the allocation of that allowance is made.

B. An allowance under this part is a limited authorization by the department or a jurisdiction approved pursuant to this part to emit one metric ton of CO₂e in accordance with this part.

C. Authorized account representative means a person designated and certified as such pursuant to 20.2.350.400 NMAC.

D. Cap emission means any emission, in units of CO₂e, that is defined as a cap emission in 20.2.300 NMAC. [Cap emissions include most but not all of the emissions required to be reported by emitting facilities under the Federal greenhouse gas mandatory reporting rule, 40 CFR 98, as well as carbon dioxide removed from natural gas and emitted by natural gas treatment plants. Some of the emissions that are not cap emissions are those resulting from motor vehicles, mobile equipment (graders, forklifts, etc.), manure management and livestock, and fugitive methane emissions from landfills, emergency generators, irrigation pumps at agricultural operations, and bench-scale research and development activities.]

E. A cap facility is any facility subject to the obligation to surrender compliance instruments pursuant to 20.2.350.300 NMAC.

F. Cap threshold means twenty-five thousand (25,000) metric tons of cap emissions, in units of CO₂e.

G. CO₂e or carbon dioxide equivalent has the meaning established in 40 CFR 98.

H. Compliance instruments include allowances, early reduction allowances and offset credits.

I. Compliance instrument surrender deadline means midnight at the end of the June 30th occurring after the end of the relevant compliance period or, if that June 30th is not a business day, midnight of the first business day thereafter, and is the deadline by which compliance instruments shall be surrendered for the compliance period immediately preceding the deadline.

J. Compliance period means a three-calendar-year time period. The first compliance period is from January 1, 2012 through December 31, 2014. Each subsequent sequential three-calendar-year period is a separate compliance period.

K. Emissions year means the calendar year in which the emissions that are subject to the obligation to surrender compliance instruments under 20.2.350.301 NMAC occur.

L. Existing cap facility means a cap facility that meets the criteria for an existing cap facility under Subsection A of 20.2.350.200 NMAC.

M. An external trading program is a greenhouse gas cap-and-trade program consisting of multiple jurisdictions that:

(1) do not include any jurisdiction in New Mexico; and

(2) have entered into mutually binding agreements between those jurisdictions to establish consistent program and trading mechanisms for purposes of capping greenhouse gases and trading greenhouse gas compliance instruments.

N. Facility means any physical property, plant, building, structure, source, or stationary equipment located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or other public right-of-way and under common ownership or common control, that emits or may emit any greenhouse gas. Operators of military installations may classify such installations as more than a single facility based on distinct and independent functional groupings within contiguous military properties. This definition does not aggregate facilities.

O. Initial cap year means the first year for which cap emissions that occur during that year will be subject to an obligation to surrender compliance instruments under this part. The initial cap year refers to the cap-and-trade program rather than to any individual facility. The initial cap year shall be the later of:

(1) 2012;

(2) the year in which this part becomes effective; or

(3) the year in which the provisions of Subsection D of 20.2.350.300 NMAC are met.

P. Offset credit means a type of compliance instrument that:

(1) is issued by a jurisdiction:

(a) approved by the department under 20.2.350.206 NMAC or 20.2.350.209 NMAC; and

(b) for which the program authority has certified that the program meets the criteria of

Subsection B of 20.2.350.208 NMAC;

(2) meets the criteria of Subsection A of 20.2.350.208 NMAC; and

(3) is subject to a limitation under Paragraph (3) of Subsection B of 20.2.350.301 NMAC for use in meeting the obligation to surrender compliance instruments.

Q. Vintage year of an allowance means the first calendar year in which the allowance becomes valid for use in meeting a compliance obligation, and is established by the issuing jurisdiction at the time of issuance. The vintage year of each allowance is reflected in the unique identification number given to the allowance.

[20.2.350.7 NMAC - N, 01/01/11]

20.2.350.8 SEVERABILITY: If any provision of this part, or the application of such provision to any person or circumstance, is held invalid, the remainder of this part, or the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.

[20.2.350.8 NMAC - N, 01/01/11]

20.2.350.9 CONSTRUCTION: This part shall be liberally construed to carry out its purpose.

[20.2.350.9 NMAC - N, 01/01/11]

20.2.350.10 COMPLIANCE WITH OTHER REGULATIONS: Compliance with this part does not relieve a person from the responsibility to comply with any other applicable federal, state, or local regulation.

[20.2.350.10 NMAC - N, 01/01/11]

20.2.350.11 NEW MEXICO GREENHOUSE GAS EMISSIONS CAP: The initial greenhouse gas emissions cap shall be the sum of the representative annual cap emissions for existing cap facilities, determined pursuant to 20.2.350.200 NMAC. The effective annual cap reduction is one and a half percent (1.5%) for the year after the initial cap year, and two percent (2%) per year for the following seven years, based on a two percent (2%) per year reduction in allocations to existing cap facilities under Subsection A of 20.2.350.201 NMAC, and an annual allocation under Paragraph (2) of Subsection B of 20.2.350.201 NMAC of the number of allowances equal to one

half percent (0.5%) of the cap into the new annual allocation account. In the event that the sum of the representative annual cap emissions (baselines) for existing facilities is reduced pursuant to Subsection E of 20.2.350.200 NMAC or increased due to an existing facility later becoming a cap facility, the initial New Mexico greenhouse gas emissions cap shall be adjusted accordingly.

[20.2.350.11 NMAC - N, 01/01/11]

20.2.350.12 APPLICABILITY TO OWNERS AND OPERATORS: Any provision of this part that applies to a cap facility (including those requirements applicable to the authorized account representative of a compliance account) shall also apply to the owners and operators of such cap facility.

[20.2.350.12 NMAC - N, 01/01/11]

20.2.350.13 [RESERVED]

20.2.350.14 SUSPENSION OF 20.2.100 NMAC: This regulation suspends 20.2.100 NMAC when the sum of initial cap year capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC represent at least 100 million metric tons CO₂e, and for so long as this regulation is in full force and effect and is not stayed.

[20.2.350.14 NMAC - N, 01/01/11]

20.2.350.15 SUNSET CLAUSE: This part and 20.2.100 NMAC shall sunset if a greenhouse gas cap-and-trade program that is at least as effective as this part in reducing cap emissions and established by the federal government becomes effective.

[20.2.350.15 NMAC - N, 01/01/11]

20.2.350.16 PROPERTY RIGHTS: An allowance issued under this part is a limited authority to emit, and shall not constitute a property right.

[20.2.350.16 NMAC - N, 01/01/11]

20.2.350.17 REASSESSMENT: Prior to January 1, 2016, the department shall evaluate and advise the board regarding amendments to the cap-and-trade program regarding the following:

- A.** additional cap reductions;
- B.** the allowance allocation provisions for existing cap facilities and new cap facilities;
- C.** emissions leakage to areas outside of the cap-and-trade program;
- D.** an allowance retirement process for emissions avoided as a result of the voluntary renewable electricity market;
- E.** provisions to issue offset credits by the department;
- F.** provisions to further assure effective functioning of the cap-and-trade market, which may include holdings limits;
- G.** provisions to allow any person that is not the owner, operator or authorized account representative of a cap facility to establish an account for compliance instruments under this part;
- H.** additional cost containment provisions, and if for a period of six (6) continuous months the average price per metric ton of CO₂e for offsets and allowances exceeds forty-five (45) dollars in 2010 dollars as adjusted annually by the consumer price index the department shall automatically return to the board with a cost containment proposal; and
- I.** evaluation of the need to adjust any facility's individual baseline due to underestimation under 20.2.350.200 NMAC, and provisions for how such adjustments will be determined.

[20.2.350.17 NMAC - N, 01/01/11]

20.2.350.18 to 20.2.350.99 [RESERVED]

20.2.350.100 TRACKING SYSTEM FOR COMPLIANCE INSTRUMENTS: The department shall maintain, or participate in, a system for tracking compliance instruments that is capable of:

- A.** maintaining records of compliance accounts, including information regarding authorized account representatives;

B. serving as a permanent repository of information on all transactions involving compliance instruments from the time they are created or approved to the time they are retired, including transfers, prices, counter-parties, and other documentation;

C. maintaining and transferring between jurisdictions information as necessary regarding compliance instruments and registrants;

D. assuring that any compliance instruments issued in units other than metric tons CO₂e are converted in an appropriate manner; and

E. providing for public access and confidentiality of information, as appropriate.
[20.2.350.100 NMAC - N, 01/01/11]

20.2.350.101 COMPLIANCE ACCOUNTS:

A. General accounts. [Reserved]

B. Compliance accounts.

(1) Nature and function of compliance accounts. Allocations of allowances, and deductions or transfers of compliance instruments pursuant to this part, shall be recorded in the compliance accounts in accordance with this part. The department shall establish one compliance account for each cap facility.

(2) A complete and accurate application for a compliance account shall be submitted to the department:

(a) by October 1, 2012 for each cap facility for which reported cap emissions for emissions year 2011 meet or exceed the cap threshold; and

(b) within ninety (90) days after the first submittal for any facility of an emissions report under 20.2.300 NMAC for which cap emissions meet or exceed the cap threshold.

(3) A complete application for a compliance account shall include:

(a) an account certificate of representation for an authorized account representative, and if applicable an alternate authorized account representative, that meets the requirements under Subsection D of 20.2.350.400 NMAC; and

(b) identification of the cap facility, including plant name and the identification number associated with the emissions reports submitted pursuant to 20.2.300 NMAC, to which the compliance account shall apply.

(4) Upon receipt of a complete application for a compliance account under Paragraph (2) of Subsection B of this section, the department shall establish a compliance account for the cap facility for which the application was submitted.

(5) The department may place restrictions on a compliance account for any violation of this part.

(6) Closing of compliance accounts. The department may close a compliance account if it determines that:

(a) no cap facility is registered in the compliance account;

(b) no outstanding compliance obligations are associated with the authorized account representative or the account; and

(c) no remaining compliance instruments are in the account.

C. Accounts under the control of the department. The department shall create and maintain the following accounts:

(1) an account containing the allowances to be distributed by the department;

(2) an account into which compliance instruments shall be surrendered, or transferred for retirement or cancellation by the department; and

(3) a new annual allocation account.

D. [RESERVED]

E. Account identification. The department shall assign a unique identifying number to each compliance account established under this part.

F. All submissions to the department pertaining to the account, including submissions concerning the deduction or transfer of compliance instruments in the account and modifications to the account, shall be made only by the authorized account representative for the account.

G. Banking. Each compliance instrument that is held in a compliance account shall remain in such account unless and until the compliance instrument is deducted or transferred under this part.

H. Account error. The department may, at its sole discretion, correct any error in any compliance account under this part. Within ten (10) business days of making such correction, the department shall notify the authorized account representative for the account.

[20.2.350.101 NMAC - N, 01/01/11]

20.2.350.102 COMPLIANCE INSTRUMENT TRANSFERS:

A. Submission of compliance instrument transfers. Each authorized account representative seeking to record a compliance instrument transfer to or from an account established under this part shall submit the transfer to the department by means of the tracking system established under 20.2.350.100 NMAC. To be considered correctly submitted, the compliance instrument transfer shall include the following elements in a format specified by the department:

- (1) the numbers identifying both the transferor and transferee accounts;
- (2) the serial number of each compliance instrument to be transferred, indicating:
 - (a) the jurisdiction that originally issued the compliance instrument;
 - (b) the vintage year of the compliance instrument; and
 - (c) whether the compliance instrument is an allowance or offset credit;
- (3) certification that the transfer is being conducted by the authorized account representative of the transferor account;
- (4) the date of the transaction; and
- (5) the purchase or sale price of the compliance instrument that is the subject of a sale or purchase transaction.

B. [Reserved]

C. Recording transfers of compliance instruments. Each completed compliance instrument transfer shall be recorded by means of the tracking system established under 20.2.350.100 NMAC in the transferor account and the transferee account. The transfer shall not be completed unless:

- (1) the transferor has correctly submitted the transfer; and
- (2) the transferor account includes each compliance instrument identified by serial number in the transfer.

D. Notification.

(1) Notification of recording. As soon as practicable after the recording of a compliance instrument transfer under Subsection C of this section, the department shall electronically notify each party to the transfer. Notice shall be given to the authorized account representatives for both the transferor and transferee accounts.

(2) Notification of non-recording. As soon as practicable after receipt of a compliance instrument transfer that fails to meet the requirements of this part, the department shall electronically notify the authorized account representatives for both accounts subject to the transfer of:

- (a) a decision not to record the transfer; and
- (b) the reasons for such non-recording.

E. Nothing in this section shall preclude the submission of a compliance instrument transfer for recording following notification of non-recording.

[20.2.350.102 NMAC - N, 01/01/11]

20.2.350.103 RECORDKEEPING: Unless otherwise provided, the application for each compliance account, the account certificate of representation for the authorized account representative, and all documents that demonstrate the truth of the statements in the account certificate of representation, shall be maintained for seven (7) years after the document was created, or until such documents are superseded because of the submission of a new account certificate of representation changing the authorized account representative, whichever is later. The authorized account representatives, owners of each account, and owners and operators of each cap facility shall keep copies of such documents and make them available to the department upon request.

[20.2.350.103 NMAC - N, 01/01/11]

20.2.350.104 to 20.2.350.199 [RESERVED]

20.2.350.200 BASELINE QUANTITIES FOR EXISTING CAP FACILITIES:

A. For the purposes of this part, an existing cap facility is a cap facility that:

- (1) began operating prior to January 1, 2011; and
- (2) has been subject to the obligation to surrender compliance instruments pursuant to 20.2.350.300 NMAC for emissions that occurred in every year from the year in which it first qualified as an existing cap facility to and including the emissions year for which allowances are being allocated under this part.

B. By April 2, 2012, the owner, operator or authorized account representative of each facility for which baseline quantities will be determined for purposes of existing cap facility allocations for the initial cap year under this part shall provide to the department all relevant and necessary information to as accurately as possible determine such quantities. Each facility that is not subject to a compliance obligation under 20.2.350.300 NMAC for emissions that occur during the initial cap year shall provide such information by April 1 following the first year for which emissions from the facility are subject to a compliance obligation. Additional information as requested by the department shall be provided by the deadlines established in the request.

C. Baseline quantities. For the purposes of this part, representative annual cap emissions means the cap emissions which occur during normal operation in a typical year contemporaneous with the effective date of this part.

(1) Representative annual cap emissions for purposes of allocating allowances to existing cap facilities. Representative annual cap emissions of each existing cap facility shall be based on the best available estimate of emissions.

(a) The best available estimate of emissions shall be based, where possible, on:

(i) any greenhouse gas emissions reports submitted to the department for calendar years 2009, 2010, and 2011, with greater weight given to verified data; and

(ii) any other emissions reports which have been verified by a third party.

(b) Where emissions reports as specified in Subparagraph (a) of this paragraph are not available for all years, emissions shall be estimated by best available methods, which may include the following methods. The department shall take into account the potential margin of error associated with the emissions estimates used.

(i) Methods in 20.2.300 NMAC.

(ii) Methods in 40 CFR 98.

(iii) The department reporting procedures issued in any year for reporting under 20.2.73 NMAC or 20.2.87 NMAC.

(iv) Reporting protocols of any voluntary greenhouse gas registry.

(v) Industry standard protocols for estimating greenhouse gas emissions.

(vi) Simple correlations with production.

(2) In establishing representative annual cap emissions for purposes of allocating allowances to an existing cap facility, the department shall consider:

(a) a previous emissions intensity, if the intensity of greenhouse gas emissions per unit of production decreased between January 1, 2005 and December 31, 2009, and the supporting information is complete and verified; and

(b) other information and quantifications provided and certified by the owner, operator or authorized account representative of the facility indicating that the years 2009 through 2011 are not representative of annual cap emissions during normal operation in a typical year contemporaneous with the effective date of this part, which may include the effects of an economy-wide downturn that results in unrepresentatively low levels of production.

(3) The department shall:

(a) evaluate each sector to assure that the representative cap emissions for cap facilities in that sector are determined in a consistent and equitable manner; and

(b) take into account the potential margin of error associated with the data and emissions estimates used in developing representative annual cap emissions.

D. Comment and review.

(1) By October 1, 2012, the department shall notify the authorized account representative of each existing facility anticipated to be subject to a compliance obligation for emissions during the initial cap year and release for public comment:

(a) the department's preliminary determination of its representative annual cap emissions; and

(b) the department's evaluation under Subparagraph (a) of Paragraph (3) of Subsection C of this section describing the means by which the representative cap emissions for cap facilities in each sector have been determined in a consistent and equitable manner.

(2) The deadline for providing public comments shall be November 16, 2012. The department shall release its final determination by December 31, 2012. The department's final determination may be appealed pursuant to the Air Quality Control Act, Section 74-2-9.A.

E. The department may revise the representative annual cap emissions for the existing cap facility if new information indicates that the values for representative annual cap emissions overestimated that of normal operation in a typical year contemporaneous with the effective date of this part.
[20.2.350.200 NMAC - N, 01/01/11]

20.2.350.201 ALLOCATION OF EXISTING FACILITY ALLOWANCES:

A. Existing facility allocation. Except as provided in Subsection B of this section, the department shall allocate without charge into the compliance account of each existing cap facility those allowances as calculated by Equation 201-1. Allocation shall occur by May 1 of the year following each emissions year in which the facility qualifies for an existing facility allocation as an existing cap facility. If the number of allowances as calculated by Equation 201-1 is not a whole number, the allocation shall be that number rounded to the nearest whole number.

$$A_i = E_R \times [1 - [(Y_i - Y_N) \times 0.02]] \quad \text{Equation 201-1}$$

Where:

- A_i = allowances allocated for emissions year i
- E_R = representative annual cap emissions, in metric tons CO₂e.
- Y_i = emissions year i or ($Y_N + 8$), whichever is less
- Y_N = initial cap year, as defined in Section 20.2.350.7 NMAC
- 0.02 = annual cap reduction.

B. Each existing cap facility in the phase-out period under Subsection B of 20.2.350.300 NMAC shall be allocated the lesser of the following:

- (1) the number of allowances equal to the number of metric tons CO₂e reported under 20.2.300 NMAC for the emissions year for which the allocation is being made; or
- (2) the number of allowances as calculated under Subsection A of this section.

C. On May 1 of each year after the initial cap year, the department shall record in the new annual allocation account:

- (1) each allowance that is not allocated as a result of a facility no longer qualifying as an existing cap facility under 20.2.350.300 NMAC; and
- (2) the number of allowances equal to one half of one percent (0.5%) of the allowances under the cap for the emissions year.

[20.2.350.201 NMAC - N, 01/01/11]

20.2.350.202 NEW ANNUAL ALLOCATIONS:

A. The authorized account representative of cap facility may choose to apply for new annual allocations for:

- (1) cap emissions from a new cap facility that commences operation after January 1, 2011;
- (2) for an existing facility that becomes a cap facility after the initial cap year, the new cap emissions that do not qualify for existing cap facility allocations; and
- (3) new cap emissions that are directly attributable to changes in equipment or activities necessary to meet new federal air quality requirements for the production of clean fuels.

B. Authorization date for the request for new annual allocations. The authorization date for the request for new annual allocations shall be the later of the following dates.

- (1) The date on which the department establishes the maximum new annual allocations pursuant to 20.2.350.203 NMAC.
- (2) The date on which the department receives a request under this section that new annual allocations be established for a facility.
- (3) The date on which the department receives notification that the new cap facility or equipment and activities associated with qualifying emissions have commenced operation.
- (4) If after a cap facility has received new annual allocations it ceases to be a cap facility, the date the department receives notification that the facility has commenced operations at a level at which it becomes a cap facility again.

C. Distribution from the new annual allocation account. The department shall, until the account is exhausted or the sum of the maximum new annual allocations established under 20.2.350.203 NMAC for the

authorized requests have been satisfied, allot the allowances in the new annual allocation account in order of authorization date with the earlier dates first.

D. In order to assure that the provisions of this part for new allocations are implemented in a consistent and equitable manner, the department shall develop detailed procedures for establishing maximum new annual allocation values under 20.2.350.203 NMAC and the allocation of allowances in the new annual allocation account under this section.

(1) By October 31, 2011 the department shall release the draft detailed procedures for public comment. The deadline for providing public comments shall be November 30, 2011.

(2) By December 31, 2011, the department shall, after consideration of public comments, release final detailed procedures.

[20.2.350.202 NMAC - N, 01/01/11]

20.2.350.203 MAXIMUM NEW ANNUAL ALLOCATIONS:

A. No allocation of allowances under 20.2.350.202 NMAC may occur unless:

(1) the authorized account representative has submitted a request that the department establish the maximum new annual allocation for the request; and

(2) the department has determined pursuant to this section the maximum new annual allocation that may occur for the request.

B. The request that the department establish a maximum new annual allocation for a facility shall contain the following information:

(1) the cap facility for which the new allocations are being requested;

(2) the equipment and activities associated with the new cap emissions and date on which they commenced or are anticipated to commence production;

(3) for new cap emissions that are directly attributable to changes in equipment or activities necessary to meet new federal air quality requirements:

(a) a description of the new federal air quality requirements for which the increased cap emissions are directly attributable to meet;

(b) a quantification of the increase in cap emissions, including supporting data and calculations; and

(c) an explanation of why the increase of cap emissions cannot be avoided to meet the new federal air quality requirements; and

(4) a quantification, including supporting information, of the new cap emissions resulting from combustion.

C. Maximum new annual allocations for a facility shall be determined by the department as the cap emissions that would occur during normal operation from the combustion of an equivalent number of British thermal units of natural gas for all combustion at the facility. The limit to the maximum new annual allocations for purposes of allocating allowances to a facility under this part does not limit the type of fuel that is used at the facility or the actual emissions that may occur at that facility.

D. The department may revise the maximum annual new allocation under this section if new information indicates that it was overestimated as a result of information provided in the request.

E. No facility shall receive new annual allocation allowances for any emissions level used in determining baseline quantities, under 20.2.350.200 NMAC, which are the basis for any allocation of existing facility allowances under 20.2.350.201.

[20.2.350.203 NMAC - N, 01/01/11]

20.2.350.204 RECORDING OF ALLOWANCE ALLOCATIONS:

A. Allocation shall occur when the department records in the compliance account of the cap facility the allowances allocated under 20.2.350.201 NMAC.

B. Serial numbers for allocated allowances. Prior to allocating allowances to and recording them in an account, the department shall assign each allowance a unique identification number that shall include digits identifying the vintage year for that allowance.

[20.2.350.204 NMAC - N, 01/01/11]

20.2.350.205 [RESERVED]

20.2.350.206 COMPLIANCE INSTRUMENTS THAT ORIGINATE IN OTHER JURISDICTIONS: A compliance instrument issued by another jurisdiction may be used to meet a compliance obligation under 20.2.350.301 NMAC if the compliance instrument meets the requirements of this section.

A. The compliance instrument shall be:

- (1) recorded in the compliance account of the cap facility;
- (2) valid, not retired, and not used to meet a compliance obligation in any other jurisdiction;
- (3) of a vintage year that occurs during or prior to the compliance period for which it is being used;

and

- (4) issued by a jurisdiction approved under Subsection B of this section.

B. The department may approve another jurisdiction for purposes of accepting a compliance instrument that originates from that jurisdiction if:

- (1) the department has evaluated the jurisdiction based on the qualifications described in 20.2.350.207 NMAC;
- (2) the department has provided public notice and an opportunity for public comment regarding the proposed approval of the jurisdiction; and
- (3) the department and the program authority have mutually acknowledged that their programs are compatible so as to:
 - (a) allow the mutual acceptance of compliance instruments issued by the department and the other jurisdiction to meet compliance obligations; and
 - (b) provide that after any compliance instrument is retired or used to meet an obligation to surrender compliance instruments under a cap-and-trade program, it shall be disqualified for subsequent use under any system, whether such use is a sale, exchange, or submission to meet an obligation to surrender compliance instruments under a cap-and-trade program; and
- (4) the program authority for the other jurisdiction has provided assurances that it will continue to meet the qualifications in 20.2.350.207 NMAC.

[20.2.350.206 NMAC - N, 01/01/11]

20.2.350.207 QUALIFICATIONS FOR APPROVAL UNDER 20.2.350.206 NMAC OF A JURISDICTION FOR PURPOSES OF ACCEPTING COMPLIANCE INSTRUMENTS THAT ORIGINATE FROM THAT JURISDICTION: In evaluating a jurisdiction, the department shall consider whether the jurisdiction:

A. has committed to a binding and annually declining aggregate total greenhouse gas emissions cap that covers one or more economic sectors in that jurisdiction;

B. includes the following:

- (1) a comprehensive registration requirement for all market participants;
- (2) the capability to transfer relevant and necessary information on all registrants between the jurisdiction and the department using an emissions tracking system that meets the criteria in 20.2.350.100 NMAC;
- (3) provisions to ensure that the integrity of offset credits accepted into the system is equal to or greater than that required by 20.2.350.208 NMAC;
- (4) restrictions to the use of offset credits comparable to the quantitative usage limit established in Paragraph (3) of Subsection B of 20.2.350.301 NMAC;
- (5) provisions for comparable monitoring, reporting, verification, compliance, and enforcement of its greenhouse gas emissions and emission reductions to those set forth in this part and 20.2.300 NMAC; and
- (6) provisions that compliance instruments that are voluntarily retired or used to meet an obligation to surrender compliance instruments are disqualified from further use in any system;

C. includes enforcement mechanisms that:

- (1) provide general market surveillance, identify suspect transactions, and provide for investigations and enforcement actions;
- (2) ensure consequences for noncompliance are comparable between the other jurisdiction and this part;
- (3) respond in a timely manner to requests by enforcement agencies in the jurisdiction and all jurisdictions approved by the department under this part for information on market participants under investigation by those agencies; and
- (4) transfer between systems in a timely manner relevant and necessary information of all relevant enforcement actions undertaken by the system's jurisdictional enforcement authority;

D. is capable of transferring between the jurisdiction and all jurisdictions approved by the department under this part information necessary to monitor market trends on a regional basis, including:

(1) prices, aggregate emissions, positions of major market participants and expected issuance of offset credits; and

(2) information that can be released to the public in a coordinated and consistent manner; and

E. provides an equal degree of protection for confidential business information.

[20.2.350.207 NMAC - N, 01/01/11]

20.2.350.208 OFFSET CREDITS:

A. No offset credit shall be used to meet a compliance obligation unless the offset credit:

(1) represents a greenhouse gas emission reduction, avoidance or sequestration that is real, additional, quantifiable, permanent, verifiable and enforceable;

(2) has been authenticated through review, approval, and issuance by a jurisdiction or external trading program approved by the department under:

(a) 20.2.350.206 NMAC or 20.2.350.209 NMAC; and

(b) Subsection B of this section;

(3) has been developed using an offset protocol that has been reviewed and approved by the department to assure that the offset credit meets the requirements of this part;

(4) has been issued for an offset project located in North America with a commencement date after January 1, 2007; and

(5) is not the result of an offset project that reduced emissions that:

(a) are covered by this part; or

(b) would be covered by this part if they occurred within its jurisdiction.

B. The department shall not approve an offset from a jurisdiction or external trading program unless the program authority can certify that the program will assure that the offset credits that it issues are for emissions reductions that are real, additional, quantifiable, permanent, verifiable and enforceable by:

(1) performing audits of offset project sites;

(2) requiring adequate reporting, recordkeeping and verification of the offset projects that produce offset credits;

(3) notifying the department in the event that an offset credit recorded in an account under this part:

(a) has been discovered to not meet the criteria of this section;

(b) has been determined to be invalid; or

(c) has been used to meet a compliance obligation not under this part; and

(4) retiring such offset credit from that jurisdiction or program at such time that the department notifies the program authority that the offset credit has been used to meet a compliance obligation under this part.

C. If the department determines that an offset credit recorded in a compliance account pursuant to this part is or has become invalid:

(1) the department shall:

(a) notify the authorized account representative and program authority for the issuing jurisdiction or external trading program of such determination and the basis for it; and

(b) if an invalid offset credit remains in the compliance account, remove it from the account; and

(2) if the offset credit has been used to meet a surrender obligation under this part, the authorized account representative shall within thirty (30) days surrender a valid compliance instrument to replace each invalid offset credit.

[20.2.350.208 NMAC - N, 01/01/11]

20.2.350.209 COMPLIANCE INSTRUMENTS THAT ORIGINATE IN AN EXTERNAL TRADING PROGRAM: A compliance instrument that originates in an external trading program may be used to meet a compliance obligation under 20.2.350.301 NMAC if:

A. the department has approved the external trading program after considering whether the program:

(1) is run by a sub-national, national or regional government;

(2) provides for emissions measurement, monitoring, reporting and verification that are comparable to the provisions of this part;

(3) includes a binding aggregate greenhouse gas emissions cap covering one or more economic sectors; and

(4) contains offset credit provisions that:
(a) ensure a level of integrity commensurate with the offset requirements in 20.2.350.208 NMAC; and

(b) limit the use of offsets so as to ensure that emissions reductions will also occur at the facilities covered by the external trading program;

B. the department and external trading program have established provisions to ensure that after any compliance instrument issued by the external trading program is used to meet an obligation to surrender compliance instruments under this part, it shall be disqualified for subsequent use under any system, whether such use is a sale, exchange, or submission to meet an obligation to surrender compliance instruments under a cap-and-trade program; and

C. the compliance instrument is:

(1) recorded in the compliance account of the cap facility in units of metric tons CO₂e (see Subsection D of 20.2.350.100 NMAC);

(2) valid and has not been used to meet compliance obligations in any other jurisdiction; and

(3) of a vintage year that has occurred during or prior to the compliance period for which it is being used.

[20.2.350.209 NMAC - N, 01/01/11]

20.2.350.210 to 20.2.350.299 [Reserved]

20.2.350.300 APPLICABILITY OF THE OBLIGATION TO SURRENDER COMPLIANCE INSTRUMENTS:

A. Except as provided in Subsections B and D of this section, the obligation to surrender compliance instruments under 20.2.350.301 NMAC applies to the owner or operator of a cap facility, which includes each facility for which emissions that meet or exceed the cap threshold are reported under 20.2.300 NMAC to have occurred in the initial cap year or any calendar year thereafter.

B. Phase-out of the obligation to surrender compliance instruments. If at any time after a facility becomes a cap facility the reported cap emissions at the facility are less than the cap threshold for three (3) consecutive years, then the facility is no longer a cap facility, until such future time that the facility again becomes a cap facility under Subsection A of this section.

C. For each emissions year in which a facility is not a cap facility:

(1) the facility shall not be subject to the obligation to surrender compliance instruments under 20.2.350.301 NMAC for cap emissions that occur during that year; and

(2) the facility shall not be allocated existing facility allowances or new annual allocation allowances under this part.

D. No facility shall be subject to an obligation to surrender a compliance instrument under this part for emissions that occur during a year prior to when the sum of initial cap year capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC represent at least one hundred million metric tons CO₂e.

E. No later than sixty (60) days from the date on which the sum of capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC no longer represents one hundred million metric tons CO₂e, the department shall request that the board reevaluate this part.

[20.2.350.300 NMAC - N, 01/01/11]

20.2.350.301 SURRENDER OF COMPLIANCE INSTRUMENTS:

A. The authorized account representative of each compliance account shall, as of the compliance instrument surrender deadline, surrender qualifying compliance instruments in an amount not less than the sum of the total cap emissions reported under 20.2.300 NMAC for each year for which the cap facility was subject to an obligation to surrender compliance instruments during the compliance period. If the total cap emissions for the compliance period in units of metric tons CO₂e is not a whole number, it shall be rounded up to the nearest whole number.

B. Qualifying compliance instruments. Compliance instruments that meet the following criteria may be used to comply with the obligation to surrender compliance instruments under this part.

(1) The compliance instrument is valid.

(2) The vintage year for each compliance instrument has occurred during or prior to the compliance period for which it is being used.

(3) The sum of offset credits and external trading program compliance instruments that are used to comply with an obligation to surrender compliance instruments under this part for a compliance period may not exceed four percent of the total compliance obligation that applies for that compliance period to the cap facility.

C. For each allowance that originated under this part and was surrendered to meet compliance obligations under this part or in any other jurisdiction, the department shall retire the compliance instrument and assure that it is disqualified for subsequent use in any program.

D. For each compliance instrument that originated in another jurisdiction or program and surrendered to meet compliance obligations under this part, the department shall notify that jurisdiction or program that the compliance instrument shall be disqualified for subsequent use in any program.
[20.2.350.301 NMAC - N, 01/01/11]

20.2.350.302 ENFORCEMENT AND PENALTIES FOR NON-COMPLIANCE:

A. Each of the following events shall constitute a separate violation of this part on each day of the applicable compliance period:

(1) Each metric ton of cap emissions or portion thereof emitted during the compliance period in excess of the number of compliance instruments surrendered on the compliance instrument surrender deadline for that compliance period.

(2) Each day or portion thereof that any report required by this part is not timely submitted or contains incomplete or inaccurate information.

B. In the event that the authorized account representative of a cap facility does not surrender sufficient compliance instruments to meet the obligation Subsection A of 20.2.350.301 NMAC, the following shall apply.

(1) The compliance account of the cap facility shall be assessed an additional surrender obligation of compliance instruments equal to three times the number of insufficient compliance instruments. This assessment shall be in addition to any fine, penalty, assessment, corrective action, injunctive relief, or obligation otherwise applicable to the cap facility.

(2) The authorized account representative shall within thirty days surrender sufficient compliance instruments to cover the additional assessment. Offset credits and external trading program compliance instruments may be used to meet this obligation, provided that their sum shall adhere to the limit in Paragraph (3) of Subsection B of 20.2.350.301 NMAC.

[20.2.350.302 NMAC - N, 01/01/11]

20.2.350.303 to 20.2.350.399 [Reserved]

20.2.350.400 AUTHORIZED ACCOUNT REPRESENTATIVES FOR CAP FACILITIES:

A. Authorization and responsibilities of authorized account representative.

(1) Except as provided under Subsection B of this section, each cap facility shall have one authorized account representative, with regard to all matters under this part concerning the cap facility.

(2) The authorized account representative of the cap facility shall be selected by an agreement binding on the owners and operators of the cap facility.

(3) Upon receipt by the department of a complete account certificate of representation under Subsection D of this section, the authorized account representative of the capped facility shall represent and, by his or her representations, actions, inactions, or submissions, legally bind each owner and operator of the cap facility represented in all matters pertaining to this part, notwithstanding any agreement between the authorized account representative and such owners and operators. The owners and operators shall be bound by any decision or order issued to the authorized account representative by the department or a court regarding the facility.

(4) No compliance account shall be established for a cap facility until the department has received a complete account certificate of representation under Subsection D of this section for an authorized account representative of the cap facility.

(5) Each submission under this part shall be submitted, signed, and certified by the authorized account representative for each cap facility on behalf of which the submission is made. Each such submission shall include the following certification statement by the authorized account representative: "I am authorized to make this submission on behalf of the owners and operators of the cap facility for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my

knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

(6) The department shall accept or act on a submission made on behalf of owners or operators of a cap facility only if the submission has been made, signed, and certified in accordance with Paragraph (5) of this subsection.

B. Alternate authorized account representative.

(1) An account certificate of representation may designate one and only one alternate authorized account representative who may act on behalf of the authorized account representative. The agreement by which the alternate authorized account representative is selected shall include a procedure for authorizing the alternate authorized account representative to act in lieu of the authorized account representative.

(2) Upon receipt by the department of a complete account certificate of representation under Subsection D of this section, any representation, action, inaction, or submission by the alternate authorized account representative shall be deemed to be a representation, action, inaction, or submission by the authorized account representative.

(3) Except in this section, whenever the term "authorized account representative" is used in this part, the term shall be construed to include the alternate authorized account representative.

C. Changing the authorized account representatives and the alternate authorized account representative; changes in the owner and operators.

(1) Changing the authorized account representative. The authorized account representative may be changed at any time upon receipt by the department of a superseding complete account certificate of representation under Subsection D of this section. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous authorized account representative or alternate authorized account representative prior to the time and date when the department receives the superseding account certificate of representation shall be binding on the new authorized account representative and the owners and operators of the cap facility.

(2) Changing the alternate authorized account representative. The alternate authorized account representative may be changed at any time upon receipt by the department of a superseding complete account certificate of representation under Subsection D of this section. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous or alternate authorized account representative or alternate authorized account representative prior to the time and date when the department receives the superseding account certificate of representation shall be binding on the new alternate authorized account representative and the owners and operators of the cap facility.

(3) Changes in the owners and operators.

(a) In the event a new owner or operator of a cap facility is not included in the list of owners and operators submitted in the account certificate of representation, such new owner or operator shall be deemed to be subject to and bound by the account certificate of representation, the representations, actions, inactions, and submissions of the authorized account representative and any alternate authorized account representative of the source or unit, and the decisions, orders, actions, and inactions of the department, as if the new owner or operator were included in such list.

(b) Within thirty (30) days following any change in the owners and operators of a cap facility, including the addition of a new owner or operator, the authorized account representative or alternate authorized account representative shall submit a revision to the account certificate of representation amending the list of owners and operators to include the change.

D. Account certificate of representation.

(1) A complete account certificate of representation for an authorized account representative or an alternate authorized account representative shall include the following elements in a format prescribed by the department:

(a) identification of the cap facility or cap facilities for which the account certificate of representation is submitted;

(b) contact information requested by the department, such as the name, address, e-mail address, telephone number, and facsimile transmission number, of the authorized account representative and any alternate authorized account representative;

(c) a list of the owners and operators of the cap facility;

(d) the following certification statement by the authorized account representative and any alternate authorized account representative: "I certify that I was selected as the authorized account representative or alternate authorized account representative, as applicable, by an agreement binding on the owners and operators of

the cap facility. I certify that I have all the necessary authority to carry out my duties and responsibilities under 20.2.350 NMAC on behalf of the owners and operators of the cap facility and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions and by any decision or order issued to me by the department or a court regarding the source or unit."; and

(e) the signature of the authorized account representative and any alternate authorized account representative and the dates signed.

(2) Unless otherwise required by the department, documents of agreement referred to in the account certificate of representation shall not be submitted to the department. Neither the department nor its agent shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

E. Objections concerning the authorized account representative.

(1) Once a complete account certificate of representation under Subsection D of this section has been submitted and received, the department shall rely on the account certificate of representation unless and until the department receives a superseding complete account certificate of representation under Subsection D of this section.

(2) Except as provided in this part, no objection or other communication submitted to the department concerning the authorization, or any representation, action, inaction, or submission of the authorized account representative shall affect any representation, action, inaction, or submission of the authorized account representative or the finality of any decision or order by the department under this part.

(3) The department shall not adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of any authorized account representative, including private legal disputes concerning the proceeds of compliance instrument transfers.

F. Delegation by authorized account representative and alternate authorized account representative.

(1) An authorized account representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the department under this part.

(2) An alternate authorized account representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the department under this part.

(3) In order to delegate authority to make an electronic submission to the department in accordance with this part, the authorized account representative or alternate authorized account representative, as appropriate, shall submit to the department a notice of delegation, in a format prescribed by the department that includes the following elements:

(a) contact information requested by the department, such as the name, address, e-mail address, telephone number, and facsimile transmission number, of such authorized account representative or alternate authorized account representative;

(b) contact information requested by the department, such as the name, address, e-mail address, telephone number and facsimile transmission number, of each such natural person, herein referred to as the "electronic submission agent";

(c) for each such natural person, a list of the type of electronic submissions under this part for which authority is delegated to him or her; and

(d) the following certification statements by such authorized account representative or alternate authorized account representative:

(i) "I agree that any electronic submission to the department that is by a natural person identified in this notice of delegation and of a type listed for such electronic submission agent in this notice of delegation and that is made when I am a authorized account representative or alternate authorized account representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under 20.2.350 NMAC shall be deemed to be an electronic submission by me."; and

(ii) "Until this notice of delegation is superseded by another notice of delegation under 20.2.350 NMAC, I agree to maintain an e-mail account and to notify the department immediately of any change in my e-mail address unless all delegation authority by me under 20.2.350 NMAC is terminated."

(4) A notice of delegation submitted under this section shall be effective, with regard to the authorized account representative or alternate authorized account representative identified in such notice, upon receipt of such notice by the department and until receipt by the department of a superseding notice of delegation by such authorized account representative or alternate authorized account representative as appropriate. The superseding notice of delegation may replace any previously identified electronic submission agent, add a new electronic submission agent, or eliminate entirely any delegation of authority.

(5) Any electronic submission covered by the certification in this section and made in accordance with a notice of delegation effective under this part shall be deemed to be an electronic submission by the authorized account representative or alternate authorized account representative submitting such notice of delegation.

[20.2.350.400 NMAC - N, 01/01/11]

HISTORY OF 20.2.350 NMAC: [RESERVED]