



September 12, 2025

Submitted via email: eprcomments@state.co.us

Colorado Department of Public Health and Environment (CDPHE)
Hazardous Materials and Waste Management Division
4300 Cherry Creek Drive South
Denver, Colorado 80246

RE: 2025 Eco-Modulation Update – Comments

Dear Colorado Department of Public Health and Environment,

AMERIPEN – the American Institute for Packaging and the Environment – appreciates the opportunity provided by the Colorado Department of Public Health and Environment (“Department” or “CDPHE”) to submit written comments regarding the second draft of rulemaking amendments to the Producer Responsibility program (“Program”) pertaining to eco-modulation and other topics. AMERIPEN respectfully submits this comment letter for CDPHE’s consideration when developing the final Program regulation amendments to submit to the Solid and Hazardous Waste Commission this year.

AMERIPEN represents the entire packaging value chain, advocating for responsible packaging policies that drive meaningful progress in packaging sustainability while supporting industry growth and consumer needs. As the leading voice for packaging policy in the United States, AMERIPEN works with legislators, regulators, and stakeholders to develop science-based, data-driven solutions that enhance packaging’s role in product protection and circularity. We have several member companies with a significant presence in Colorado, and many more who import packaging materials and products into the state. The packaging industry supports more than 19,000 jobs and accounts for more than \$6.4 billion in total economic output in Colorado.

AMERIPEN supports policy solutions, including packaging producer responsibility, that are:

- **Results Based:** Designed to achieve the recycling and recovery results needed to create a circular economy.
- **Effective and Efficient:** Focused on best practices and solutions that spur positive behaviors, increase packaging recovery, recapture material values and limit administrative costs.
- **Equitable and Fair:** Focused on all material types and funded by shared cost allocations that are scaled to make the system work and perceived as fair among all contributors and stakeholders.

The written comments and clarifying questions below from AMERIPEN, organized by rule section, speak to the entirety of the contents of the proposed regulatory amendments that the Department released on August 29, 2025.

18.1 GENERAL PROVISIONS

18.1.6 Definitions of Terms Used in this Section

On page 3, the new definition of “brand owner” contains the phrase “completing the manufacturing.” The introduction of this phrase introduces uncertainty, despite the well-meaning attempt to distinguish it from “directing the manufacturing” and manufacturing in general. There could be scenarios where the owner of a brand does not “complete” the manufacturing and instead another party performs the last step in the manufacturing process, even if the brand owner’s brand is on the product. **AMERIPEN therefore recommends deleting “, or completing the manufacturing” from the definition.**

18.9 ECO-MODULATION

18.9.1 Eco-modulation Bonus Schedule Eligibility Criteria

As a general principle, AMERIPEN believes the process for setting extended producer responsibility (EPR) dues and eco-modulation should be conducted at the covered material category level. Funds collected for each category should be used specifically to facilitate the recycling of that category and there should be no cross-subsidization between categories. Moreover, given the novelty of these bonuses, they should be limited in scope and size. This is all critical to ensure that the impacts of EPR programs send the appropriate incentives to each form of packaging without unduly burdening other forms. Finally, while it would be ideal for a producer responsibility organization (PRO) alone to set eco-modulation factors and levels, AMERIPEN recognizes that Colorado’s EPR law (“the Act”) empowers the Department to set a bonus schedule annually.

On page 6, paragraph (A) limits eligibility for the eco-modulation bonus schedule “only to a covered material that is currently on the minimum recyclable list,” among other criteria. It is understandable that there may be a desire to limit the scope of what materials may be eligible for a bonus, but there are no restrictions to this effect under the Act. AMERIPEN is concerned that this requirement is excessively restrictive and will inhibit the increased recyclability of covered material. Specifically, this approach will remove applicability of incentives that can encourage recycling for Additional Materials List (AML) items that require more effort to become curbside recyclable. During the August 20, 2025, rulemaking meeting, CDPHE indicated that the desire is for this provision to avoid providing bonuses for materials that are sent to a landfill; however, materials on AML are recyclable and not intended to be landfilled under the EPR system. **Therefore, AMERIPEN recommends expanded eligibility to also include materials on the AML.**

On page 6, paragraph (B) caps the total eco-modulation bonus schedule bonuses for a “qualifying material, stock keeping unit (SKU) and/or its covered material component(s)” at 10% of base dues. AMERIPEN appreciates the implementation of this cap, particularly in the early years of the Program, as a reasonable way to limit excessive shifting of costs. However, AMERIPEN is concerned that referencing multiple measurements (*i.e.*, material, SKU, and component) risks creating an issue in implementing the bonuses. For example, if a SKU contains multiple components, it is unclear whether the 10% cap would

apply at both the SKU level and for each component or else whether it would apply at the highest measurement level (the SKU, in this case). Moreover, producers are reporting at the material category level and not the SKU level, so it may be impractical to apply bonuses at the SKU level. AMERIPEN recommends revising the proposed amendments to treat the SKU level and material level as the only units of measurement and asks the Department for clarity as to what approach will be taken when applying bonuses at the SKU level.

On page 6, paragraph (C) requires producers to be “in compliance with the Act” to be eligible to receive bonuses under the eco-modulation bonus schedule. AMERIPEN wholeheartedly agrees that an eligible producer should be in good standing under the Act and its rules, as well as the applicable program plan. However, more specificity as to when a producer would or would not be considered compliant would be beneficial. Provisions in Section 18.11 of the existing rules may be implicated in determining compliance. AMERIPEN requests the addition of a sentence at the end of paragraph (C) as follows to clarify the grounds compliance: “A producer is not considered ‘in compliance with the Act’ if the producer is subject to a final administrative penalty order pursuant to Section 18.11.3 that is not stayed or is subject to a fully adjudicated civil action for injunctive relief pursuant to section 18.11.4.”

18.9.2 Benchmarks

Pertaining to all the proposed eco-modulation benchmarks in general, it is not readily apparent whether changes to packaging in prior years will be deemed eligible to receive each bonus. The “On-Package Sorting Instructions Benchmark” in paragraph (A) no longer requires qualifying materials to be “new or optimized,” which would appear to allow the bonus for materials that have already incorporated on-package sorting instructions beginning years ago. On the other hand, the “Sourcing Local Content” benchmark in subparagraph (B)(1) lacks any measurement timeframe, so it is not clear whether it only applies to future actions. At a minimum, AMERIPEN requests the establishment of a date after which a respective action must be taken to be eligible for a bonus. AMERIPEN suggests that actions taken in the prior ten years and maintained since then should be eligible for each of the proposed eco-modulation benchmarks. This is modeled after a provision in California’s EPR law that requires a PRO to grant producers credit for use of post-consumer recycled material between 2013 and 2022.¹

On page 6, paragraph (A) specifies the “On-Packaging Sorting Instructions Benchmark” provisions, including providing a 1% dues reduction for qualifying units. AMERIPEN generally supports the revised approach in the second draft of the rules to defer the setting of requirements to the PRO or individual producer guidelines, as it is generally preferable to provide those entities with the flexibility to set such requirements. AMERIPEN also believes that a reduction of no more than the 1% proposed is appropriate given the novelty of the bonus and relatively accessible means of achieving it. It is also important to note that different components of covered material can be manufactured and labeled by different manufacturers. A component manufacturer could place recycling instructions on the component it manufactures, while the producer of the entire packaging and product may place complementary or

¹ California Public Resources Code Section 42057(f)(2).

overarching instructions on the rest of the packaging. AMERIPEN is grateful that subparagraph (A)(1)(c) affords some flexibility to a PRO or individual producer to navigate such scenarios and urges CDPHE to ensure that this benchmark's requirement not become prescriptive in this area.

On page 7, subparagraph (B)(1) provides a 1% dues reduction for each unit "produced in-state from at least 20% Colorado postconsumer-recycled content." As an overarching matter of concern, this bonus may implicate "Dormant Commerce Clause" issues because it essentially provides a preference for Colorado-generated material to the detriment of materials from other states. Moreover, it unnecessarily complicates efforts to develop more supply and demand for post-consumer recycled content (PCR) nationwide. **AMERIPEN recommends that the Department review the legal status of the bonus with interstate commerce in mind and reconsider its inclusion.** Should the Department proceed with this bonus, AMERIPEN raises the following additional comments:

1. More clarity is needed regarding the meaning of "Colorado postconsumer-recycled content;" **AMERIPEN asks whether this term refer only to material feedstock produced in Colorado even if the product using the content is produced elsewhere, or is there another meaning? The answer should be specified in the rules.**
2. A 1% reduction is a low bonus for this benchmark considering the number of resources necessary to develop in-state manufacturing for recycled content. At this present level, it is unlikely to be pursued at all despite the worthy goal of developing more local end markets. It is especially relevant given the lack of producers of recycled content in Colorado presently. **AMERIPEN therefore requests increasing the bonus to the maximum 10% for the unit of covered material.**
3. A static 20% post-consumer recycled (PCR) content requirement may also prove too high of a bar to make the bonus worthwhile for materials that are not presently recycled in considerable amounts. **AMERIPEN therefore asks the Department to consider scaling the level of bonus with the amount of PCR incorporated starting at a minimum such as 10%;** for example, every additional 1% of Colorado PCR content used above 10% would result in an additional 1% dues reduction, capping at 10% when incorporating 20% Colorado PCR content.
4. This bonus may fall short in its capability to develop regional end markets by focusing only on in-state production. **AMERIPEN therefore asks the Department to consider adding a smaller incentive (e.g., 1%) for materials produced from at least 20% PCR content from states that border Colorado.**

On page 7, subparagraph (B)(2) provides a proportional dues reduction up to 10% for packaging that has an increased concentration of a liquid product and provides certain consumer instructions, essentially rewarding some source reduction efforts. However, eco-modulation should instead focus on incentivizing actions that increase recycling and composting beyond what the base dues already achieve. **Therefore, AMERIPEN recommends removing this bonus to avoid drifting beyond the appropriate purpose of eco-modulation.** Should the Department choose to pursue this bonus, it should note the proposal limits the potential incentives for packaging reduction by restricting eligibility to liquid products. **AMERIPEN recommends striking "liquid" from subparagraph (a) to allow powders and other formats to make use of this bonus.** AMERIPEN also recommends expanding the scope of "optimized"

beyond concentration to include right-sizing, lightweighting, and shifting to bulk or large format packaging that allows consumers to refill commercial reusable containers, which would at least be in alignment with source reduction provisions in California's EPR law.²

On page 7, subparagraph (C)(2)(a) provides an additional 1% bonus if any certified compostable material "meets the ASTM standards D8619 or D8618 for field testing." This provision is excessive and unnecessary, as recent evidence demonstrates compostable products perform consistently and reliably in appropriately managed compost piles.³ Moreover, the field testing standards are very new and it is difficult to implement them across the diversity of composting practices. It should also be noted that other states' compostability frameworks do not impose field testing requirements. AMERIPEN thus requests removal of this provision as well.

Additionally, subparagraph (C)(1)(c) specifies that the first compostability bonus is available for qualifying material "each year." However, based on CDPHE's response to a question asked at the August 20, 2025, rulemaking meeting, it is AMERIPEN's understanding that producers can only apply once per material unit for every bonus in the eco-modulation bonus schedule. AMERIPEN argues that one-time bonuses do not provide sufficient incentive to achieve the actions desired through the eco-modulation schedule, especially given that packaging materials and labeling can change over time. Furthermore, the eco-modulation system in Oregon does not limit bonuses to one year. AMERIPEN therefore recommends allowing producers to reapply for each bonus every year or, at the very least, making the duration of the bonuses be for the duration of the program plan.

On pages 8 and 9, subparagraph (D) provides "Caste Study Benchmarks" for case studies "designed to yield measurable benefits in the collection, reuse, sortation, recyclability or compostability, reduction or elimination of waste or toxicity, or development of Colorado end markets." AMERIPEN appreciates the addition of language in the second draft requiring a PRO or individual producer to recommend approval of a case study before its submission to the state, as this will allow for upfront vetting of proposals. AMERIPEN also supports the additional requirement of a report to the PRO or individual producer. Explicitly facilitating collaboration among producers to enable larger-scale projects and opportunities for smaller producers would help improve this bonus. Furthermore, case study activities that already receive funding from a PRO or individual producer of an alternative collection program should not be eligible for bonus funding since it would be redundant. To achieve these recommendations, AMERIPEN requests clarification through the addition of the following sentences to the end of subparagraph (D)(2): **"Producers shall be allowed to collaborate to produce case studies and be eligible to receive a reduction proportionate to their respective share of costs to carry out the study. A producer may not receive a reduction from this bonus if it has already received funding from a PRO or individual producer of an alternative collection program for the same applicable activity."**

² California Public Resources Code Section 42057(a)(2)(B)(i).

³ Compostable packaging disintegration at Composting Facilities. Closed Loop Partners. (2024, April 26).

<https://www.closedlooppartners.com/research/compostable-packaging-disintegration-at-composting-facilities/>

18.9.3 PRO and Alternative Collection Program Requirements

Pertaining to all the benchmarks generally, the regulations are not explicit as to how achievement of this or any other benchmark is determined. The PRO and individual producers are in the best position to ascertain achievement. AMERIPEN seeks the Department's guidance as to how benchmark compliance will be measured, and potentially recommends adding a clarifying paragraph at the beginning of Section 18.9.3 stating the following: **The PRO or an individual producer, as applicable, shall be responsible for determining whether a producer achieves the requirements of the 18.9.2 bonuses.**

On page 9, Section 18.9.3 requires a PRO or individual producer to "assess the effectiveness of the eco-modulation bonus schedule" annually. AMERIPEN supports this provision as a thoughtful means to measure how well the schedule works over time.

On page 9, paragraph (B) requires a PRO and individual producers, in coordination with the Division, to develop on-package sorting instruction guidelines. Terms such as "pictogram," "understandable, unambiguous and quickly identifiable by the consumer," and "[d]o not generate confusion, are too general or use misleading claims" are ambiguous, so AMERIPEN welcomes the addition of January 1, 2027, as a near-term deadline for guidance. AMERIPEN seeks the Department's clarification as to whether these guidelines are considered voluntary for producers and only meant to implement the related bonus, or whether the guidelines are binding for all packaging for corresponding covered materials. It is also important that such guidance consider the diversity of packaging formats and capacities for displaying instructions (e.g., some materials may not be able to accept printing but can be embossed). Therefore, AMERIPEN requests the addition of the following subparagraph: **(e) That comprehensively consider the format of the covered material and its capacity to display instructions.**

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AMERIPEN strives to offer a good-faith and proactive approach. We continue to focus on strategies that develop and/or strengthen policies to progress the "reduce, reuse, recycle" strategies, while at the same time, enhancing the value of packaging. Our members are driving innovation, designing better environmental performance to evolve the recycling infrastructure and to create a more circular economy for all packaging. In our efforts to reduce environmental impact by increasing the circularity of packaging, our members continue to recognize the value of collaboration and the importance of working across the packaging value chain.

AMERIPEN looks forward to the continued open dialogue with the Department while collectively balancing the myriad of needs for the packaging industry, sound solutions to grow a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone that ultimately assist in the success of this program. We remain committed to supporting progressive, proactive, and evidence-based strategies for sustainable packaging policies and programs.



AMERIPEN thanks the Department for this opportunity to provide written comments regarding the proposed amendments to the Program regulations and appreciates the Department staff's time and assistance during this process. Please feel free to contact Gregory Melkonian (GMelkonian@serlinhaley.com) by email with any questions on AMERIPEN's positions.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Melkonian".

Gregory Melkonian
Regulatory and Government Affairs Associate
Serlin Haley, on behalf of AMERIPEN