



September 27, 2025

*Submitted via email: [eprcomments@state.co.us](mailto: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 third draft of rulemaking amendments to the Producer Responsibility program (“Program”) about 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 collaborates with legislators, regulators, and stakeholders to develop science-based, data-driven solutions that enhance the role of packaging in product protection and circularity. We have several member companies with a significant presence in Colorado, as well as many more that import packaging materials and products into the state. The packaging industry supports more than 19,000 jobs and generates 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, address the entirety of the contents of the third draft of the proposed regulatory amendments (with track changes) released by Department on September 19, 2025.

## **18.1 GENERAL PROVISIONS**

### **18.1.6 Definitions of Terms Used in this Section**

On page 2, the third draft removes the phrase “completing the manufacturing” from the new definition of “brand owner.” AMERIPEN appreciates the definition of this phrase.

On page 3, the definitions of “eco-modulation,” “eco-modulation bonus schedule,” and “malus” are expanded beyond environmental impacts to encompass “social, economic, and health impacts.” Eco-modulation is a relatively new policy tool, and its application in EPR programs should focus on improving environmental outcomes that are not otherwise achieved through program design. **AMERIPEN, therefore, respectfully opposes this expansion.** AMERIPEN also appreciates the addition of the word “optional” in the definition of “eco-modulation bonus schedule” to clarify the voluntary nature of the bonuses and their requirements.

## **18.9 PRODUCER ECO-MODULATION**

### **18.9.1 Eco-modulation Bonus Schedule Eligibility Criteria**

As a general principle, AMERIPEN believes that 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 or composting 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 crucial to ensure that the impacts of EPR programs provide the appropriate incentives for each form of packaging without unduly burdening other forms. Finally, while it would be ideal for a 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 8, subparagraph (A)(1) (and the rest of Section 18.9) now applies the eco-modulation bonuses at the “qualifying material” level, with “qualifying material” also being defined in Section 18.1. AMERIPEN objected to the previous approach, which would have applied bonuses to “qualifying material, stock keeping unit (SKU) and/or its covered material component(s)” and which could have created implementation challenges. Producers are reporting at the material category level, so applying bonuses at the qualifying material level may be the most sensible approach. However, some ambiguity remains in this framework: one product may use covered material that qualifies for a certain bonus but another product from the same producer using the same type of material may not. In such cases, only those units of covered material that meet the criteria for a bonus are eligible to receive its incentive. For example, a producer of consumer goods may label Product A’s container with recycling instructions (thus qualifying for the “On-Package Sorting Instructions Benchmark” bonus) but then does not label Product B’s container despite it being made of the same material; in this example, the bonus should not apply to the proportion of covered materials used for Product B. **AMERIPEN thus recommends adding clarifying language that the bonuses only apply to the specific units of covered material that qualify for a bonus,**



rather than to all of a producer's covered material in cases where only some of the covered material qualifies.

On page 8, paragraph (A) has been amended to no longer limit eligibility for the eco-modulation bonus schedule "only to a covered material that is currently on the minimum recyclable list," among other criteria. AMERIPEN is grateful for the Department's acknowledgement that the program should incentive materials beyond those on the Minimum Recyclable List (MRL). Materials on the Additional Materials List (AML) require more effort to become curbside recyclable, so it is sensible to make them eligible for bonuses. While this amended language exceeds AMERIPEN's prior request by allowing unlisted materials bound for disposal also to benefit, it appears reasonable considering the bonuses that remain in the proposed rule.

On page 9, language in what will be subparagraph (A)(2) has been added to add specificity about when a producer is not considered "in compliance with the Act." AMERIPEN greatly appreciates this addition, as it will help ensure that eligible producers are in good standing under the Act and its rules, as well as the applicable program plan.

On page 9, paragraph (C) explicitly states that bonus benchmarks are not mandatory. AMERIPEN greatly appreciates this clarification.

### **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 for years. On the other hand, the "Sourcing Local Content" benchmark in subparagraph (B) lacks a measurement timeframe, so it is unclear 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.<sup>1</sup>

Additionally, based on CDPHE's response to a question asked at the August 20, 2025, rulemaking meeting, it was 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 a sufficient incentive to achieve the desired actions 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

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<sup>1</sup> California Public Resources Code Section 42057(f)(2).

explicitly allowing producers to reapply for each bonus every year, or, at the very least, making the duration of the bonuses match the duration of the program plan.

On page 9, paragraph (A) specifies the “On-Packaging Sorting Instructions Benchmark” provisions, including providing a 1% dues reduction for qualifying material. AMERIPEN generally supports the revised approach in the second draft of the rules, which defers the setting of requirements to the PRO or individual producer guidelines. This approach is generally preferable, as it provides those entities with the flexibility to set such requirements. AMERIPEN also believes that a reduction of no more than 1% 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 element it manufactures. In contrast, the producer of the entire packaging and product may place complementary or overarching instructions on the rest of the packaging. AMERIPEN is grateful that the third draft of rules affords more flexibility for a PRO or individual producer to navigate such scenarios and urges CDPHE to ensure that this benchmark’s requirements do not become prescriptive in this area.

On page 10, subparagraph (B) provides a 1% dues reduction for each qualifying material that, among other things, “uses at least 20% postconsumer-recycled content generated in Colorado.” As an overarching matter of concern, this bonus may implicate “Dormant Commerce Clause” issues because it essentially provides a preference for material generated and utilized in Colorado 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 continues to strongly recommend 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. The third draft of the rules added a condition that only materials on the MRL are eligible for this bonus. Similar to comments expressed above, AMERIPEN is concerned that this will unnecessarily restrict incentives for increasing the use of post-consumer recycled (PCR) material. It also conflicts with the revised language that allows all materials to qualify for bonuses. AMERIPEN therefore recommends revising this condition also to include materials on the AML.
2. AMERIPEN appreciates the removal of the unclear term “Colorado postconsumer-recycled content” in the third draft of the rules, which has been replaced with a specification that the material must be generated in Colorado.
3. 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 despite the worthy goal of developing more local end markets. It is especially relevant given the current lack of producers of recycled content in Colorado. AMERIPEN therefore requests that the bonus be increased to a maximum of 10% for the unit of covered material.
4. A static 20% 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.

5. 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 10, the proposed bonus for an increased concentration of a liquid product, as specified in subparagraph (B)(2), has been deleted. AMERIPEN supports this deletion, since eco-modulation should focus on incentivizing actions that increase recycling and composting beyond what the base dues already achieve.

On pages 10 and 11, an additional 1% bonus for certified compostable material that “meets the ASTM standards D8619 or D8618 for field testing” has been deleted. AMERIPEN supports this deletion, as this provision was excessive and unnecessary, given recent evidence demonstrates compostable products perform consistently and reliably in appropriately managed compost piles.<sup>2</sup> Moreover, the field-testing standards are relatively new, and it is challenging to implement them across the diverse range of composting practices. Other states’ compostability frameworks do not require field testing.

On pages 11 and 12, paragraph (D) provides a “Case Study Benchmark” 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 an individual producer of an alternative collection program should not be eligible for bonus funding, as it would be redundant. To achieve these recommendations, AMERIPEN continues to request 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.”**

### **18.9.3 PRO and Alternative Collection Program Requirements**

On page 12, 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

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<sup>2</sup> Compostable packaging disintegration at Composting Facilities. Closed Loop Partners. (2024, April 26). <https://www.closedlooppartners.com/research/compostable-packaging-disintegration-at-composting-facilities/>



measure how well the schedule works over time. However, delaying the deadline for the criteria to 2028 provides producers with one less year to prepare to pursue the bonus, even though packaging redesign can be a lengthy process. AMERIPEN preferred the prior deadline of January 1, 2027, in subparagraph (B).

On page 12, paragraph (B) requires a PRO and individual producers, in coordination with the Division, to develop on-package sorting instruction guidelines. AMERIPEN appreciates the removal of vague 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.” AMERIPEN also supports the current approach in this subparagraph that generally defers guidance design to the PRO and individual producers. However, AMERIPEN cautions that the third draft’s delay of the guidance deadline to 2028 provides producers even less time to prepare their packaging to qualify.

On page 13, paragraph (C) now requires the PRO and individual producers to develop verification processes for the benchmarks. AMERIPEN supports this language as a means to specifying how achievement of this or any other benchmark is determined, as the PRO and individual producers are in the best position to ascertain achievement.

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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 advance the “reduce, reuse, recycle” strategies, while also 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 needs of the packaging industry, developing sound solutions to foster a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone, ultimately supporting 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 considering its prior comments and for this opportunity to provide written comments regarding the proposed amendments to the Program regulations. AMERIPEN appreciates the time and assistance of the Department staff 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