DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission

Hazardous Materials and Waste Management Division

6 CCR 1007-2 Part 1

STATEMENT OF BASIS AND PURPOSE AND SPECIFIC STATUTORY AUTHORITY FOR

Amendments to the Regulations Pertaining to Solid Waste Sites and Facilities (6 CCR 1007-2, Part 1) – Addition of Section 18.9 (Producer Eco-modulation) and Amendment of Section 18 (Producer Responsibility Regulations)

Basis and Purpose

I. Statutory Authority

These regulations are promulgated pursuant to the authority granted to the Solid and Hazardous Waste Commission ("Commission") in the Producer Responsibility Program for Statewide Recycling Act (the "Act"), Sections 25-17-705(7) and 25-17-709(1)(d), Colorado Revised Statutes (C.R.S.). These regulations implement House Bill 22-1355 passed by the Legislature in 2022 and codified at Sections 25-17-701 to 716, C.R.S.

Section 709(1)(d) of the Act includes the following authorizations related to the proposed eco-modulation bonus schedule requirements within Section 18.9:

> By January 1, 2026, and each year thereafter, the executive director shall develop an eco-modulation bonus schedule that is designed to reduce the producer responsibility dues of producers that meet certain benchmarks established by the executive director by rule. The executive director shall consult with the organization and the advisory board in developing the eco-modulation bonus schedule. The organization shall reduce the producer responsibility dues of producers in accordance with the eco-modulation bonus schedule developed by the executive director.

Section 705(7) of the Act includes the following authorizations related to the proposed administrative changes within Section 18:

> The executive director shall enforce this part 7 in accordance with Section 25-17-710 and the commission shall promulgate rules in accordance with article 4 of title 24 as may be necessary for the administration of this part 7 and the enforcement of this part 7 pursuant to Section 25-17-710.

II. Purpose of Amendments to Section 18 Regulations

The purpose of revising Section 18 is to:

1. Remove the administrative burden for the department, producer responsibility organization ("PRO") and producers from submitting documents and records if they believe they are exempt for covered material;
2. Provide a pathway for a producer to dispute and resolve the final application of eco-modulation factors to the dues owed to the PRO and/or an individual producer of any alternative collection program;
3. Fix typos and small errors;
4. Clean up and add definitions to clarify the order of obligation for producers in Section 18.2; and
5. Add definitions to clarify the requirements in section 18.9.

The purpose of developing Section 18.9 is to:

1. Create criteria that a producer and a covered material must meet prior to receiving department incentives;
2. Outline the eco-modulation bonus schedule that is designed to reduce producer responsibility dues of producers that meet certain benchmarks that enhance system or environmental outcomes; and
3. Specify the requirements of the PRO and individual producers of an alternative collection program that will be implementing the department's eco-modulation bonus schedule.

Discussion of Regulatory Proposal

I. Authorization

Sections 25-17-703, 705, 710, and 713, C.R.S. direct the Commission to promulgate regulations towards implementing the program.

Section 25-17-709(1)(d), C.R.S. directs the department to develop an eco-modulation bonus schedule that is designed to reduce the producer responsibility dues of producers that meet certain benchmarks established by the executive director by rule.

Section 25-17-705(7), C.R.S. also provides that "the commission shall promulgate rules in accordance with article 4 of title 24 as may be necessary for the administration of this part 7 and the enforcement of this part 7 pursuant to Section 25-17-710."

<u>II. Definitions of Terms Used in this Section (Section 18.1.6)</u>

The additions and changes proposed in Section 18.1.6 regarding definitions were added to:

1. Help clarify the eco-modulation benchmarks in Section 18.9; and
2. Help clarify the order of obligation for producers in Section 18.2.

New definitions added include:

"Benchmark": The standard a covered material or producer must meet to receive an eco-modulation incentive.

"Brand owner": The definition was added to better clarify which producer is obligated when the brand owner and manufacturer are separate entities, and clarify similar existing regulatory language in the producer order of obligation section.

"Certified compostable": The definition was added from SB23-253, as codified at Sections 25-17-801 *et seq.* C.R.S., to be more easily referenced in Section 18.9.

"Eco-modulation" and "eco-modulation bonus schedule": The definitions were added to better clarify the purpose of the eco-modulation bonus schedule in Section 18.9.

"Malus": The definition was added to clarify the difference between maluses and incentives developed by the PRO or an individual producer of an alternative collection program from incentives developed by the department.

"Postconsumer-recycled-content rate": This definition was left out of the 2024 rulemaking in error. This is defined in Section 25-17-703(28), C.R.S. and therefore, should be added to 18.1.6 definitions.

"Qualifying Material": This was defined to clarify the covered material that meets the benchmarks established in Section 18.9.2.

Revised definitions include:

"Compostable": A typo was fixed on one of the listed ASTM standards.

"Contamination": The definition of contamination was clarified to only include covered materials that are not certified compostable to ensure that the PRO would not be responsible for other types of contamination that occurs at compost sites, such as rocks, dirt and garden hoses. This helps clarify "inbound contamination rate."

"Inbound contamination rate": "Covered material" was changed to "contamination" to ensure that all contamination at material recovery facilities ("MRFs") are the responsibility of the PRO or individual producer of an alternative collection program.

"Reuse" or "Refill": "Five" was struck in the "reuse" or "refill" definition, since it was a typo and contrary to the term "multiple."

"Small business": "Global" was added to clarify that the small business exemption is for businesses that make less than the total annual gross "global" sales as adjusted by the Consumer Price Index. This was a result from the department receiving many producer questions on this particular exemption. This is consistent with existing department guidance.

<u>III. Producers (Section 18.2)</u>

The intent of the changes made in 18.2.2 was to clarify who the obligated producers are in internet transactions. The legislative intent was for there to be two different, but equally, obligated producers for internet transactions: (1) the producer of the primary packaging material which is used to directly protect and contain the product, and (2) the person that also packages the product for shipping (secondary packaging) to the consumer for an internet transaction.

The intent of the change made in Section 18.2.3 was to fix a grammatical error.

The intent of the removal in Section 18.2.5 was to remove the requirement for producers to submit records to the PRO when they are exempt and to remove the large administrative burden of reporting or managing records from exempt producers from the PRO.

IV. Producer dues hearing (Section 18.2.7)

The intent of the addition of Section 18.2.7 “Producer dues hearing” was to provide producers with a public, transparent process to resolve alleged errors in their producer dues, specifically with regards to eco-modulation factors.

Section 18.2.7(A) sets out a timeline for a request for hearing and clarifies that a hearing follows the internal processes (informal dispute resolution) set out by the PRO.

Section 18.2.7(B) sets out the requirements for a hearing request (including proof of payment of dues) and specifies that the board administrator may dismiss a request which does not comply with these requirements. This section also provides a producer with the ability to request the hearing request information be kept as confidential business information according to the process already set out in Section 18.1.4.

Section 18.2.7(C) describes the hearing process and gives the Advisory Board the authority to review and make recommendations on the producer’s hearing request based on the evidence submitted. The board administrator must work with the Board to set a hearing date and post notice of that hearing date. This section also allows the PRO or an individual producer of an alternative collection program to request party status at the hearing. The producer bears the burden of proof at the hearing and must demonstrate how the alleged error is contrary to statute, the regulations, or the applicable program plan. This section also allows the Board to make a recommendation on a hearing request even if the producer fails to attend the hearing.

Section 18.2.7(D) provides that the Director of the Hazardous Materials and Waste Management Division has the final decision-making authority and must make their decision after reviewing the Advisory Board’s recommendation and within 45 days of receipt of this recommendation.

Section 18.2.7(E) explains that a producer’s obligation to pay the dues assessed is not stayed by a hearing request and that should an error be found, a refund will be issued.

Section 18.2.7(F) permits judicial review of the decision of the Division Director under the requirements of the Administrative Procedure Act.

V. Covered Materials - Minimum Recyclable List (MRL) (Section 18.3)

The intent of the changes in Section 18.3 was to remove the requirement of producers submitting records to the PRO when they are exempt to remove the large administrative burden of reporting or managing records from exempt producers from the PRO. Under the previous regulations established in 2024, any entity looking to qualify for an exemption would need to submit documentation and receive approval prior to being exempt.

VI. PRO Funding Mechanism (Section 18.5.4)

The intent of the changes in 18.5.4 is to clarify the scope of the eco-modulation benchmarks in Section 18.9. This revision is necessary because the department only has the authority to develop an eco-modulation bonus schedule that reduces producer responsibility dues. The department does not have the authority to increase producer dues based on the bonus schedule.

VII. Eco-modulation Bonus Schedule Eligibility Criteria (Section 18.9.1)

The intent of Section 18.9.1 is to create baseline eligibility requirements for producers and their covered materials to be able to qualify for bonuses set forth in Section 18.9.2. This section also specifies that these requirements will be assessed by the PRO or individual producer of an alternative collection program in coordination with the department. In (A)(1) the qualifying material needs to be sold or distributed in Colorado of the applicable reporting year and may qualify for each year it meets the corresponding benchmark.

Additionally, as required by Section 18.9.1(A)(2), the producer must be compliant with the Act as determined by a producer's compliance status based on an active administrative order or civil action for injunctive relief. The intent is to only reward producers that are acting in good faith and are participating fully and responsibly in the program.

“(B)” of the eligibility criteria ensures that producers are only eligible for 18.9.2 bonuses equal to a reduction in base dues of 10% for each qualifying material. These do not include incentives or maluses that are applied by the PRO or individual producer of an alternative collection program. While this may not impact the bonus schedule now, since the bonuses could only add up to a 3% total, the department expects to recommend the Commission raise the percentages for each benchmark in future years as more data comes available. The 10% cap assures the PRO and individual producer of an alternative collection program that bonuses will not rise too drastically.

"(C)" indicates that benchmarks are not mandatory requirements for producers, rather optional incentives.

VIII. Benchmarks (Section 18.9.2)

The intent of the first paragraph of 18.9.2 is to ensure that the PRO or individual producer of an alternative collection program, provides producers a way to estimate their dues in advance of receiving their invoice.

The intent of the second paragraph is to ensure achieved bonus schedule incentives are applied to the 2027 invoices and all invoices thereafter.

(A) On-Package Sorting Instructions: The intent of this benchmark is to incentivize producers that follow the guidance of the PRO and/or the individual producer of an alternative collection program to provide clear, concise, and standardized information to the consumer on how to properly sort their covered material. On-package sorting instructions have been incentivized in Quebec's and France's producer responsibility programs. France now requires on-package sorting instructions utilizing their standardized Triman logo due to a 2022 law[1]. Under the department's benchmark, producers will not be eligible for this benchmark until 2029, this allows the PRO and/or individual producer of any alternative collection program to develop criteria.

(B) Local End Use Benchmark: The intent of this benchmark is to incentivize producers that manufacture new covered materials on the MRL to be made of at least 20% postconsumer-recycled (PCR) content generated in the United States, and utilized by an end market business in Colorado. The 20% target aligns with Circular Action Alliance's (CAA) proposed 2030 postconsumer-recycled content target for rigid plastic packaging[2]. This is the lowest percentage target out of any

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[1] Decree No.2022-748 of April 29, 2022

[2] CAA's Draft Amended Program Plan - June 2025 (P25)

material on the MRL and allows the department to set one goal across material types versus different targets based on various materials. "End Market Business" is defined under the "Materials recovery facility" definition in section 18.1.6. The department had considered utilizing 20% PCR content generated in Colorado only, but recognized that this may be difficult for some producers to track and hence, expanded to United States content. The original intent was modelled off of Éco Enterprises Québec's (EEQ)[3] incentive to source local content, however, theirs was also in reference to virgin material. The department believes it important to incentivize end markets in Colorado.

(C) Compostability Benchmark: Compostable packaging is penalized under the current recyclability criteria and therefore, will receive maluses associated with products that are not on either the MRL or Additional Materials List ("AML"). Compostable packaging is a contaminant for MRFs and can pose challenges for compost facilities. However, the statute explicitly contemplates compostable packaging as a legitimate recovery pathway if compost facilities can process it and can help bring in food scraps to those facilities. Therefore, while the department does not intend to negate the maluses associated with compostable packaging, covered materials, that are certified compostable in accordance with ASTM (D6400, D6868, D8410 or any successor standards) and the labeling requirements set forth in SB23-253, will be eligible to receive a small eco-modulation incentive. Colorado will be leading the way with compostability benchmarks, but will serve to harmonize efforts with other producer responsibility states such as Minnesota[4] and California[5] both of which require all packaging to be recyclable or compostable by 2032.

(D) Case Study Benchmark: The intent of this benchmark is to provide pathways for producers to innovate packaging to perform better in recycling and composting systems, and/or to reduce or eliminate waste or toxicity. This benchmark avoids being overly prescriptive on possible studies. This allows for producers to experiment with new and more efficient ways of managing the end of life of their packaging. A producer would need to initially submit a proposal, receive a recommendation and approval from the PRO and the Department before beginning a case study. They would then need to complete the case study and

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[3] EEQ is Quebec's PRO for paper and packaging EPR program
[4] Minn. Stat. § 115A.144-115A.1463
[5] Cal. Pub. Res. Code. § 41821.5

report out to receive the incentive. In order to specifically support Colorado's recycling operations, this case study would need to take place in Colorado or take place in the United States, but be paired with investment(s) in Colorado. Lastly, the incentive shall not exceed the individual producer's contributions to carry out the study. The incentive would be granted for the reporting year it was published and approved by the PRO/or alternative collection program. This benchmark was based on EEQ's case study bonus.

IX. PRO and Alternative Collection Program Requirements (Section 18.9.3)

The intent of this section is for the PRO or individual producer of an alternative collection program to:

(A) Assess producer participation, effectiveness and practicality of the benchmarks developed in Section 18.9.2 and after baselines have been established and report on their findings in their annual report;

(B) Develop on-package sorting instructions criteria by 2028. The two-year delay on on-package sorting instructions is intended to provide the PRO and individual producer of an alternative collection program time to develop guidance and criteria for this benchmark;

(C) Develop and publish guidance criteria for the case study benchmark by October 31, 2026; and

(D) Develop guidance and determine the verification processes for the benchmarks in 18.9.2, and receive approval from the department prior to October 31, 2026.

Stakeholder Involvement in the Process

The department notified over 700 stakeholders by e-mail of the proposed revisions of these regulations. Stakeholders were given an opportunity to provide any comments during the three stakeholder meetings, one advisory board meeting as well as in writing after each stakeholder meeting.

Over the course of the three stakeholder meetings, the department had 200 total participants attend virtually, including producers, industry associations, local government, service providers, consultants, non-governmental organizations (NGOs), and other solid waste industry representatives.

The department utilized various methods to inform industry representatives, trade associations, local government agencies, local government agency associations, and other interested parties of the proposed regulatory revisions. These methods included:

1. Posting a Stakeholder Process Notification on the department's producer responsibility and rulemaking pages to notify stakeholders of upcoming stakeholder meetings and related draft documents.

2. Providing stakeholders information regarding stakeholder meetings and providing all instructions to access the draft regulations by e-mail. Stakeholders were notified via Constant Contact as early as June 25th to register for the meetings. This stakeholder contact list consisted of over 700 recipients, including: local governments; registered recycling facilities; manufacturers; landfills and transfer stations; household hazardous waste ("HHW") facilities; trade associations; business advocacy organizations; environmental and community nonprofits; compost operators; haulers of recyclable materials; producers; and other private operators and industry associations including the Recycle Colorado ("RC"), National Waste & Recycling Association ("NWRA"), Solid Waste Association of North America ("SWANA"), Colorado Municipal League ("CML"), Colorado Communities for Climate Action ("CC4CA"), and Colorado Counties, Inc. ("CCI").

3. Notifying all known interested parties by email prior to the release of the first draft of the revisions to the regulations.

4. Sending out stakeholder meeting email notices that included the latest draft revisions to the regulations.

5. Holding three stakeholder meetings on: August 20, 2025; September 3, 2025; and September 24, 2025 to receive comments from stakeholders regarding the department's proposed regulations for Section 18.9. Key stakeholder questions and/or issues are compiled and discussed in the Key Issues Encountered During Stakeholder Process section of this document. The department used an online webinar platform with language interpretation and teleconferencing so geographically diverse stakeholders could participate. Additionally, the department's website was utilized to post updates to the regulation revision

process, iterative versions of support and working documents, and audio recordings of the stakeholder meetings.

6. Notifying the advisory board and members of the public during the Producer Responsibility Advisory Board meetings.

During the stakeholder process, the department followed the applicable process and procedures required by Executive Order No. 5 to notify local governments regarding the upcoming revisions to the Solid Waste Regulations. As of the date of publishing this notice, no entities have responded to Executive Order No. 5.

Issues Encountered During Stakeholder Process

As Colorado is the first state in the nation to promulgate regulations for implementing eco-modulation bonuses, the department received numerous comments on the proposed rules under Section 18 during the stakeholder process. A summary of the notable stakeholder comments submitted to the department are summarized below.

The department received several clarifying questions during the stakeholder meetings specific to the timeline of public comment/filing/promulgating as well as the justification for low bonus percentages. The department extended the public comment period beyond the original thirty day public comment period to ensure stakeholders had sufficient time to submit feedback. With the final producer dues still under development for the first year of the program, the department felt it was necessary to start with a cautious approach for establishing the maximum bonus rate schedule not to exceed 10% of base dues, along with the PRO's eco-modulation malus and incentive rate factors.

The department also received fifty-seven emailed comments from organizations, and another 189 from individual members of the public. Most of the email comments covered multiple topics, or sections. Comments were received from organizations such as: A1 Organics, Alliance for Automotive Innovation, American Chemistry Council (ACC), American Distilled Spirits Alliance (ADSA), American Forest & Paper Association (AF&PA), AMERIPEN, Association of Plastic Recyclers (APR), Biodegradable Products Institute (BPI), Boulder County, Braskem, BSH Home Appliance Corporation (BSH), CAA, Can Manufacturing Institute (CMI), Carton Council, City of Northglenn, Consumer Brand Association (CBA), Flexible Packaging Institute (FPA), Food Packaging Institute (FPI), EcoCycle, Glass Packaging Institute (GPI), GreenLatinos, Household & Commercial Products Association (HCPA), Imperial Dade, North Pacific Paper Company (NORPAC), PakTech, Perkins Coie, Pressurized Cylinder Industry Association (PCIA), RR Donnelley, Schinner, Swire Coca-Cola, United States Bakery (USB), UPSTREAM, Window & Door Manufacturers Association (WDMA), Wine Institute and others.

The majority of the 189 comments received from members of the public touched on the same one to three topics and were close to identical emails. Many of the public comments submitted asked the department to set new requirements on toxic constituents in packaging when promulgating requirements on the eco-modulation bonus criteria. The department needs to further research this complex subject and consult with experts on toxicology and packaging materials before a regulatory requirement can be proposed. Due to the limited timeframe with the January 1, 2026 eco-modulation deadline established in the Act, and the complexity of this issue, the department was not able to address this topic during the current rulemaking.

In addition to email exchanges of updated proposed draft language in response to comments, the department also set up several meetings with some stakeholders who provided feedback to better understand and talk through suggested edits.

Based on the feedback provided, five definitions were further modified to provide clarity and eight definitions were added.

The comments primarily pertained to eco-modulation benchmarks developed in Section 18.9.2 and the corresponding criteria for producers and covered materials in 18.9.1 and the requirements for the PRO and individual producers of alternative collection programs in 18.9.3. There were also a number of comments that pertained to the 18.2.7 producer dues section, the definitions sections or were generally related to Section 18 as a whole.

Notable additions or removals based on stakeholder feedback include:

- Extended the original public comment period from 30 to 45 days. Supported by AMERIPEN.

18.1.6 Definitions:

- Added “certified compostable” definition from SB23-253. Supported by AF&PA.
- Defined and clarified “brand owner” with support from AMERIPEN and CAA.

- Updated the definition of “eco-modulation” and “eco-modulation bonus schedule” to include the purpose of preventing, minimizing or reducing negative environmental, social, economic and health impacts of covered materials. This was supported by 26 NGOs and Colorado businesses. AF&PA questioned this decision, stating that it is difficult to quantify and that they are not addressed in the eco-modulation factors. AMERIPEN opposed it.
- Clarified in the definition of “eco-modulation bonus schedule” that incentives are optional due to feedback from PakTech.
- Defined “qualifying material” to further clarify the covered materials that are eligible for benchmarks in Section 18.9.2 and replaced original language within section 18.9. Suggested by CAA. Similar concerns were also expressed on “stock keep unit/covered material component” language from AF&PA, AMERIPEN and FPI.

18.2.5 and 18.3

- The PRO requested the striking of the language that producers must submit documents and records to the PRO if they believe they are exempt. The department agreed that was an unnecessary administrative burden to the PRO. HCPA supported. UPSTREAM disputed this decision.

18.2.7 Producer Dues Hearing

- The department added an administrative hearings process for resolving disputes regarding producer dues set by the PRO or an individual producer of an alternative collection program to address due process concerns. Some stakeholders supported the addition of this process and some stakeholders raised concerns.
- AF&PA, GreenLatinos and Imperial Dade supported the changes, stating it would add transparency to a largely internal process. Some of these stakeholders requested the department remove the requirement for producers to participate in the dispute resolution process in contract before submitting a request for hearing.
- CAA opposed the changes, stating the changes would increase their budget, create uncertainty, and was outside the scope of the rulemaking. CAA requested the department remove this section entirely.
- Other stakeholders asked clarifying questions about the section or made suggestions to change the section, but did not express support or concerns.
- In response, the department clarified that the producer dues hearings process only applied to eco-modulation and added a requirement that the producer submit proof of payment of dues to address CAA’s concerns regarding financial uncertainty. The department also clarified that the hearings process applied to LPMA.

18.5.4 PRO Funding Mechanism

- Removed “or increased.” to better align with statute intent on the eco-modulation bonus schedule. Supported by AF&PA.

18.9.1 Eligibility Criteria:

- Added “each” to (A) to specify that bonuses apply to each applicable reporting year and are ongoing incentives versus one-time/intended for new or optimized products only. Clarified based on comments from ACC, AMERIPEN, Boulder County and Perkins Coie. Changed “program year” to “reporting year”. Based on feedback from NORPAC, Schinner and USB. Clarified that PRO/alternative collection program will be assessing criteria of the benchmarks in coordination with the department, based on feedback from AMERIPEN.
- (A) Expanded the eligibility criteria to include both covered materials on the AML and covered materials that are not on either the MRL or the AML for specific benchmarks The intent of opening up the criteria on these benchmarks is to ensure that: 1. sorting instructions can benefit consumers and prevent contamination, regardless of whether or not it is on the MRL and, 2. innovation can occur through case studies, and that there are pathways for covered materials to make their way to the MRL or AML. This was supported by ADSA, AMERIPEN, APR, Boulder County, CAA, FPI, PCIA and a number of advisory board members participating in the stakeholder process in their personal capacities. There was no opposition to this decision.
- Specified that a producer is not in compliance with the Act is the producer is subject to a final administrative order, due to feedback from AMERIPEN.
- Adjusted phrasing to read “bonuses equal to a reduction in base dues…” in section 18.9 to better clarify how incentives are being applied to producer dues, due to feedback from CAA.
- Clarified that all bonus benchmarks are not mandatory, due to feedback from PakTech.

18.9.2 Benchmarks

- Changed the date to read “no later than January 31, 2027” to specify when the PRO and individual producer of an alternative collection program should apply dues. This was based on feedback from CAA.
- Multiple stakeholder comments urged Colorado to harmonize with other state level requirements for implementing eco-modulation criteria, including AF&PA, Alliance for Automotive Innovation and PCIA. The department removed and simplified a number of their initial concepts i.e., compostable field testing, product concentration; and extended the timeline on the on-package sorting instruction benchmark in order to make time and space for future harmonization with other jurisdictions.
- Reduced the number of benchmarks and instead plans to scale benchmarks over time. Supported by APR, PCIA and Swire Coca-Cola.
- On Package Sorting Instructions:
    - Delayed on-package sorting instructions benchmark to January 1, 2029. Supported by CAA and Imperial Dade. Opposed by AMERIPEN.
- Local End Use Benchmark:

    - Provided clarity to the Local End Use Benchmark, by clarifying the postconsumer-recycled must be utilized by an end user in Colorado, removing requirement that the PCR must be generated in Colorado for ease of tracking. Based on feedback from AMERIPEN, APR, CAA, GPI, HCPA, Imperial Dade, Perkins Coie and others.
    - Lowered the local end user benchmark from 30% to 20% based on APR feedback and others.
- Removed concentration benchmark, supported by AMERIPEN and CAA.
- Case Study Benchmark:
    - Clarified that a producer or group of producers may submit case study proposals, based on feedback from AMERIPEN, Carton Council, CBA and FPA.
    - Clarified parameters and created a system to verify case study projects prior to being implemented based on feedback from APR and Carton Council.
    - Limited case studies that take place in Colorado or are specifically paired with investments within Colorado. This was based on feedback from ADSA, AF&PA, CAA, GPI, NORPAC, Schinner and USB.
    - Added clarification that the incentive be awarded the year the final report is published, based on feedback from AF&PA and FPA.
    - Added additional language that a producer may not receive a reduction if they have already received funding from the PRO/alternative collection program for the same applicable activity. This was based on feedback from AF&PA, AMERIPEN and Carton Council.
    - Include PRO/alternative collection program review and department approval on case studies. Supported by Carton Council.
    - Removed examples of case study projects, based on comments from CAA and FPA.

18.9.3

- Added that the PRO/alternative collection program evaluates the practicality of the bonus schedule, based on feedback from ACC.
- Simplified the language around on-package sorting instructions to be less ambiguous and prescriptive, supported by AMERIPEN, CBA, and FPA.
- Developed a requirement for the PRO and individual producer of an alternative collection program to develop guidance criteria for the case study benchmark, based on feedback from AMERIPEN and FPA.
- The department developed language for the PRO and individual producer of an alternative collection program to develop guidance on determining verification processes for benchmarks in 18.9.2 and to receive approval from the department, based on feedback from AF&PA and Imperial Dade. Supported by AMERIPEN.
- Removed the requirement that it must be conducted through a technical committee, based on feedback from CAA.

Alternatives Considered and Why Rejected

The department received a number of suggested alternatives and additions to the eco-modulation benchmarks. A comment we received from many stakeholders was that the PRO and individual program already had many eco-modulation factors to implement in their first year and allowing them to focus on implementation was of utmost importance, prior to providing more complexity with CDPHE eco-modulation bonuses. The notable requests and considerations are as follows:

1. Timing of eco-modulation rules:

   CAA recommended establishing future eco-modulation rules before July 1. In future years, the department plans to open up rulemaking to coincide with the annual adjusted producer exemption dollar limitation which must occur before July 1 each year.

   Timing of implementation of the rules:

   ADSA requests the department to provide at least a twelve month notice before any methodological changes take effect in order to give producers predictability to plan and comply effectively, while also expressing that bonuses should not be delayed until 2027. Based on feedback from stakeholders and the reality of a tight timeline, the department has the eco-modulation bonuses beginning guidance in 2026 and implementation in 2027 to allow the PRO and alternative collection program time to develop and publish guidance and criteria on verification processes. This also allows a fair playing field for all producers to prepare for the upcoming incentives.

2. Certified compostable definition:

   The department received feedback from CAA, that the “Certified Compostable” definition creates confusion given how “compostable” is defined in the Act. “Certified compostable” is defined in §25-17-803, C.R.S. and helps to provide clarity to the eco-modulation benchmarks. The department does not have rulemaking authority to clarify “certified compostable.”

3. Post-consumer recycled content rate definition:

   AF&PA expressed concern over the definition of “postconsumer-recycled-content rate” including “within or into the United States market territory.” They stated that it might be restrictive to manufacturers and that mills don’t differentiate where recycled content comes from when making new materials. This definition was directly pulled from the Act and the department is not authorized to remove the U.S. territory specification.

APR recommended defining “postconsumer recycled content” to align with international standards established under ISO 14021:2016[6] and Washington[7]. The definition provided includes materials that are out-of-scope. The definition would need to comply with the intent of the Act and be consumer-facing covered materials.

4. Reuse and refill definitions:

   GreenLatinos expressed desire for the “reuse” or “refill” definition to align with PR3’s definition, which states that a container must withstand at least 45 uses. The statute definition in §25-17-703(43)(b), states “Was intended to be used for its original purpose at least five times”. This definition cannot be changed through rulemaking.

5. Internet transaction, dual obligation of producers:

   In 18.2.2, Imperial Dade and Perkins Coie expressed concerns that obligating both the producer of the product packaging and the shipping packaging equally may introduce unnecessary complexity, and could discourage implementation of eco-modulation. RR Donnelley also expressed concerns on the internet transaction regarding use of branded packaging for shipping. This requirement is set in statute and cannot be changed. The department also believes that obligation to both the producer of the product packaging and shipping packaging is necessary, since in many scenarios, the producer of the product packaging does not have control over the shipping packaging and vice versa. These are often separate producers with separate dues.

6. Reporting on exempt reusable and refillables:

   UPSTREAM requested that producers of reusable and refillable packaging must submit documents and records if they believe they are exempt in Sections 18.2.5 and 18.3. This was suggested when the department struck the identical language that producers must submit documents and records to the PRO if they believe they are exempt. Reusables and refillable packaging are not covered materials because they are not packaging material under statute. Therefore, the department does not have the authority to make this suggestion.

7. Delayed timeline of producer dues and reporting:

[6] International Organization for Standardization 14021:2016
[7] RCW 70A.245.010

The department received a request to delay the requirement for producers to register with the PRO until July 31, 2026. However, the Act states that producers are required to participate in the program by July 1, 2025 and subsequently pay producer responsibility dues to the PRO by January 1, 2026. In addition, by January 1, 2026, and each year thereafter, the executive director shall develop an eco-modulation bonus schedule. Thus, the department does not have the discretion to change these statutory deadlines.

8. Remove or modify Section 18.2.7, producer dues hearing

APR, CAA and CBA expressed concerns about the addition of a new section authorizing a producer dues hearings into the third draft of the regulations and the department's presentation on the new language at the third informal stakeholder meeting. These entities also expressed concern of the added burden for the advisory board, CAA staff, producers, and the department with this provision and ultimately included a request to remove the language in Section 18.2.7.

Other stakeholders including HCPA, NORPAC, RJ Schinner and USB requested the department expand the scope of producers eligible for hearings, including modifying Section 18.2.7 to remove the requirement that a producer must first go through CAA's dispute resolution process which includes internal, informal dispute resolution and then arbitration, prior to appealing dues to the Department.

Imperial Dade expressed appreciation for the producer dues appeal process but noted concerns with the Advisory Board evaluating producer dues appeals as this new role may fall outside the scope of the Board's authority under the Act and noted that producer dues appeals should be evaluated by the department rather than members of the Advisory Board.

The department has developed a transparent, efficient, and fair administrative hearings process for resolving disputes regarding producer dues set by the PRO or an individual producer of an alternative collection program. This process addresses legal concerns regarding the binding arbitration with no right to judicial review proposed in the PRO's contracts with producers. The process is available to all producers who receive eco-modulated dues, does not require significant resources to engage in, and is thus equitable to all producers. Additionally, Oregon's regulations also provide for a similar process to resolve disputes between the PRO and recycling depot or drop off centers. *See* OAR 340-090-0640(1)(b)(D).

The administrative hearings process is necessary to provide producers with the opportunity to correct potential miscalculations of the eco-modulation factors in front of two impartial tribunals, the Advisory Board, and the Director of the Hazardous Materials and Waste Management Division. The process permits the Advisory Board to make the initial recommendation, with the Division director making the final decision. This process does not conflict with the Act or the Administrative Procedure Act ("APA"), which permits an agency to preside over a hearing because the Board is an agency under the definition set by the APA and because the Division Director has the final decision making authority.

Further, the regulations set out an aggressive timeline for the administrative hearing, while balancing the required notice timelines in the APA. Overall, the process should take no more than 120 days. The regulations also allows producers to request judicial review, an option which is not allowed through the PRO's process. The judicial review process will be based on administrative record, allowing the case to proceed toward the merits efficiently. How quickly the PRO or individual of an alternative collection program and producer proceed through the dispute resolution process is beyond the department's control.

The regulations include a number of guardrails to ensure that producers do not use hearing requests to delay the program, use the process to increase dues for others, or create significant financial uncertainty beyond the uncertainty already present in the program due to producers who have not registered or may not pay dues regardless of the availability of an administrative hearing. The hearings process is also only applicable to the eco-modulation factors and not the base dues. The hearings process requires producers to first engage in internal dispute resolution with the PRO or an individual producer of an alternative collection program and does not allow a producer withhold disputed dues. Such a step is necessary to allow an opportunity to resolve the dispute and if not, narrow down the dispute. And, producers must provide proof of payment of the disputed dues with their hearings requests.

The process is within the scope of the rulemaking because the department noticed the change during the informal stakeholder process before requesting the Commission submit a formal notice of proposed rulemaking. Further, the draft hearings regulations are solely focused on the application of the eco-modulation factors. Finally, the department posted the proposed hearings regulations on September 19, 2025 or almost two months before the Commission held its rulemaking hearing, leaving ample time for additional stakeholder feedback beyond the time already provided through the informal stakeholder process.

9. Strike section 18.3's second paragraph:

The paragraph describes that the category lists in Section 18.3.1 are not all-inclusive. PakTech expressed concerns that this leaves the list open to interpretation and that if the department does not intend to create a material list it should be stricken. Otherwise, if it's the PRO's responsibility the section PakTech believes this should be amended to indicate this. The department determined that this paragraph follows intent in statute. The covered material list is subject to change by law because there is a mechanism to request exemptions.

10. Overly Prescriptive:

The Alliance for Automotive Innovation and FPA claimed that the department's draft rules were overly prescriptive compared to those promulgated in other states. The statute requirement for the department to develop an eco-modulation bonus schedule is highly unusual internationally. Typically, the PRO is the only entity establishing eco-modulation schemes. However, per the Act, by January 1, 2026, the executive director shall develop an eco-modulation bonus schedule that is designed to reduce the producer responsibility dues of producers that meet certain benchmarks.

11. Delay eco-modulation:

AF&PA urged the department to delay eco-modulation incentives until the program has more time to mature. While the department will not delay eco-modulation bonuses based on the requirements set forth in the Act, the department has developed minimal percentage bonuses for the four benchmarks to allow the program to mature. The Department must fulfill the required date of January 1, 2026 for eco-modulation rules as required by the Act.

12. On package sorting instructions:

Avoid additional labeling requirements:

The Toy Association views the state-specific labeling requirements as problematic since producers have no control as to where their products end up through the supply chain. The Toy Association also mentioned that the European Union (EU) filed suit against France's mandate on the grounds that it violates the "free movement of goods" principle within the EU, since this has become quite costly for members. Unlike France's Triman symbol standards, the department's on-package sorting instructions benchmark is not a mandate, rather an incentive. The PRO and alternative collection program will be creating the criteria, and will have two years to do so, which allows them to create criteria that harmonizes national standards and through other states that have producer responsibility programs.

13. Utilization of domestic postconsumer recycled material/concerns around state specific benchmark:

    ADSA, AF&PA, APR, Canopy, FPA, FPI, HCPA, Imperial Dade, Swire Coca-Cola, the Toy Association, WDMA and the Wine Institute expressed support for CDPHE to incentivize domestic/regional postconsumer-recycled material/end markets and/or concern that the local end user benchmark is too state-specific. Some also expressed that this may result in adoption of packaging with lower amounts of PCR overall. CAA will address an eco-modulation factor related to high levels of postconsumer recycled material use (§25-17-705(4)(i)(IV)(C)). Therefore, the department determined it duplicative to address this through CDPHE's bonus schedule and does not believe that this will result in an increase in virgin material over PCR as expressed by some stakeholders. The intent of the local end use bonus is to incentivize the use of PCR in-state.

    There was also a request from APR that the local end use benchmark be broadened to include remanufacturing out-of-state for Colorado-sourced recycled content. Based on other concerns from AF&PA and CMI, the department recognizes that by expanding the incentive to manufacturing out-of-state may pose challenges for tracking state-specific PCR content for various covered material types, in addition to becoming more duplicative with CAA's PCR factor. The intent of the local end use benchmark was to incentivize local end use of PCR content.

    In the same vein, AF&PA prefers an approach on recycling rate to be industry utilization of recycled material rather than at an individual product level and suggested that incentivizing certain products over others in the paper industry could have negative consequences since recovered fiber relies on complex, cross-border, circular supply chains. The department's bonus incentive on local end use content remains small and will likely not impact the paper industry in this first year since there are no known mills currently in Colorado.

    ASDA and the Wine Institute requested a graduated PCR content benchmark, citing concerns around wine bottle stability, and worker/consumer safety, especially around carbonated alcoholic beverages. AF&PA, Carton Council and CBA wanted PCR rates to be practically achievable and vary by material type. AMERIPEN and APR requested that the percentage be lowered to 10% and/or scaling the bonuses with the amount of PCR incorporated. The 20% PCR target aligns with CAA's proposed 2030 postconsumer-recycled content target for rigid plastic packaging[8]. This is the lowest percentage target out of any material on the MRL (10% lower than glass) and allows the department to set

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one goal across material types versus different targets based on various materials. As the data becomes available after the first year of the program, the department may consider adjusting to better serve the realities of producers.

AMERIPEN requested that producers be awarded for all benchmarks retroactively, but specifically the local end use benchmark since California law requires the PRO to grant producers credit for use of PCR between 2013-2022. The department will not be granting incentives retroactively for any benchmarks.

14. Dormant Commerce Clause:

Stakeholders ADSA, AMERIPEN, Carton Council, CBA and the Wine Institute expressed concerns regarding the dormant commerce clause as it pertains to the local end user benchmark. The local content benchmark is not a state tax which burdens interstate commerce. It is solely an optional incentive, and therefore, this is not in violation of the Dormant Commerce Clause.

15. Increased concentration:

This benchmark was originally added by the department prior to public comment. After it received the least amount of support from stakeholders, the advisory board and stakeholder discussion identified that this needed additional development for proper implementation, and the department chose to remove it. AF&PA and the Carton Council also requested that this apply to solids products as well as liquids. Perkins Coie requested that it should be reimplemented after it was removed. The department's decision to remove this benchmark was due to the fact that CAA can address this through their required eco-modulation factor related to source reduction (§25-17-705(4)(i)(IV)(A)) and would like to prevent duplicity. Therefore, the department can work with CAA to address this in future years or can introduce this benchmark at a later date which will allow the department to meet other public comment requests which were to limit the number of initial benchmarks.

16. Compost certification standards:

Current ASTM D6400/D6868 are dated and lack strong safeguards for PFAS, additives and real-world disintegration: A1 Organics expressed concerns around utilizing the ASTM D6400/D6868 standards, and suggested the department use more protective and performance-based standards such as the ones established by the EU and Compost Manufacturing Alliance (CMA) approved.

BSH also encouraged the department to align compostability standards with internationally recognized compostability standards such as ISO, EU and Bureau de Normalisation du Quebec (BNQ).

The department cannot endorse one third party certification over another and is limited to the statutory definitions in HB22-1355 and SB23-253. That said, the department will continue to seek ways to increase stringency in compostable packaging standards as the program progresses.

17. Compostability Benchmark

Field Testing:

The department explored including field testing as a requirement for an incentive for compostable packaging. From doing more research, the new ASTM testing methods D8618 and D8619 are strictly procedural requirements for field testing and reporting, they do not set any standards for compostability. While a facility in Colorado could test to determine if a product was accepted at their site, the department does not view that as a reliable measure of compostability for all sites in Colorado. The department wants to research this concept further before implementing it into rule and work to ensure that eco-modulation can raise the bar on accepted compostable packaging. The department received feedback on the compostability field testing concept from A1 Organics, BPI, BSH and the City of Northglenn. AF&PA and AMERIPEN supported the removal of the field testing.

Compostable products as a contaminate:

Some stakeholders such as APR, Carton Council, FPI, and the Toy Association wrote in to oppose the compostability benchmark in its entirety. One expressed concerns that this benchmark is not equitable to all materials. Others expressed that compostable products are ineffective, and contaminate the recycling stream, and are not desired by compost facilities. Due to this, compostables will be malused heavily based on the fact that they are not on the MRL or AML. They also expressed that this will be incentivizing something that is already mandated in law, that the benchmark is an administrative burden and an additional cost to the extended producer responsibility system. AF&PA cautioned that the state statute labeling requirements do not harmonize with other extended producer responsibility (EPR) states which adds additional complexity for products. However, statute explicitly contemplates compostable packaging as a recovery pathway if compost facilities can process it. Therefore, the department did not choose to remove this benchmark. The department has intentionally kept this incentive low at 1% to ensure compostable packaging is not unfairly incentivized going into year 1. Producers are not required to participate in the eco-modulation bonuses.

Too State-Specific:

The Toy Association expressed that state-specific packaging requirements are difficult and costly to implement and on small toy packages there is little printable space that is used for safety warnings for young children. The compostable labeling requirement is a state mandate outside of the eco-modulation incentives.

Providing documentation for certified compostable products and packaging:

A1 Organics requested that the department require verified/certified third-party documentation of compostability. The requirements in 18.9.3(D) will require the PRO and individual producer of an alternative collection program to develop verification processes. Producers will need to submit verification in order to be eligible for the benchmark. Secondly, third party certification is already required for all compostable materials pursuant to §25-17-801, C.R.S., outside of the eco-modulation bonus incentive.

18. Case study benchmark:

AF&PA, Carton Council, GPI and Molson Coors expressed support for bonuses being awarded retroactively to previously conducted case studies. The department will not be awarding incentives retroactively. The intent is to incentivize future innovation.

ACC, CBA, Perkins Coie, and UPSTREAM disagreed with the department's decision to include the provision that case study bonus shall not exceed the cost to carry out the study, stating that it may not be considered a meaningful financial incentive for producers. The department chose to include this necessary cap on the incentive that can be granted. The intent of the case study benchmark is to also encourage studies that result in more sustainable end-of-life packaging, and will ultimately help producers move products away from maluses and towards incentives and/or less producer dues for their covered materials. Therefore, the incentive provided by the department is the first incentive in what will hopefully lead to improved covered materials.

FPA encouraged the department to only offer case study incentives limited to packaging redesign, similar to that of EEQ. The department expects packaging redesign to be addressed in PRO's and individual producer of an alternative collection program eco-modulation factors. The department's intent is to provide innovation in studies that expand into areas past packaging redesign.

AF&PA, Carton Council and CBA state that case studies may cause unnecessary costs to all producers and that this may be duplicative with CAA's plan to identify and prioritize investments for improvements and innovation. The case study benchmark provides a process for producers to bring project proposals to PRO or individual producer of an alternative collection program, rather than the projects being brought forth by the PRO or individual producer of an alternative collection program.

ACC requested that the department remove "toxicity" language from the case study benchmark, stating that it is beyond the scope of the Act and leaves the benchmark vague and unenforceable. The department disagrees with this interpretation. The intent of §25-17-702 is to have a positive impact on the environment and public health. Producers that can address toxicity in their products through the case study benchmark, after proposing their concept to the PRO/alternative collection program may be eligible for an incentive.

ACC and CBA are concerned that the case study benchmark lacks protections for sensitive business information. The protections outlined in section 18.1.4 apply to the case study benchmark.

19. Increasing the percent of base dues:

Many stakeholders including 26 NGO's, AF&PA, AMERIPEN, APR, Boulder County, GPI, Perkins Coie and WDMA expressed concern regarding the low percent incentive of the bonus schedule, expressing that the incentives will not be effective in behavior change at such a low percent and/or that the incentive should equate to an equivalent reduction in processing costs for MRFs. On the other hand, AMERIPEN expressed that bonuses should be limited in size.

The department chose to keep the incentives minimal due to the following factors. The PRO and individual producer of an alternative collection program have eight eco-modulation factors to account for in statute in addition to the four benchmarks developed by the department. These are on top of the already adjusted base dues that will promote sustainable packaging. Additionally, the PRO and the individual producers of an alternative collection program will also need to develop criteria and guidance to manage the benchmarks developed by the department as well as the PRO's eight factors required in statute. For the success of the program, it is vital that incentives developed by the department remain small until there is refined data to better understand how the incentives will impact producer dues.

20. Future Benchmarks Ideas Offered:

Toxicity was the topic the department received the most public comment on, specifically from individual members of the public, the 26 NGO’s and Colorado businesses, ADSA, GPI, and the Wine Institute. These stakeholders request the department to include criteria and/or benchmarks for packaging that reduces or eliminates toxicity. A1 Organics provided language that would align with EU PFAs limits for food-contact compostable packaging. The department needs more time to evaluate standards and applicable thresholds on toxicity in packaging, and plans to further explore this topic, its intent within statute and its relevance to the program in future rulemakings.

UPSTREAM and GPI encouraged the department to adopt bonuses for reuse and refill, for example for producers transitioning to reusables or those who voluntarily report their reusables. And conversely, ADSA and the Wine Institute expressed that any refill or reuse eco-modulation factor would disadvantage out-of-state producers and alcohol producers due to highly regulated and flammable products, and therefore asks the department to acknowledge this disparity in any future refill and reuse incentives..

ADSA and the Wine Institute requested benchmarks on sustainable farming practices, timely due payments, minimal water usage or reduced pollution.

PakTech requested incentives on use of responsible end markets and that the department incentivize third party certification for recyclability for plastic products to claim recyclability.

ACC and Braskem requested that the department develop a benchmark for renewable or bio-based feedstock that can demonstrably reduce lifecycle impacts.

ADSA requested that the department incorporate a benchmark that would incentivize recycling of small-format containers.

A1 Organics requested a benchmark for finished compost procurement. If a producer purchases or funds pathways for finished compost in Colorado from source-separated organic streams that include certified compostables within Colorado. This project incentive could be accomplished through a case study benchmark.

The department determined that it should focus on the four current benchmarks for next year and explore adding benchmarks as the program develops, as data becomes more available and the PRO’s eco-modulation factors have gone fully into effect.

Alternatively, other stakeholders such as HCPA expressed that four is still too many eco-modulation benchmarks from the department and that this could result in a significant resource burden on the PRO The department has collaborated closely with CAA to make changes, such as extending their runway to implement the benchmarks or removing benchmarks altogether, that will allow CAA to successfully manage the department's eco-modulation bonuses.

Cost Benefit Analysis

A cost benefit analysis will be performed if requested by the Colorado Department of Regulatory Agencies.