AMERIPEN (Gregory Melkonian)

On behalf of AMERIPEN, please see the attached comment letter regarding Recycling Reform Rulemaking - Chapter 173-950 WAC - Comment Period #2. Thank you.

September 2, 2026

Submitted via public comment form at https://ecology.commentinput.com/?id=fuSCmsPi5

Washington State Department of Ecology

RE: Washington Recycling Reform Rulemaking - Chapter 173-950 WAC - Comment Period #2

Dear Washington State Department of Ecology,

AMERIPEN – the American Institute for Packaging and the Environment – is providing feedback to the Washington State Department of Ecology ("the Department" or "Ecology") regarding the regulatory topics presented at the August 19, 2026, meeting of the Rulemaking Advisory Committee ("RAC") as part of the rulemaking for the Recycling Reform Act ("RRA" or "the Act"). AMERIPEN respectfully submits this comment letter for the Department's consideration as it prepares and refines rulemaking concepts.

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. Our membership includes materials suppliers, packaging manufacturers, retailers, consumer packaged goods companies, and end-of-life materials managers. This cross-sectional membership gives AMERIPEN a perspective on packaging policy that no single-sector commenter can offer, and it informs the technical and regulatory analysis that follows.

AMERIPEN feedback and suggested improvements to the rule concepts originally released during this comment period are organized below according to the same order as in the draft rule language document.

173-950-020 Applicability:

A) Paragraph (1)(d) states that the rulemaking chapter applies to a group of producers registered to implement an alternative collection plan, "[u]ntil 2034." It is preferable to cite a full date, including a month and day, when referring to a date in rules. Presumably this 2034 date refers to the start of the second program plan period, which is not fixed and may not be ascertainable at this point. Given that, it would be more appropriate at this time to reference the intended event rather than the specific date.

> Therefore, AMERIPEN recommends replacing "2034" with "the beginning of the second plan implementation period."

B) Subsection (3) identifies what subjects are excluded from the applicability of the proposed rules. However, it may be written too broadly, as materials, producers, and services that are exempt under the Act may still be subject to minor provisions in statute or the rule.

> Therefore, AMERIPEN recommends adding an introductory sentence to the subsection stating, "Unless otherwise stated in this chapter, this chapter does not apply to the following:".

173-950-030 Definitions:

"Alternative collection" is used throughout the Act without a specific definition, despite being an important term with relevance to collection lists, recyclability, and reimbursement. Moreover, it would be helpful to explicitly state in such a definition that "alternative collection" is limited to "covered materials" to avoid any question as to whether other types of materials could be reimbursed under an alternative collection program (ACP).

> AMERIPEN suggests the addition of a definition as follows: "'Alternative collection' means the collection of covered materials through a collection system other than residential recycling collection, residential composting collection, or public place collection, to provide convenient statewide recovery of specific covered materials designated for alternative collection."

173-950-110 Producer Duties:

A) Paragraph (1)(b) requires producers to maintain compliance documents and records "for a minimum of seven years." However, this does not match the time-based cap on the length of records retention that is in place in other states' EPR programs such as Maryland.[1] As such, it would obligate producers to maintain records for an additional two years beyond what is standard, which would create new and unreasonable costs for producer compliance policies that will be specific to one state.

> AMERIPEN therefore recommends that this requirement be capped at five years, consistent with language in other states, by replacing "seven" with "five".

B) AMERIPEN also appreciates the Department implementing in paragraph (1)(c) a standard of 15 business days or later if specified by the Department to answer records requests, which provides harmonization with other states.

C) Subsection (2) of the proposed rule requires a producer to "be in compliance with all reasonable and necessary terms of its agreement with the producer responsibility organization" ("PRO") to be considered "a member in good standing with a registered producer responsibility organization." Presumably, this is intended to correspond with subsection (2) of Revised Code of Washington ("RCW") 70A.208.040, which bans a producer from introducing covered material if the producer is not in good standing. But it would be helpful to include a direct cross-reference to that provision for clarity.

Moreover, and more substantively, this proposed rule subsection raises several serious concerns for AMERIPEN. First, by essentially codifying the agreements into rule as obligations, it raises a legal question as to whether the state has authority to effectively direct all producers to enter into a contract with another private sector agent. By codifying that a producer must "be in compliance with all reasonable and necessary terms" of the PRO, the state may be seen as requiring producers to enter into a contract with the PRO. In doing so, the state risks a constitutional challenge under the Fourteenth Amendment, which protects producers' liberty to enter (or not enter) into contracts.[2]

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[1] Code of Maryland Regulations 26.04.14.09(B)

[2] See, 16A C.J.S. Constitutional Law §720 (2012)(the liberty to contract includes the right "to decline to enter into a contract"). Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 333 (6th Cir. 1997)("It is still hornbook law that the freedom of contract entails the freedom not to contract . . ."); Yachting Promotions, Inc. v. Broward Yachts, Inc., 792 So. 2d 660, 663 (Fla. Dist. Ct. App. 2001)("It is well settled that the freedom of contract entails the freedom not to contract . . ."); Winston-Salem/Forsyth Cnty. Unit of N. Carolina Ass'n of Educators v. Phillips, 381 F. Supp. 644, 646 (M.D.N.C. 1974)("There is nothing in the United States Constitution which entitles one to have a contract

Second and relatedly, it exposes producers to liability for not satisfying every provision of the producer agreements, even though the PRO and its agreements have policies for addressing such instances. Producers should not be subject to the Act's penalties for noncompliance with a PRO agreement in addition to the consequences and remedies provided in the agreements themselves.

Finally, this provision elevates the terms of the agreements reached between producers and a PRO to the same treatment as actual provisions of rulemaking. Yet the final terms have not been negotiated, proposed, or sent for signing. In effect, adopting this subsection into rules grants perpetual endorsement of any future agreement terms without affording any guaranteed due process protections when the terms are released or updated. To address these issues, this subsection could be rewritten to focus on actual adjudication of producer violations under the Act, using language in Colorado's packaging extended producer responsibility regulations as a model.[3]

In sum, the proposed rule may convert private contractual terms into regulatory obligations without those terms being clearly authorized by statute, established in rule, or subject to adequate procedural safeguards.

> AMERIPEN accordingly requests that this section be rewritten by deleting the existing provision and replacing it with the following: "(2) For purposes of RCW 70A.208.040(2), a producer is a member in good standing with a registered producer responsibility organization unless the producer is subject to an outstanding final administrative penalty issued pursuant to RCW 70A.208.230 and that penalty is no longer subject to appeal, including judicial review as provided pursuant to RCW 43.21B.180."

<u>173-950-120 Individual Producer Plan:</u>

A) Paragraph (1)(a) requires a producer to provide at least two years' notice to the Department and a PRO if it intends to leave the PRO. While two years may be a reasonable time for planning purposes leading up to the initial program period, it is unnecessarily long as a general requirement. It has the effect of locking a producer into a compliance structure even if it is qualified to operate individually and opts to do so. A PRO plan is unlikely to need updating should the producer leave, but it could be revised with a plan amendment if absolutely necessary. A shorter period is merited, and if the Department disapproves of an individual producer plan, the producer can simply remain in the PRO's operation. Additionally, the current language is imprecise because it sets the notice date as January 1, even if the plan implementation date two years later occurs on a different date.

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with another who does not want it."); Shaitelman v. Phoenix Mut. Life Ins. Co., 517 F. Supp. 21, 25 (S.D.N.Y. 1980)("It is 'well-settled law' in New York that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reason whatever."); Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356, 51 S. Ct. 476, 477, 75 L. Ed. 1112 (1931)("[t]he general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts," emphasis added).

[3] *"Producers of a covered material must be in compliance with the Act. 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."* Colorado Code of Regulations Title 6, Section 1007-2-18.9.1(A)(2).

To address these issues, AMERIPEN recommends that the required notice period be shortened to no more than twelve months prior to implementation of a plan. As a technical note, AMERIPEN also recommends replacing the term "that year" with a more specific description (e.g., "the calendar year that is two years before the year a plan is implemented") to reduce confusion.

B) Subparagraph (1)(c)(ii) specifies what the one-time fee for an individual plan review covers. To ensure costs to producers are appropriately limited to what is strictly necessary, AMERIPEN recommends that the language be modified as follows: "(ii) This fee covers **the actual and reasonable costs for the department, including**:".

C) Paragraph (2)(j) states that the individual producer plan must contain "[a]ny other relevant information required by the department." However, the corresponding provision in the Act states that the PRO plan must include "[a]ny other information required by the department *by rule*."[4] (Emphasis added.) The Act thus requires the Department to spell out all additional plan components in rule; however, the proposal in paragraph (2)(j) would defer those additions to being ordered outside the rulemaking process.

AMERIPEN therefore recommends that this paragraph be deleted and that the Department specifically state what additional components are required, if any.

D) Subsection (4) requires a PRO to implement an approved plan "within six months of approval." However, RCW 70A.208.040(3)(d) states that the plan must be implemented by the later of January 1, 2030, or within six months of approval. Omitting the full scope of this provision may unnecessarily limit the time a PRO has to implement its approved plan, in contravention of the law.

AMERIPEN therefore recommends that this subsection be revised as follows: "A producer responsibility organization must implement the approved plan **by January 1, 2030, or** within six months of approval**, whichever is later**."

173-950-210 Producer Responsibility Organization Duties:

A) For the same reasons as discussed above in Section 173-950-110, AMERIPEN recommends reducing the PRO records retention requirement in paragraph (2)(a) from seven years to five years.

B) As a technical note, AMERIPEN requests the date in paragraph (3)(c) be modified from "January 1" to "January 31" in accordance with RCW 70A.208.120.

173-950-220 Coordinating Body:

A) Paragraph (1)(a) requires coordinated plans submitted by coordinating bodies to include the plans of all PROs "into a single plan," as specified.

Given that the PRO plans will need to operate in harmony with one another, AMERIPEN recommends revising the paragraph as follows to make clear the coordinating body's duty to proactively resolve conflicts: "[…] into a single plan that implements all requirements of this chapter **without conflict** and encompasses […]".

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[4] RCW 70A.208.130(3)(v).

B) Paragraph (2)(d) states that each coordinated plan must include a "process by which a producer responsibility organization or multiple producer responsibility organizations will assume responsibilities to implement a coordinated plan should the coordinating body be unable to implement the coordinated plan." However, PROs are already responsible for "implementing" plans, while the coordinating body's role is better described as "integrating" the plans.

Therefore, AMERIPEN requests replacing instances of "implement" in this paragraph with "integrate".

173-950-230 Reuse Financial Assistance Program:

The Act requires PROs to increase the amount of funding and expenditures for the reuse financial assistance program if the Department determines "reuse and return rate targets or statewide requirements are not met."[5] This section of the rule would benefit from additional implementation information for this provision. First, the timing of the determinations and subsequent increased contributions and expenditures is unspecified.

AMERIPEN recommends adding a provision requiring that any increased contributions not be required until the PROs have had sufficient time to raise their annual producer fees accordingly, and that expenditures are not required to increase until those additional funds are raised.

Second, the method for determining the appropriate amount for the increases is not stated, but it is important that it be grounded in justification to avoid unnecessarily raising program costs.

AMERIPEN recommends that rule language be added to require the Department to preliminarily identify the increase amounts to all PROs and provide an explanation as to why those amounts are justified, and that the language allows the PROs to propose an alternative amount with justification that the Department must consider before deciding on final amounts.

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AMERIPEN strives to offer a good-faith and proactive approach to crafting packaging policies. We continue to focus on initiatives that develop and/or strengthen policies to advance the "reduce, reuse, recycle" strategies, while also underscoring the value of packaging. Our members are driving innovation, designing new packaging to be recycled, composted, or reused, and creating a more circular economy for all packaging. In our efforts to reduce environmental impact by increasing packaging circularity, our members continue to recognize the value of collaboration and the importance of working across the packaging value chain.

AMERIPEN thanks the Department for its consideration of this written feedback regarding the rule concepts discussed at the first RAC meeting and welcomes the opportunity to meet with Department staff and to provide technical assistance with any of the items raised in these comments. AMERIPEN respectfully requests that the Department adopt the foregoing recommendations as it refines the rulemaking proposal. Please contact me (daniellew@ameripen.org) or Gregory Melkonian by email (gmelkonian@serlinhaley.com) with any questions on the input AMERIPEN provided in this letter.

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[5] RCW 70A.208.040(5)(a)(ii).

Sincerely,

Danielle F. Waterfield, Esq.

Policy Director and General Counsel