Statement of Basis and Purpose

The Arkansas Department of Environmental Quality maintains and administers a hazardous waste management program to implement the provisions of the Arkansas Hazardous Waste Management Act (Arkansas Code, Annotated, §§ 8-7-201 *et seq*.) and to provide a program which is, at a minimum, equivalent in force and effect to the Federal program as established by the Resource Conservation and Recovery Act, as amended, including but not limited to the Hazardous and Solid Waste Amendments. To this end, the Department, through the procedures of the Arkansas Pollution Control and Ecology Commission, conducts rulemaking at least annually in order to adopt the additions and revisions to the federal hazardous waste regulations promulgated by EPA during the preceding year and update the State hazardous waste program in order to maintain its equivalency to federal requirements.

The background, purpose, and specific need for each revision is discussed separately below.

I. Federally-initiated changes to Regulation No. 23 fall under five measures as follows:

1. National Environmental Performance Track Program; (69 FR 21737–21754; and 69 FR 62217–62224, October 25, 2004).

This federal revision, promulgated by the U.S. EPA on April 22, 2004 and corrected on October 25, 2004, will apply only to members of EPA's National Environmental Performance Track Program[1]. The rule includes provisions that increase the amount of time a hazardous waste generator (who is a member of the NEPT program) may accumulate waste without a permit or interim status. Reporting requirements are also simplified for some NEPT generators. EPA intends these provisions to serve as incentives for Arkansas facilities to join the Performance Track Program.

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

2. National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks (69 FR 22601–22661, April 26, 2004)

[1] Currently (July 2005) five Arkansas facilities are enrolled in Performance Track: Baxter Healthcare Corporation of Mountain Home; CYRO Industries of Osceola; Dassault Falcon Jet of Little Rock; International Paper – Pine Bluff Mill of Pine Bluff; and Lockheed Martin Missiles and Fire Control of East Camden.

This federal rule established new national emission standards for hazardous air pollutants (NESHAP) for automobile and light-duty truck surface coating operations at major sources of hazardous air pollutants (HAP). It requires these operations to meet HAP emission standards reflecting the application of the maximum achievable control technology (MACT). It affects the provisions of Regulation No. 23 in that it amends the RCRA air emission standards at Section 264 and 265, Subsections BB for owners and operators of treatment, storage, and disposal facilities to exempt these air emissions from certain activities that are covered by the final NESHAP.

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

3. Hazardous Waste – Nonwastewaters From Production of Dyes, Pigments, and Food, Drug and Cosmetic Colorants; Mass Loadings-Based Listing; (70 FR 9138–9180, February 24, 2005; corrected by 70 FR 35032-35034, June 16, 2005).

This revision adds hazardous nonwastewaters generated from the production of certain dyes, pigments, and food, drug and cosmetic colorants (K181) to the list of hazardous wastes in Section 261.32. The rule adds seven hazardous constituents of these wastes – aniline, o-anisidine, 4-chloroaniline, p-cresidine, 2,4-dimethylaniline, 1,2-phenylenediamine, and 1,3-phenylenediamine to Appendix VII of Section 261. These constituents of concern serve as the basis for the new listing. Annual mass loadings are established for these constituents such that wastes will not be hazardous if the constituents are below the regulatory threshold. Five of these constituents were also added to the list of hazardous constituents in Appendix VIII of Section 261. Land Disposal Restrictions (LDR) treatment standards for the specific constituents of the waste are also added to Section 268. Lastly, the newly listed wastes are designated as hazardous substances subject to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Arkansas Remedial Action Trust Fund Act, by virtue of their being subject to CERCLA.

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

4. Hazardous Waste Management System; Modification of the Hazardous Waste Manifest System; Final Rule. (70 FR 10776–10825, March 4, 2005 (corrected by 70 FR 35034-35041, June 16, 2005).

This Federal rule revised the Uniform Hazardous Waste Manifest regulations and the manifest and continuation sheet forms used to track hazardous waste from a generator's site to the site of disposition. The revisions standardize the content and appearance of the

manifest form (EPA Form 8700-22) and continuation sheet (EPA Form 8700-22A). It also makes these forms available from a greater number of sources and adopts new procedures for tracking certain types of waste shipments with the manifest. These shipments include hazardous wastes that destination facilities reject, wastes consisting of residues from non-empty hazardous waste containers, and wastes entering or leaving the United States.

Some of the revisions include removal or consolidation of primarily "state optional" information from the Uniform Manifest form. Item A (State Manifest Document Number) was removed as this is now to be a nationally unique number, to be pre-printed on the new forms. Item B (State Generator's ID) was consolidated within the EPA ID field. Items C through F (Transporter ID and Phone) were removed. Item G (State Facility's ID) was also removed. Item H (Facility's Phone) was made mandatory in the new Designated Facility's Name and Site Address field.

Item I (RCRA Waste Codes) was standardized and space was expanded in order to include more waste codes. Items J and 15 were combined to create the new Item 14 – Special Handling Instructions and Additional Information. States will no longer be able to require state-specific information in this area. Item K (Handling Codes) was revised and standardized in the new mandatory field Item 19 – Hazardous Waste Report Management Method Codes. This corresponds with the final disposition of the waste by the designated facility. New data elements include adding a Generator Site Address field, an Emergency Response Telephone number field, and an International Shipments field. The space for recording RCRA waste codes and discrepancies was also expanded.

The rule also added requirements to 40 CFR 271.10 that emphasize the necessity for consistency in the use of the revised manifest form. One key addition is that States may require the entry of State waste codes that apply to State-specific hazardous wastes. However, States may not require entry of waste codes that are redundant with Federal codes. States cannot impose enforcement sanctions on a transporter during transportation of a shipment for failure of the form to include a state-required waste code. It is the generator's responsibility to ensure the manifest is correct. Both the consignment State and the generator State retain the authority to request that copies of the manifest form be submitted to the State.

Implementation of this rule will require that the Commission repeal a number of state-specific provisions in Regulation No. 23 that have historically been more stringent than the corresponding Federal provisions, for example the requirement that Arkansas generators could only use an Arkansas state manifest for shipping their hazardous wastes off-site for treatment, storage, and/or disposal. Since the early 1980s, ADEQ's Hazardous Waste Division has printed and sold hazardous waste manifest forms for Arkansas generators and TSD facilities, as well as for out-of-state generators who ship their hazardous wastes to Arkansas for treatment, storage, or disposal. Regulation No. 23 currently requires the exclusive use of Arkansas hazardous waste manifests within the state, unless the generator is shipping waste out-of-state, and the consignment state requires the use of its own state-specific manifest. This state requirement will be

superseded by implementation of the new Federal Uniform Manifest Rule. In reviewing the Federal rule while drafting the State rule change, it was determined not to be cost efficient for ADEQ to undergo the processes of becoming a registered provider of manifests under the new EPA rules, and subsequently become a competitor with private industry as a manifest source.

With ADEQ withdrawing from the manifest distribution scheme, generators will be able to obtain EPA Uniform Hazardous Waste Manifests from a number of sources. Generators can order manifests from industrial supply companies that supply container labels and other items needed for hazardous waste shipment. The TSD or Transporter will often provide manifests to their customers. As part of its outreach in implementing the new manifest rules, the Hazardous Waste Division will update its manifesting web page to provide information on sources of Uniform Hazardous Waste Manifests.

Implementation of the Uniform Manifest rule will require that the Commission withdraw a number of previous State-only, more stringent requirements concerning the use of manifests in Arkansas. The State-only requirements which will be repealed by this rulemaking include:

1) The requirement to use only Arkansas manifests for shipments of hazardous waste in Arkansas (§§ 262.13(b); 262.21(d); and 262.24(c));

2) Prohibitions on using the generic federal uniform manifest (§ 262.21(a) and (b));

3) Routine submission of all manifest discrepancy reports to the Department (§ 262.24(a)). Only manifest discrepancies which cannot be resolved between the generator and the receiving TSD facility within a 15-day period need be submitted to the Department for information and investigation as may be needed ;

4) Submission of information copies of manifests for international import/export shipments (§ 262.24(h));

Other state-specific manifesting requirements will remain in place. These include the requirement for all generators, to include conditionally-exempt small quantity generators, to use a hazardous waste manifest for all hazardous wastes shipped off-site for treatment, storage, and/or disposal. (§§ 262.24(d) and 262.35(a)(5))

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

Fiscal Impact: Implementation of the Federal Uniform Manifest Rule will have a significant financial impact on ADEQ's funding for the state hazardous waste management program due to loss of income derived from manifest sales. ADEQ currently sells Arkansas manifests for $2.00 per copy. Over the past three years the

Hazardous Waste Division has received an average of $170,000 per year from manifest sales. These funds are deposited into the Hazardous Waste Permit Fee Fund. The Division's average yearly expenses for the manifest program are approximately $47,000 per year (salary, fringe benefits, and shared resources) for an Administrative Assistant II manifest coordinator position, $5,100 per year in printing costs for the forms, and $2,500 per year to ship the manifests to purchasers. The remainder of the funds realized from manifest sales is used in general support of the State hazardous waste management program.

5. Waste Management System; Testing and Monitoring Activities; Methods Innovation Rule and SW-846 Final Update IIIB, 70 FR 34537-34592, June 14, 2005.

This Federal revision amends the requirements to use specific testing and monitoring procedures when conducting sampling and analysis in support of the Federal RCRA hazardous and non-hazardous waste regulations as well as specific provisions of the Clean Air Act regulations that apply to hazardous waste combustors. These amendments allow more flexibility by removing from the regulations specific requirements to use the methods found in EPA's publication "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," also known as "SW-846," in conducting various testing and monitoring, and by limiting the required use of SW-846 methods to circumstances where the SW-846 method is the only one capable of measuring the particular property (e.g., where the method is used to record a required method-defined parameter, or where the SW-846 method result is incorporated into a specific definition or waste characteristic, such as the definition of the toxicity characteristic by use of the TCLP, or the definition of ignitability using the standard tests for flash point).

This rule does not add any additional or more stringent requirements to the hazardous waste regulations. Instead, it removes the absolute requirement to use SW-846 methods and clarifies EPA's guidance in the selection of appropriate analytical methods. The revisions make it easier and more cost-effective to comply with the RCRA regulations by allowing flexibility in the selection of analytical methods and their use. If, for example, a facility operator finds that a particular SW-846 method yields data that is suitably effective for demonstrating compliance in the particular waste or matrix being analyzed, then the SW-846 method may still be used. On the other hand, if a different analytical method also yields suitably effective data at lower cost, then that method may be used in lieu of the SW-846 method formerly prescribed.

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

6. Hazardous Waste Management System; Modification of the Hazardous Waste Program; Mercury-Containing Equipment, 70 FR 45508-45520, August 5, 2005

In response to a number of queries from the public and Arkansas industries, the Department proposed to provide for the management of "mercury-containing devices" (hereafter "MCDs") under the Universal Waste regulations at Regulation No. 23 § 273.

On July 27, 2005, the U.S. EPA finalized a federal rule which added "mercury-containing equipment" to the federally-recognized list of universal wastes. This rule was published in the Federal Register on August 5, 2005. In comparing the draft state proposal with the Federal rule, ADEQ staff found that the two were very nearly identical. For the sake of consistency, the language of the federal rule was adopted and incorporated into this proposal with the exception of retaining the state-proposed term "mercury-containing device" or "MCD" in lieu of the Federal term "mercury-containing equipment."

In preparation of the state proposal, it was found that during the previous rulemaking to incorporate electronic waste or "consumer electronic items" in January 2005, this waste stream had been inadvertently omitted from the itemizations of those materials considered to be universal wastes in the introductory language to Sections 264, 265, 268, and 270 of Regulation No. 23. Therefore, in addition to adopting and incorporating the provisions of the federal rule establishing the universal waste provisions for mercury-containing devices, administrative corrections have been made at § 264.1(g)(11)(v); § 265.1(g)(14)(v), § 268.1(f)(5), and § 273.32(h)(4) and (5) to add the state-listed "consumer electronic items" to the recital of those materials addressed under the State's universal waste program.

Compliance with Executive Order 05-04: This revision substantially codifies existing Federal regulations, as promulgated in the August 5, 2005 Federal final rule, and that it also codifies provisions of existing state law in that it implements the provisions of A.C.A. § 8-9-606(e)(2), established by Act 649 of 2005. It is therefore exempted from the provisions of Executive Order 05-04.

II. State-initiated changes to the Federal provisions of Regulation No. 23 fall under four measures as follows:

1. Characteristic of Ignitability (Ignitable Compressed Gases)

In its initial definition of "ignitable compressed gases" used to categorize specific types of D001 ignitable hazardous wastes, EPA adopted the U.S. Department of Transportation's ("U.S. DoT," or "DoT") definition of "flammable" compressed gases at 49 CFR 173.300. However, in the 2000 edition of Title 49 of the Code of Federal Regulations, the U.S. DoT moved this definition to § 173.115, and the EPA definition at 40 CFR 261.21(a)(3) – subsequently incorporated into Regulation No. 23 – now points to an invalid reference. EPA has recognized this problem, however instead up dating the regulation to reflect the correct and intended definition, has advised through the former

RCRA Hotline that state agencies should address the earlier (and obsolete) copies of the 1990 and earlier versions of 49 CFR 173 which still contain the citation at § 173.300.

In the pre-2000 49 CFR 173.300, DoT defined a flammable compressed gas as a compressed gas that is 1) flammable when in a mixture of 13% or less with air (e.g., a lower flammability limit of 13% or less), or 2) has a flammable range with air of at least 12% (e.g., the difference between its upper and lower flammability limits is at least 12 percentage points). All such percentage points were based on standard volume at 68ºF and 1 atmosphere of pressure. The revised, 2000 DoT definition of a flammable compressed gas at § 173.115 is essentially the same as the previous definition at § 173.300. However, the old federal regulations specified a set of Bureau of Explosive test methods to determine flammability, whereas the new, current regulation at § 173.115 now specifies the use of ASTM E681-85 (Standard Test Method for Concentration Limits of Flammability of Chemicals.

In the same manner as noted above, the update to the DoT regulations changed the citation to the definition of "oxidizer," referenced in Regulation No. 23 § 261.21(a)(4). The current citation for the referenced DoT definition is 49 CFR 173.127, and the corresponding citation in Regulation No. 23 is revised to reflect the correct reference.

In reviewing the effect of this discrepancy between the EPA definitions and the RCRA Hotline's guidance to refer to obsolete DoT regulations in comparison to the new DoT definition, ADEQ staff believe that the discrepancy would make the current definition of "ignitable compressed gas" unenforceable, and nearly impossible for the Department to prevail in an enforcement case for ignitable compressed gases where the applicable regulation is based upon a nonexistent DoT standard. Cross-references to a number of other authorized state programs shows that those states have previously made the same correction to their regulations. Therefore, the applicable citation to the DoT definition at Regulation No. 23 § 261.21(a)(3) is revised to reflect the current DoT definition at 49 CFR 173.115, and the term "flammable" is substituted to clarify the difference in language between the two regulations – where EPA refers to an "ignitable" compressed gas in reference to defining the hazardous characteristic of "ignitability," DoT is concerned with and refers to "flammable" gases and other materials. Both definitions refer to the same risk to the public health and safety.

Compliance with Executive Order 05-04: This revision incorporates an update of a Federal rule into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

This revision is determined to be equivalent to the corresponding Federal regulations, and there is no additional economic impact or regulatory burden placed upon either the Department or the regulated community as a result of its implementation.

2. Deletion of the Notification of Regulated Waste Activity ("NORWA") Form; (Appendix II to Section 262).

In January, 2004, U.S. EPA revised its Form 8700-12 (Notification of Regulated Waste Activity) to make the form compatible with that used in the Biennial Report as well as to provide for collecting notification information for newly regulated activities such as universal waste handlers and destination facilities. EPA has issued small revisions and updates to the form 8700-12 on a regular basis, and to allow greater flexibility in responding to these updates, the corresponding State form and its instructions are being removed from Regulation No. 23. The Department will maintain a copy of the current notification form and instructions for completion on the Department web site at http://www.adeq.state.ar.us/hazwaste/branch_tech_admin/notify.htm.

Compliance with Executive Order 05-04: This revision incorporates a Federal revision into the corresponding State regulations, and is therefore not subject to the provisions of Executive Order 05-04.

This revision is determined to be equivalent to the corresponding Federal regulations, and there is no additional economic impact or regulatory burden placed upon either the Department or the regulated community as a result of its implementation.

3. Post-Closure Permit Renewal Fees

The schedule for permit renewal fees at Section 6(a)(3)(iii) and 6(a)(4)(iii) is corrected by revising these paragraphs to delete the assessment of a waste management activity fee when a permit issued only for post-closure care is due for renewal at the end of the 10-year life of the permit. This applies to the fee schedule for both commercial and noncommercial facilities. Facilities which conduct only post-closure care activities do not actively handle, treat, store, or dispose of hazardous wastes (with the exception of collected leachate from the liner leak detection and collection system for a landfill or similar land treatment unit, which is addressed under the conditions of the facility's post-closure permit), and it is inappropriate to assess such a fee for wastes which have been previously disposed or left in place in the closed unit.

While the Department has not previously assessed such a fee at post-closure-only units, this revision is being made to remove any doubt that the waste management activity fee should be applied to these units. The waste management activity fee is based upon the design capacity of the permitted unit, and if assessed, comprises a significant portion of a permitted facility's annual fees – in many cases the waste management activity fee is three to five times the amount of the basic permit fee, elevating the total fee to the annual permit fee cap established at Section 6(h) ($80,000 per year for noncommercial facilities; $100,000 per year for commercial facilities).

Compliance with Executive Order 05-04: This revision constitutes a technical correction to an existing State regulation, and is not subject to the provisions of Executive Order 05-04.