

Kieling, John, NMENV**ENTERED**

From: Dave McCoy [dave@radfreenm.org]
Sent: Wednesday, February 28, 2007 5:16 PM
To: Curry, Ron, NMENV; Bearzi, James, NMENV
Cc: Padilla, Cindy, NMENV; Rich Mayer; Ines Triay; 'Nancy Simmons'; Moats, William, NMENV; Kieling, John, NMENV
Subject: Two Requests to NMED for Soil Gas public hearing and Response revision
Attachments: REQUEST FOR PUBLIC HEARING SOIL GAS PLAN.doc; Request for Revision of NMED Responses to Public Comment.doc

February 28, 2007

Dear Secretary Curry and Mr. Bearzi,

Attached are two requests from Citizen Action regarding: 1) NMED Responses to Citizen Comments, and 2) to allow extended comment period, hold a public hearing on the Soil Analysis Plan and to issue a cease and desist order for further construction of the soil cover at the Sandia National Laboratories' Mixed Waste Landfill.

Sincerely,

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STATE OF NEW MEXICO

BEFORE THE SECRETARY OF ENVIRONMENT

PUBLIC NOTICE NO. 07-01

IN THE MATTER OF A REQUEST FOR)
APPROVAL OF THE SOIL-VAPOR)
SAMPLING AND ANALYSIS PLAN FOR)
THE MIXED WASTE LANDFILL,)
SANDIA NATIONAL LABORATORIES,)
BERNALILLO COUNTY, NEW MEXICO)

**CITIZEN ACTION NEW MEXICO’S REQUEST TO THE SECRETARY OF THE
NEW MEXICO ENVIRONMENT DEPARTMENT (NMED) FOR AN
EXTENDED COMMENT PERIOD, PUBLIC HEARING AND A CEASE AND
DESIST ORDER FOR CONSTRUCTION ACTIVITIES AT THE MIXED WASTE
LANDFILL**

**Pursuant to the Resource Conservation and Recovery Act (42 U.S.C. Section 6974),
incorporated by the New Mexico Hazardous Waste Act, Citizen Action hereby
petitions the Secretary of NMED to extend the period for public comment, provide a
public hearing and issue a cease and desist order for construction of the soil cover in
the above matter of Soil-Vapor Sampling and Analysis Plan (SAP).**

The reasons for the request are as follows:

The subgrade portion of the cover has been constructed by SNL/DOE despite a ruling by the New Mexico Environment Department (NMED) that requires SNL/DOE to correct **several** deficiencies in the plan for the dump, called a Corrective Measures Implementation Plan (CMIP), which, according to NMED, is part of a RCRA process for the modification of a permit. The CMIP specifically states that SNL/DOE must conduct additional soil gas sampling to detect toxic substances buried at the dump to help resolve the issue of any “rupturing of containers” that might have occurred since the mid 1990s and any “leaking of their contents.” In the absence of approval for the CMI Plan, DOE/Sandia proceeded with construction of the soil cover. Numerous more complicated issues exist for the SAP now that the soil cover construction has proceeded or been completed prior to soil gas sampling.

[http://www.nmenv.state.nm.us/hwb/SNL/CMiWP/SAP for VOCs, Tritium, Radon at MWL-Dec2006.pdf](http://www.nmenv.state.nm.us/hwb/SNL/CMiWP/SAP_for_VOCs,_Tritium,_Radon_at_MWL-Dec2006.pdf)

[http://www.nmenv.state.nm.us/hwb/SNL/MWL/SNL NOD 11-20-2006 MWL CMI WP.pdf](http://www.nmenv.state.nm.us/hwb/SNL/MWL/SNL_NOD_11-20-2006_MWL_CMI_WP.pdf)

[http://www.nmenv.state.nm.us/hwb/SNL/CMiWP/SNL MWL CMI NOD Response \(12-21-2006\).pdf](http://www.nmenv.state.nm.us/hwb/SNL/CMiWP/SNL_MWL_CMI_NOD_Response_(12-21-2006).pdf)

1. The Corrective Measures Implementation Plan (CMIP) was part of the Resource Conservation and Recovery Act (RCRA) Corrective Action plan under 40 CFR 264.101 mandated for the Mixed Waste Landfill.
2. The CMIP was issued a Notice of Disapproval (NOD) on 11/20/2006 by the NMED with a requirement for a Soil-Vapor Sampling and Analysis Plan (SAP).
3. On November 21, 2006. NMED sent out a "Dear Interested Citizen" cover letter to NMED Responses to Public Comments on the Mixed Waste Landfill. It states (last paragraph) that "NMED's review of the CMI Plan has revealed several deficiencies that must be corrected before implementation of the CMI work." [http://www.nmenv.state.nm.us/hwb/SNL/MWL/Interested_Citizen_Letter - Response Comments \(11-21-2006\).pdf](http://www.nmenv.state.nm.us/hwb/SNL/MWL/Interested_Citizen_Letter_-_Response_Comments_(11-21-2006).pdf)
4. In the November 2006 Notice of Disapproval, NMED stated "... actual start time is dependent on when the CMI Plan is approved..." (NOD, Part 1, Paragraph 2).
5. In the SAP, Appendix A at p. 8, paragraph 3.1, SNL admits that it has recently completed the subgrade and that added thickness will have to be accounted for at boring locations. [http://www.nmenv.state.nm.us/hwb/SNL/CMIWP/SAP_for_VOCs, Tritium, Ra don at MWL-Dec2006.pdf](http://www.nmenv.state.nm.us/hwb/SNL/CMIWP/SAP_for_VOCs,_Tritium,_Radon_at_MWL-Dec2006.pdf)
6. The Dear Interested Citizen letter of November 21, 2006 assured citizens that deficiencies had to be corrected before implementation of CMI work, and specifically, before the construction of the subgrade. The record shows that NMED was speaking out of both sides of its mouth in violation of the public trust.
7. Without any NMED notice to citizens or posting on its internet website, Citizen Action discovered by means of a January 2007 Public Records Request that NMED secretly received a July 12, 2006 letter from Sandia National Laboratories. The letter notified NMED of "current and planned field work at the Mixed Waste Landfill (MWL)." The letter further stated: "Construction of the cover itself will not begin until formal approval of the MWL Corrective Measures Implementation (CMI) Plan is issued by the New Mexico Environment Department.
8. The Corrective Measure Implementation Plan (CMIP) for the Mixed Waste Landfill (MWL) has not received final approval. Nevertheless, in the absence of CMIP approval, SNL proceeded with construction for an integral portion of the cover for the MWL.
9. Although the CMIP has not received final approval, NMED acquiesced in the construction of the subgrade along with other activities integral and related to the cover construction. In a September 18, 2006 letter, RE: Fence Removal and Subgrade Preparation at the Sandia National Laboratories Mixed Waste Landfill, NMED informed Sandia National Laboratories that the NMED had reviewed those portions of the MWL CMI Plan relating to removal of the fence and preparation of the subgrade cover. "Additionally, NMED has not received any public comment comments [sic] on this narrow aspect of the CMI Plan. NMED has determined that the Permittees may proceed with the removal of the fence at the MWL and apply the subgrade cover. This determination does not in any way affect the pending agency action on the MWL CMI Plan."

10. Public comments were on record and under review by NMED at the time NMED was granting approval to SNL to install the subgrade while claiming that it had not “received any comments.” In fact, the “Dear Interested Citizen” letter of November 2006 was the cover letter for the NMED’s Responses to Public Comments on the SNL. Numerous of those public comments directly related to the dirt cover remedy. NMED proceeded to allow construction integral to the cover with full knowledge that the entire remedy of putting a dirt cover in place at the MWL has been the subject of continuing written comments to NMED, media reports, intense public scrutiny, controversy and opposition to leaving hazardous and radioactive wastes in the MWL by placement of a dirt cover over the wastes.
11. NMED allowed the construction of a portion of the cover during review and prior to even furnishing its mandated Responses to Public Comments. The public was denied due process, full knowledge and participation in decisions surrounding this highly controversial action.
12. NMED allowed construction of the dirt cover to begin with full knowledge that the contents of containers containing radioactive and RCRA hazardous wastes could be released to the soil, air and groundwater from the deliberate compaction of the subgrade with heavy earth moving equipment as part of construction activities.
13. Upon information and belief, NMED knew that it planned to issue an NOD for the Corrective Measures Implementation Plan that would include the subgrade portion of the plan.
14. Sandia/DOE and NMED have violated RCRA by proceeding with a subgrade construction that is part of the dirt cover remedy prior to approval of the CMI Plan and despite a November 2006 Notice of Disapproval.
http://www.nmenv.state.nm.us/hwb/SNL/MWL/SNL_NOD_11-20-2006_MWL_CMI_WP.pdf
15. The NOD specifically stated in Part 1, Comments on Landfill Construction Plans and Performance Modeling 2. Section 2.1—“Provide a more detailed schedule that, at a minimum, indicates completion times for the following cover and project elements: subgrade, bio-intrusion barrier, native soil layer, topsoil layer, seeding, fencing, overall completion of project and submittal of Corrective Measure Implementation (CMI) Report to NMED. As the actual start time is dependent on when the CMI Plan is approved, the completion times can be proposed as the number of days from the start time (assume the start time = 0 days.)”
16. The timing for construction of different activities in the NOD is an issue. Upon information and belief, NMED intends to allow and SNL intends to proceed with additional construction activities at the MWL prior to the approval of the CMI Plan. The December 15, 2006 DOE/Sandia Responses to NMED’s Notice of Disapproval: Mixed Waste Landfill Corrective Measures Implementation Work Plan, November 2005 [sic] states (p.1 at 2)): “DOE/SNL complete the soil gas and tritium sampling activities by mid-January, and cover construction activities are initiated shortly thereafter, allowing the current MWL field crew and heavy equipment to be retained.” NMED should inform the public if construction activities are continuing at the MWL and whether the cover and soil monitoring have now been completed.

17. Upon information and belief, NMED intends to allow and SNL intends to proceed with accomplishment of all construction activities for the MWL cover prior to the approval of the CMI Plan. The December 15, 2006 DOE/Sandia Responses state (p.2, 3)): "The cover start time To assumes full NMED approval of the MWL cover design presented in the CMI Plan (SNL/NM November 2005), as well as approval of the DOE/SNL responses to the Part 1 NOD comments." NMED should immediately inform the public whether DOE/Sandia has accomplished construction based on the "assumption" of NMED approval.
18. The issues raised by NMED's NOD were not resolved by NMED prior to the construction of the subgrade.
19. The monitoring for the flux of gases and "hotspots," including, but not limited to, radon and tritium and other radionuclides, radioactive gases and volatile organic compounds released to the air pathway is an issue given the rupture of containers which may have occurred as a result of compaction.
20. The use of the SAP data in the Fate and Transport Model is an issue.
21. By allowing SNL to proceed with construction before resolving the issues set forth in the NOD, NMED has created public confusion and the public need for additional information and time to analyze the effects of the subgrade construction on the entire Soil-Vapor Sampling and Analysis Plan.
22. NMED, in Part 2 of the NOD, put forth a requirement for more soil gas monitoring out of concern for rupturing containers. The use of heavy equipment during subgrade construction posed the risk of destruction of the containers from compaction and release of hazardous radioactive and chemical compounds and gases to air and groundwater.
23. The public has not been informed as to whether there was an NMED or DOE approved Health and Safety Plan for monitoring for releases as a result of construction activities.
24. The public has not been informed as to whether there was/is active monitoring for releases which could be occurring now. Both RCRA and DOE Orders provide for a requirement to have approved Health and Safety or Risk Assessment Analyses in place prior to engaging in activities which can cause dangerous releases of radioactive and hazardous wastes to the environment.
25. The public has not been informed as to the extent of rupturing of containers from the compaction activities during subgrade preparation.
26. The public has not been informed as to the effects of compaction on the movement of soil gases beneath the MWL and the number of monitors, type, depth and locations of monitoring which may now be necessary.
27. In Appendix A at p. 8, paragraph 3.1, SNL admits that it has recently completed the subgrade and that added thickness will have to be accounted for at boring locations. The public has had no opportunity for review of the changes in monitoring that may be necessary as a result of the added thickness.
[http://www.nmenv.state.nm.us/hwb/SNL/CMIWP/SAP for VOCs, Tritium, Radon at MWL-Dec2006.pdf](http://www.nmenv.state.nm.us/hwb/SNL/CMIWP/SAP_for_VOCs,_Tritium,_Radon_at_MWL-Dec2006.pdf)
28. Sandia's construction of the subgrade may have resulted in an inability to get accurate information about poisonous gases at the dump including, radon, tritium, and volatile organic compounds. By going ahead with additional cover related

- construction activities prior to approval of the CMI Plan, Sandia is interfering with the knowledge of the dump's dangerous wastes and increasing the danger to the community.
29. The release of liquid contaminants to the groundwater by the compaction activities for the subgrade construction and additional construction activities for the cover, which upon information and belief are now proceeding, need to be monitored by a 40 CFR 264.101 Subpart F compliant well monitoring system. No adequate well monitoring system compliant with 40 CFR 264.90-100 currently exists at the MWL. Although the MWL is regulated as a Solid Waste Management Unit (SWMU), "The groundwater monitoring requirements for SWMUs should mirror the requirements for regulated units under Subpart F." (Richard Mayer, Environmental Protection Agency (EPA) Region 6, 2/20/07, E-mail to Joni Arends, Concerned Citizens for Nuclear Safety).
 30. The November 2006 NMED Responses to Public Comments are in conflict with the EPA view that Subpart F is applicable to a SWMU and are further evidence that no adequate well monitoring network exists at the MWL. "Although the regulatory requirements of 20.4.1.500 NMAC incorporating 40 CFR 264 Subpart F can be used as guidance, nearly all of the requirements of Subpart F do not apply to the MWL because it is not a permitted unit. Instead the landfill is regulated as a Solid Waste Management Unit subject to corrective action pursuant to 20.4.1.500 NMAC incorporating 40 CFR 264.101." (NMED Responses to Public Comments on the Sandia National Laboratories' Mixed Waste Landfill Corrective Measures Implementation Plan, p. 44, (November 21, 2006).
 31. The public has not been informed as to the impacts of the construction impacts on soil gas monitoring and the relation to the Fate and Transport Model.

For all of the reasons stated above, not the least of which is the NMED betrayal of the public trust in approving construction of the MWL cover portions prior to the approval of the CMI Plan, Citizen Action requests that a full public hearing be held on the MWL cover and all construction activities which have taken place, relating to the cover and the ability of monitoring systems to protect the public health and safety. Citizen Action requests that NMED issue a cease and desist order for all construction related activities at the MWL until the public has had full opportunity of due process to review exactly what has been performed at the MWL with opportunity to comment, examine witnesses and present evidence.

Citizen Action requests that this document be made a part of the public record in this matter.

Respectfully submitted,

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February 28, 2007
Mr. Ron Curry, Secretary
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Santa Fe, New Mexico 87502

Mr. James Bearzi, Chief
New Mexico Environment Department
Hazardous Waste Bureau
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303

**RE: REQUEST FOR NEW MEXICO ENVIRONMENT DEPARTMENT (NMED)
TO REVISE AND REISSUE:**

- 1). NMED NOTICE OF DISAPPROVAL (11/20/07), AND;**
- 2). RESPONSES TO CITIZEN COMMENTS, SANDIA NATIONAL LABORATORIES (SNL) MIXED WASTE LANDFILL (MWL) CORRECTIVE MEASURES IMPLEMENTATION PLAN (11/21/06) (“RESPONSE”) TO BE IN ACCORD WITH THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA). 40 CFR 264.90-100 (Subpart F).**

Dear Secretary Curry and Mr. Bearzi,

Attached below is a 2/20/07 e-mail letter from Richard Mayer, Environmental Protection Agency (EPA) Region VI, that is persuasive evidence that the NMED has made the incorrect legal interpretation that 40 CFR Subpart F does not apply to the well monitoring network at the MWL.

The attached e-mail states that: “The groundwater monitoring requirements for SWMUs should mirror the requirements for regulated units under Subpart F.”

Citizen Action believes it imperative for NMED to change its analysis in the Response to be in accord with the RCRA requirements set forth in the EPA letter and to expand the Notice of Disapproval to the well monitoring network at the Mixed Waste Landfill (MWL). Citizen Action has explained problems with the MWL well monitoring system in numerous communications cited in the Attachment section below.

Citizen Action is requesting that the Notice of Disapproval for the SAP be expanded to include the inadequacy of the monitoring well network at MWL to provide reliable and representative groundwater sampling in the absence of compliance with the standards of Subpart F, i.e., 40 CFR 264.90-100.

The NMED view expressed in the Response, particularly NMED responses to “Robert Gilkeson, Registered Geologist, that Subpart F requirements do not apply to the MWL monitoring network, is an admission by NMED and SNL that the monitoring network does not comply with Subpart F. For this reason, Citizen Action believes it imperative for NMED to change its analyses in the Response to be in accord with the RCRA requirements set forth in the EPA letter. All this begs the question as to whether a well monitoring system that gives lip service to RCRA, but has no genuine compliance, can provide protection of groundwater at the MWL and detect the escape of hazardous and radioactive wastes to the ground water.

The NMED selection of the remedy of a soil cover for the MWL cannot be supported on the basis of the well monitoring data produced from a network that has not been in compliance with Subpart F from the onset of construction of the seven monitoring wells beginning in 1989 to the present.

NMED and Sandia/DOE have had ongoing knowledge of the failure of the MWL monitoring well network to comply with Subpart F and have stated so in numerous documents contained in the administrative record for the MWL. Nevertheless, NMED and Sandia/DOE have proceeded as if the inadequacies of the well monitoring network did not matter. NMED and Sandia/DOE continued to present data from this failed system as truthful, correct and complete for the purpose of promoting the cheapest remedy possible without adequate concern for the protection of the groundwater that serves the City of Albuquerque.

The applicable regulatory drivers claimed for the MWL have varied, ranging from the position that 40 CFR Subpart F applied to the design and installation of the well monitoring system and the current opposite view of NMED that Subpart F does not apply. Views have varied over time as to whether the MWL was regulated under 40 CFR 264 Subpart F or G or 265 Subpart F or G. Recently in 2006 in its Response to Citizen Comments, the NMED maintains that Subpart F is not applicable to the existing well monitoring system.

The November 21, 2006, NMED Responses to Public Comments on the Sandia National Laboratories Mixed Landfill Corrective Measures Implementation Plan states (p.44-45):

“As previously stated, some of the regulatory requirements of 20.4.1.500 NMAC incorporating 40 CFR 264 Subpart F may be useful guidance. However the bulk of the requirements of Subpart F do not apply to the MWL because it is not a permitted unit. Instead the landfill is regulated as a Solid Waste Management Unit pursuant to corrective action under 20.4.1.500 NMAC incorporating 40 CFR 264.101.”

The NMED assertion is incorrect that once a Solid Waste Management Unit (SWMU) is deemed to be in Corrective Action under 40 CFR 264.101 that the well monitoring network no longer needs to comply with RCRA Subpart F requirements. This view is an aberration from the statements in numerous previous documents written by the

Department of Energy, Sandia National Laboratories and the New Mexico Environment Department that indicated compliance with Subpart F requirements was necessary.

Numerous documents going as far back as 1991, contained in the Administrative Record, as well as presentations by Mr. Gilkeson and Citizen Action, reveal that the MWL groundwater monitoring system lacks the required monitoring system under RCRA Subpart F and/or for the 40 CFR 264.101 Corrective Action status used by the NMED and SNL. Numerous documents of both NMED and Sandia/DOE acknowledge and repeatedly state that for numerous reasons, the “well monitoring system is inadequate.” (See e.g., AR 006224, 006521, 009173, 010981, 010984-10986,). These voluminous documents and records regarding the MWL and its monitoring system were not publicly available to Citizen Action, other public participants or the Hearing Officer previous to the hearing in this matter.

Both NMED and SNL/DOE have known, but did not inform the public or the Hearing Officer in the public hearings for the MWL CMI Plan remedy of a soil cover that the monitoring well network at the MWL does not have a legally required upgradient background well and three down gradient wells capable of monitoring either the fine-grained sediments for early detection of contaminant release from the MWL or for monitoring the Ancestral Rio Grande strata (uppermost aquifer under RCRA).

Both NMED and SNL/DOE have known, but did not inform the public or the Hearing Officer that: the MWL monitoring wells were not developed properly; not in the proper locations; that well screens were across differing strata; that a packer was not installed and after installation contaminants continued to leak from beneath the dump into the uppermost aquifer; that organic drilling fluids and bentonite muds were used which adsorb contaminants of concern; that wells are going dry, and; that purge to dry sampling methods would also destroy contaminants of concern including volatile organic chemicals, heavy metals and radionuclides, including Greater than Class C Waste and transuranics.

Nevertheless, NMED and SNL presented well monitoring data at the public hearing that both NMED and Sandia/DOE knew to be unreliable and misrepresentative and not in compliance with RCRA mandated requirements for monitoring. NMED and Sandia/DOE presented the useless data to support the claim that there was no contamination from the MWL when, in fact, both knew that they could not monitor for contamination because of the defective well monitoring system.

CONCLUSION

NMED should revise and reissue its Responses to Public Comments to acknowledge:

1. The legal requirement under RCRA for the application of 40 CFR 264.90-100 (Subpart F) to the well monitoring network at the MWL;
2. The failure of the MWL to comply with Subpart F;
3. The failure of the MWL well monitoring network to have provided reliable and representative water sampling data; and,

4. The lack of factual data from the well monitoring system at MWL to support the decision to proceed with a soil cover for the MWL.

Respectfully submitted,

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Cc: Attorney Nancy Simmons;
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----- Forwarded Message

From: Joni Arends <jarends@nuclearactive.org>
Date: Tue, 20 Feb 2007 15:49:54 -0700
To: <Mayer.Richard@epamail.epa.gov>
Conversation: A couple of questions for you
Subject: Re: A couple of questions for you

Thanks Rich!

On 2/20/07 2:55 PM, "Mayer.Richard@epamail.epa.gov"
<Mayer.Richard@epamail.epa.gov> wrote:

> The groundwater monitoring requirements for SWMUs should mirror the
> requirements for regulated units under Subpart F. The groundwater
> monitoring wells should be located (hydraulically down-gradient)
> close/near/next to the SWMU or regulated unit in adequate/sufficient
> numbers. Also, for the monitoring wells located next to the
> SWMU/regulated unit, the uppermost aquifer should be monitored (in
> addition, other deeper zones may need to be monitored according to
> site conditions, other factors, etc.). The site should also have a
> sufficient number of "background" groundwater monitoring wells in
> order to determine a release for natural occurring contaminants like
> metals and some radionuclides.
>
> If contamination is found in the monitoring wells next to the
> SWMU/regulated unit, then further horizontal and vertical delineation
> of the groundwater plume is required with additional wells.
>
> Also, the words sufficient or adequate can be interpreted
> differently.
> For example, if a SWMU/regulated unit was 300' by 300' and the
> groundwater flow direction was from Northwest to Southeast, two
> downgradient monitoring wells next to the unit (initial wells) would
> not be a sufficient/adequate number. Now if you had a unit that was

> 50' by 50', with groundwater flow from Northwest to Southeast, then 2
> downgradient monitoring wells next to the unit/SWMU probably would be
> sufficient.

>

> This is just a brief general summary. As you know, each site can
have

> its own unique groundwater monitoring issues.

>

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The October 12, 2006 Notice of Intent to Sue (NOI);

The November 20, 2006 Supplement to the October 12, 2006 NOI, and;

The December 18, 2006 Notice Re:

- 1) Request for Public Review and Comment Period for Sandia National Laboratories ("SNL" or "Sandia") Soil Gas Work Plan;**
- 2) Reply of Citizen Action in Opposition to NMED Responses to Citizen Comments, SNL MWL CMI (Nov. 21, 2006) ("NMED Response(s)");**
- 3) Public Request for Information (bold numbered throughout text);**
- 4) Request for NMED Secretary Ron Curry to Require NMED Staff to issue Notices of Violation at the Mixed Waste Landfill ("MWL") at SNL under the Resource Conservation and Recovery Act ("RCRA"), the Consent Order of April 29, 2004 ("CO"), and the Hazardous and Solid Waste Act ("HSWA") Module IV, and;**
- 5) Request for NMED Secretary Ron Curry to Review Staff conduct at public meetings.**