

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment** _____
Correction _____ **Substitute** _____

Date 17 January 2024

Bill No: HB 55-280

Sponsor: Jimmy G. Mason, Randall T. Pettigrew, and Harlan Vincent
Short Title: Oral Fluid Drug Detection Pilot Project

Agency Name and Code Number: 280-LOPD
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---------------|------|---------------------------|---------------|
| FY24 | FY25 | | |
| | | | |
| | | | |

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------|---------------|
| FY24 | FY25 | FY26 | | |
| | | | | |
| | | | | |

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY24 | FY25 | FY26 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| Total | | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None Known
Duplicates/Relates to Appropriation in the General Appropriation Act: None Known

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

This exact bill was brought in the 2023 Regular Session as HB 275 and died after being tabled in the first committee hearing conducted in HJC.

HB 55 is proposing the enactment of a pilot project to test oral fluid during a roadside stop for driving while under the influence of drugs or alcohol. This proposed statute contains definitions for terms within the statute. Of note, “oral fluid” is defined as saliva collected by a swab or spitting into a vial.

HB 55 proposes a 4-year project to be conducted mainly by the state police and sheriff’s departments, but also includes some municipal police departments, such as Bernalillo, Dona Ana, San Juan, Lea, and San Miguel counties. The purpose is to collect data on the efficacy of using the roadside detection, determining if the roadside detection device can replace or augment drug recognition experts, determining if it is efficient and cost-effective for law enforcement use, such as whether DUI stops are conducted quicker and if there is an increase in convictions.

HB 55 proposes an expert panel to be selected to design the pilot project. The department of public safety will enact rules for the project, apply for federal grants, select, purchase, and provide the devices to the agencies in the project, train those participating agencies on the devices.

HB 55 states that the testing done under this project is voluntary for the driver and if the driver agrees to submit to the test it will only be used to determine probable cause. Each participating agency is to collect and submit data monthly on a variety of factors relevant to each specific stop where testing occurred. The department of safety would then use the data to evaluate accuracy of technology, ease of use, whether it was efficient and effective, and any other relevant factors, and provide a report to the committee.

This project would begin by January 1, 2025 and would appropriate \$650,000 of funds from the cannabis regulation revenue/funds to conduct this project.

FISCAL IMPLICATIONS

Drug Recognition Experts are trained to conduct modified field sobriety tests specifically when someone is under the influence of drugs. These experts are necessary because there is no quick

and easy detection device that can accurately determine impairment by drugs. For instance, marijuana can be detectable, after use, 24 hours in saliva, 90 days in hair, 12 hours in blood, and it depends on how frequent a user the person is. Dan Wagener, M.A., *American Addiction Centers*, <https://americanaddictioncenters.org/marijuana-rehab/how-long-system-body>. This means that there would be more of a likelihood of finding probable cause for a driving while under the influence of drugs arrest even if someone used marijuana 24 hours earlier but was no longer intoxicated.

This increase in defendants into the criminal justice system would fiscally impact LOPD because it may become necessary to litigate whether this device is accurate in proving probable cause that a person is intoxicated by drugs and under the law should not be driving. Both the prosecution and the defense would need to hire experts. This would be a great expense to both sides. This also means there will be an increased need for more experienced attorneys to handle these cases and an increased likelihood that such cases would be taken to trial and appealed, as opposed to being resolved through a plea. If more trials result, LOPD may need to hire more trial attorneys with greater experience.

While it is possible the Law Offices of the Public Defender could absorb an increase in cases due to the passage of this bill, any increase in LOPD expenditures brought about because of the passage of this bill and other proposed criminal legislation would likely require an increase in indigent defense funding to adequately represent individuals charged under this act and other prospective crimes. Defense of such cases and hearings would be handled by, at a minimum, mid-level felony capable LOPD criminal defense attorneys (Associate Trial Attorneys), or higher. Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. An Associate Trial Attorney's mid-point salary including benefits is \$98,073.36 in Albuquerque/Santa Fe and \$104,167.76 in the outlying areas (due to necessary salary differential to maintain qualified employees). Recurring statewide operational costs per attorney would be \$12,780.00 with start-up costs of \$5,210.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$126,722.33. Again, assessment of the impact would be necessary after the implementation of the proposed legislation, but such is likely to result in a requirement for additional funds to LOPD in order to provide constitutionally required effective assistance of counsel. Presumably the courts and DAs would also be affected in similar measure to LOPD, and an increase in sentences would also likely have a fiscal impact on DOC.

SIGNIFICANT ISSUES

This bill seeks to enact a law where a new scientific device will be used, if the driver agrees, to find probable cause to arrest the driver for driving while under the influence of drugs. Although this mode of testing has been tested in other countries and other states in the U.S., its accuracy is still undetermined.

“Accuracy and sensitivity of currently available devices vary, however, three particular OF devices prove more than sufficient in their results, and therefore toxicologists and law enforcement alike are pursuing further evaluation and implantation. The technology used in these devices is similar, but not identical to, that which is used in toxicology laboratories. Yet, since the technology is not identical, the results are not identical either, and accuracy may vary depending upon the drug being tested. Also, these devices are designed to avoid false positive readings, yet sometimes at the expense of missing true positives. Yet, while they aren't perfect,

accuracy measurements are generally in the 90% range or higher for most drugs and in the 80% range for THC.”

We Save Lives, Highway Safety Advocates, Roadside Oral Fluid Testing, <https://wesavelives.org/solve-the-problem/roadside-oral-fluid-testing/>. This means that in cases involving marijuana, there is a 20% chance that there is no probable cause to arrest a citizen pulled over on suspicion of driving while under the influence of drugs, but that citizen is arrested because the test read positive. Indeed, a study on Roadside screening tests for cannabis use, published in April 2023 by several academics supported by the Canadian Institutes of Health Research, found that “continued investment in the development and testing of oral fluid screening tests” was needed. See Erica Wennberg, et al, *Roadside Screening Tests for Cannabis Use: A Systematic Review* (Mar. 22, 2023) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10102219/#>.

Also, as noted above, there may be a positive result for a person who is no longer intoxicated but used marijuana within a 24-hour period, however, the positive result would automatically give the authorities probable cause to arrest. Currently, it does not appear that this new form of testing would survive a *Daubert* analysis as to “(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known [or] potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.” *State v. Aleman*, 2008-NMCA-137, ¶ 21, 145 N.M. 79, 87. If it was proven to be scientifically accurate, there would be no need for a pilot project testing its accuracy. Therefore, it should not be used to prove that there was probable cause for an arrest.

These issues would also impact the efficacy of the pilot project at gathering accurate information and could lead to extensive search and seizure litigation. Since the pilot project depends on “consent” of the driver, it is difficult to imagine drug-impaired drivers giving voluntary consent. More likely, drivers confident in their sobriety will consent, resulting in false positives based on trace amounts from *prior consumption*, and thus challenging the probable cause determination. Meanwhile, others are likely to assert that consent was not voluntarily given, resulting in additional search and seizure litigation.

PERFORMANCE IMPLICATIONS

See Significant Issues, supra.

ADMINISTRATIVE IMPLICATIONS

None noted.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None known.

TECHNICAL ISSUES

Analyst is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill and analyst is unaware that it has been drawn pursuant to a special message of the Governor.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

If the purpose of HB 55 is to determine whether the device is accurate and saves on police resources, then this project should solely be for the collection of data. This data should not be used to determine probable cause to arrest because this project is gathering data to determine accuracy, meaning there is no way of knowing whether it is accurate. To avoid expending resources to hire experts to testify on a device that has not yet been deemed accurate by any state in the U.S., this evidence, if collected, should be excluded for probable cause and conviction purposes.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. DUIs will continue to be criminalized and will be proven through the investigations currently utilized to prove DUI by alcohol or drugs, for example, drug recognition experts, breathalyzers, field sobriety tests, and blood draws.

As an incentive to enact, this bill states it will also “determine if the handheld roadside detection device can augment or replace certified drug recognition experts, particularly in rural areas of the state where such experts are not readily available.” A drug recognition officer not being available does not hinder police agencies in conducting DUI investigations or prosecutors in prosecuting such cases of driving while under the influence of drugs without drug recognition officers present. This appears to be a non-factor in the courts because officers who are even generally trained in detection of drugs are allowed to conduct the investigation and testify in court as to their findings, resulting in convictions for driving while under the influence of drugs. Appellate courts have interpreted *State v. Aleman*, a drug recognition expert case, to mean that while a DRE is helpful to the jury it is not required in every case. In utilizing this understanding, the appellate courts often affirm convictions obtained without a DRE investigation or testimony. *See, e.g., State v. Lozoya-Hernandez*, No. A-1-CA-38422, ¶¶ 18-23, 2021 WL 4496291 (N.M. Ct. App. Oct. 1, 2021); *State v. Anker-Unnever*, No. A-1-CA-37437, ¶ 15, 2020 WL 2096409 (N.M. Ct. App. Apr. 21, 2020). Therefore, it does not seem to impact the conviction rate of DUIs in rural areas that do not have great access to DREs.

AMENDMENTS

None at this time.