

<b>LFC Requester:</b>	<b>Scott Sanchez</b>
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**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

**AgencyAnalysis.nmlegis.gov**

*{Analysis must be uploaded as a PDF}*

**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** 1/17/24  
**Bill No:** HB 55

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

**Agency Name and Code**    AOC  
**Number:**                    218  
**Person Writing**            Charlene Romero  
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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)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: HB 55 creates a new section in New Mexico Statutes Annotated (NMSA) that creates the Oral Fluid Roadside Detection Pilot Project. The pilot project would be administered by the Department of Public Safety (DPS). Section 1, Paragraph A, defines a “handheld roadside detection device” as “a portable screening instrument that can detect the presence of one or more drug categories through the collection of oral fluid”, “oral fluid” as “saliva that is collected by a swab or by spitting into a vial” and “pilot” as the oral fluid roadside detection pilot project.”

The pilot would be a four-year project conducted by state police, sheriff’s offices and selected municipal police departments in Bernalillo, Doña Ana, San Juan, Lea and San Miguel counties.

The purpose of the pilot would be to:

- (1) investigate the efficacy of using handheld roadside detection devices for oral fluid testing for the presence of drugs when a law enforcement officer has reasonable suspicion that a driver may be driving under the influence of intoxicating liquor or drugs;
- (2) 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; and
- (3) determine if the use of the handheld roadside detection devices is an efficient and cost-effective law enforcement aid that:
  - (a) shortens the time it takes for a law enforcement officer to process a case of driving while under the influence of intoxicating liquor or drugs; and
  - (b) increases the conviction rates for persons arrested for driving while under the influence of intoxicating liquor or drugs.

DPS would be required to convene an expert panel to assist in designing the pilot. The panel would consist of:

- (1) one district attorney, or the district attorney's designee, from each judicial district encompassing a county that is participating in the pilot;
- (2) ten members representing counties and municipalities participating in the pilot;
- (3) two drug recognition experts;
- (4) the secretary of health or the secretary's designee;
- (5) a state police officer responsible for commercial vehicle enforcement;

- (6) one drug testing expert from a testing laboratory; and
- (7) the director of the cannabis control division of the regulation and licensing department.

DPS would be required to promulgate rules for conduct of the pilot. DPS and pilot participants would also be required to apply for federal grants available for the purposes of the pilot.

DPS would be required to select and purchase handheld roadside detection devices, provide the devices to participating state police officers and local law enforcement departments and train participants in the use of the devices.

Law enforcement officers who are not drug recognition experts would be allowed to participate in the pilot. Roadside oral fluid testing would be voluntary for the driver and the Bill provides for it to be used to determine probable cause. The Bill would require detection of a drug category by a handheld roadside detection device to be confirmed by a blood test.

Each participating law enforcement agency would be required to collect monthly data to determine the efficacy of using the handheld roadside detection devices for roadside drug testing and arrest and conviction rates of drivers pursuant to Section 66-8-102 NMSA 1978, including for each agency:

- (1) how many times drivers were requested to submit to a roadside oral fluid test;
- (2) how many drivers submitted to the test and how many drivers refused the test;
- (3) a list of each drug category detected and the frequency of detection;
- (4) whether a drug recognition expert was called to the scene;
- (5) how many positive and negative detections were registered with the devices;
- (6) of the positive detections, how many were confirmed by a blood test;
- (7) of the positive detections confirmed by a blood test, the percentage of confirmation for each drug category;
- (8) of the positive detections, how many drivers required medical intervention;
- (9) of drivers arrested, how many went to pretrial diversion, how many went to trial and how many were convicted;
- (10) how many drivers were sentenced to jail, how many had their sentences suspended or deferred and how many were ordered to DWI school;
- (11) how many drivers were charged or convicted with a previous incident of driving while under the influence of intoxicating liquor or drugs;
- (12) whether there were any circumstances in which weather did not permit or complicated the collection and testing of oral fluid; and
- (13) any other data the department considers necessary to evaluate the pilot.

DPS would be required to use the data collected to evaluate:

- (1) the accuracy of the technology;
- (2) its ease of use;
- (3) whether law enforcement officers found the technology efficient and effective; and
- (4) other relevant measures determined by the department.

DPS would provide periodic reports to the interim committee that studies corrections issues and a final report to the governor and the legislature, including findings and recommendations.

Section 2 of the Bill would require the pilot project to be operational by January 1, 2025.

Section 3 of the Bill would also appropriate \$650,000 from the cannabis regulation fund to DPS for expenditure in fiscal years 2025 through 2028 to conduct an oral fluid roadside detection pilot project and to purchase handheld roadside detection devices for pilot project participants, to pay per diem and mileage to the expert panel convened to assist the department in designing the pilot project and to pay other expenses related to the pilot project. Any unexpended or unencumbered balance remaining at the end of fiscal year 2028 would revert to the cannabis regulation fund.

## **FISCAL IMPLICATIONS**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the effect that this would have on DWI prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. If this pilot project increases the number of DWI charges filed in the courts, the courts will require additional resources to handle the increase.

## **SIGNIFICANT ISSUES**

The purpose of this pilot project is to investigate the efficacy and reliability of these handheld roadside detection devices for oral fluid testing for the presence of drugs when a law enforcement officer has reasonable suspicion that a driver may be driving under the influence of intoxicating liquor or drugs. However, the Bill also provides for the results of these tests to be used to determine probable cause. If the efficacy and reliability of these testing devices has yet to be established, using them to determine probable cause for an arrest is putting the cart before the horse. In *State v. Morales*, the Court of Appeals held “that the [s]tate must prove the scientific reliability of a drug field test in a manner consistent with the *Daubert/Alberico* standard, if it wishes to use the results of that test at trial to identify a controlled substance.” 2002-NMCA-052, ¶ 1. The *Daubert/Alberico* standard is used to evaluate the scientific reliability of evidence. In order for the results of the handheld roadside detection devices in the pilot project to establish probable cause, they must be found to be scientifically reliable. The pilot project may be able to establish the scientific reliability of this evidence, but until that is done, the results of those tests cannot be used to establish probable cause for an arrest or search warrant. Yes, the Bill does require the results of the tests to be verified by a blood test, however, if the roadside test is used to establish probable cause for a warrant for a blood test, the results of the roadside test must also be admissible to lay a foundation for the probable cause determination on the warrant. Therefore, the state would need evidence independent of the results of the portable testing machine to establish probable cause, until the scientific reliability of the portable testing machine can be established.

Establishing that one of the purposes of the pilot project is to determine if the use of the handheld roadside detection devices will “increase[ ] the conviction rates for persons arrested for driving while under the influence of intoxicating liquor or drugs,” presupposes a goal that may result in confirmation bias and undermine the scientific validity of the information gathered from the pilot project. If the goal was to gauge the accuracy of these devices in determining the identification of drugs in a person’s system at the time of driving, to aid the accuracy of the overall investigation, it would provide a more objective standard by which to assess the data, rather than

viewing it as only a tool to increase convictions. These tools will only be able to detect drugs, but will not be able to make any determination about specific levels of impairment due to those drugs. They can just as easily be used to screen out people who are not under the influence of any drug. Therefore, evaluating whether they are an effective tool to help increase convictions is a problematic purpose under which to establish the pilot program, because it only looks at the efficacy of proving guilt and not at helping to identify the innocent. In other words, if the goal is to “investigate the efficacy and reliability” of these devices in increasing conviction rates, it is only looking at one side of the equation and not evaluating the accuracy of the information gathered by these devices. To establish unbiased scientific data, a goal of ensuring accuracy of the information gathered would be more appropriate.

### **PERFORMANCE IMPLICATIONS**

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

### **ADMINISTRATIVE IMPLICATIONS**

There may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None

### **TECHNICAL ISSUES**

### **OTHER SUBSTANTIVE ISSUES**

### **ALTERNATIVES**

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

### **AMENDMENTS**