

LFC Requester:

Scott Sanchez

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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 x **Amendment**
Correction **Substitute**

Date Prepared: 1/17/24

Bill No: HB 0055

Sponsor: Jimmy G. Mason; Randall
T. Pettigrew and Harlan
Vincent

Short Title: Oral Fluid Drug Detection
Pilot Project

Agency Name and Code Number: 305 – New Mexico
Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
	\$650,000	Yes. 2025 to 2028	Cannabis Regulation Fund – Dept. of Public Safety

(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:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

House Bill (“HB”) 55 would create a roadside oral fluid drug detection test pilot project. The test would detect the presence of drugs when a driver is stopped for suspicion of driving under the influence of intoxicating liquor or drugs. The pilot program would require the Department of Public Safety to promulgate rules and collect data to determine the efficacy of the device.

HB 55 requires DPS to:

- promulgate rules for the conduct of the pilot project.
- apply for federal grants.
- select and purchase the handheld roadside detection devices.
- train the participating law enforcement officers.
- convene an expert panel of persons to assist in designing the pilot.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

NMSA 1978 Section 66-8-102(B) provides that “it is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state.” In 2021, Governor Michelle Lujan Grisham signed a bill legalizing the cultivation, manufacturing, purchasing, possession and consumption of recreational cannabis for adults 21 and older. Following the legalization of cannabis many states

have faced an increase in crashes / fatalities and injuries related to drug impaired driving. The New Mexico DWI statute does not define “drug,” however, the statute does criminalize driving under the influence of “any drug.” This includes both illegal and legal (prescription and over-the-counter) drugs. HB 55 would provide funding for the DPS to purchase handheld roadside detection devices to be used for an oral fluid detection pilot program.

In New Mexico, there is no *per se* limit for drugs of any category. NMSA 1978 Section 66-8-102(B). Section E(1) of HB 55 would establish a “cut-off drug level” that corresponds to federal department of health and human service regulations for mandatory drug testing of federal employees. This is contrary to the standard outlined by the statute, as there is no hardline standard or *per se* limit. Further, a positive drug test result does not necessarily mean impaired driving. Drugs are often difficult to test for impairment because of individual differences in absorption distribution, action and metabolism. National Highway Traffic Safety Administration (“NTSA”), “Drug-Impaired Driving: Understanding the Problem & Ways to Reduce It,” a Report to Congress, 2009, Compton, RR., Vegega, M. and Smither, D.

Section (G) provides that the testing is “voluntary for the driver and shall be used only to determine probable cause.” This provision presents two concerns. First, blood tests are “searches” under the Fourth Amendment. *State v. Vargas*, 2017-NMSC-029. Section (G) requires consent to test, and consent is an exception to the warrant requirement. However, Section (H) states that there shall be confirmation by a blood test. Understanding that this is a pilot program to determine the efficacy of the testing using the handheld device, what if the driver refuses the blood test? Also, rules will need to establish the time lapse from saliva test to blood draw and the possible implication of metabolizing any drugs in the driver’s system.

HB 55 does not specify which drugs can be tested with saliva/oral testing. This may result in a saliva/oral test expanding the scope of the investigation into a blood test. A blood test may provide additional test results that may not have been available by only a saliva/oral test. HB 55 does not clarify whether consent is limited only to the suspected drug category of the saliva/oral testing, or also authorizes testing for additional substances that are only detectable in blood. If that is the intended scope of consent, standards and practices for generating informed consent would need to be developed, likely by rule.

The second issue with HB055 (G) is that in New Mexico, probable cause for arrest is based upon the facts and circumstances within the officer’s knowledge are sufficient to warrant the officer to believe than an offense has been committed or is being committed. *State v. Granillo-Macias*, 2008-NMCA-021, ¶ 9, 143 N.M. 455. There is no one determining factor. As such, a saliva test can only be used *as a factor* in determining probable cause. Standardized Field Sobriety Tests should still be conducted, in conjunction with other observations as suggested by the National Highway Traffic Safety Administration (“NTSA”).

Further, HB 55 does not specify whether saliva testing vials will be tagged into evidence for further independent testing. Currently, drivers under the suspicion of driving under the influence of alcohol or drugs have the option of requesting an independent blood draw pursuant to the New Mexico Implied Consent Act.

PERFORMANCE IMPLICATIONS

HB 55 would impose significant implementation obligations on DPS that may not be within its current capacities. Building out staff to handle the implementation will require an additional

appropriation.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

DPS will likely need to establish a new division or bureau to maintain, calibrate and certify the testing devices.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

Section (B)(2) states that the testing device “can augment or replace certified drug recognition experts” where experts are not readily available. Because impairment varies from person-to-person, a drug recognition expert’s testimony as to impairment may still be required to establish a DWI offense. To avoid creating a perception that the test alone will prove a DWI, the term “replace” should be eliminated.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Impaired driving will continue to be investigated using drug recognition experts, breathalyzers, field sobriety tests, etc.

AMENDMENTS

Suggested amendment to Section (G): “Roadside oral fluid testing is voluntary for the driver and may be used as a factor in determining probable cause.”