F I S C A L I M P A C T R E P O R T

SPONSOR Maestas **ORIGINAL DATE** 2/7/17 **LAST UPDATED** **HB** 280

SHORT TITLE Industrial Hemp Research Rules **SB**

ANALYST Dulany

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	NM industrial hemp research and development fund

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	NM industrial hemp research and development fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 89, HB 166, SB 6a/SCON, SB 278
Duplicate to HB 144
Conflicts with HB 154

SOURCES OF INFORMATION
LFC Files
Colorado Department of Agriculture (CDA)
Kentucky Department of Agriculture (KDA)

Responses Received From
New Mexico Department of Agriculture (NMDA)
Office of the Attorney General (OAG)

Responses Not Received From
Department of Public Safety

SUMMARY

Synopsis of Bill

House Bill 280 adds a new section to statute relating to NMDA requiring the department to issue licenses to grow industrial hemp for research and development purposes – including agricultural, agronomic, ecological, processing, sales, and marketing research – pursuant to rules to be promulgated by NMDA. The bill requires an institution of higher education, person, or business that plans to grow industrial hemp seed or industrial hemp fiber to obtain a grower's license by submitting an application to NMDA.

HB 280 requires New Mexico State University (NMSU) to establish a New Mexico industrial hemp research and development fund consisting of fees collected by NMDA for industrial hemp research and development, donations, grants, and income earned from investment of the fund. Money in the fund does not revert to any other fund at the end of a fiscal year.

HB 280 amends the Controlled Substances Act to amend the definition of "marijuana" to exclude the plant Cannabis sativa L. and any part of the plant, whether growing or not, containing a delta-9-tetrahydrocannabinol (THC) concentration of no more than 0.3 percent on a dry weight basis. Finally, HB 280 specifies the enumeration of marijuana, tetrahydrocannabinols, or chemical derivatives thereof as a Schedule I controlled substance does not apply to cultivation of industrial hemp by qualified entities pursuant to rules adopted by NMDA.

FISCAL IMPLICATIONS

NMDA reports it cannot predict the level of revenue expected from fees, but it believes it will be insufficient to fully enact and adequately maintain the provisions of the bill without compromising activities within existing regulatory programs.

Although the level of participation is indeterminate at this time, examples from other states may provide insight into potential revenues. The Kentucky Department of Agriculture (KDA) set a schedule of fees differentiating hemp growers from hemp processors, along with an application fee:

- Application fee: $50
- Annual processor or handler fee:
    - $400 for small processors and handlers
    - $1,000 for large processors
- Grower fee: $350

Other fees apply, such as site modification fees ($500) and a post-harvest retest, product THC test, or pesticide residue test fee ($150). The program experienced 166 participants in 2016, 24 of which were processors and handlers. Depending on whether the 24 processors were small processors or large processors, annual base revenues to KDA's industrial hemp research pilot program could range from $67.6 thousand to $82 thousand. Revenues could be higher depending on site modifications and post-harvest retests.

Revenues from fees for the program would likely require a ramp-up period as the department establishes fee schedules and promulgates rules. Initial costs would likely need to be paid from other sources. NMDA closed out FY16 with $1.6 million in fund balance.

SIGNIFICANT ISSUES

As noted by OAG and NMDA, the federal Agricultural Act of 2014 provides:

> "…an institution of higher education…or a State department of agriculture may grow or cultivate industrial hemp if -- (1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and (2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs."

OAG points out federal law only prescribes growing or cultivating hemp by a postsecondary educational institution or state department of agriculture, while HB 280 would authorize NMDA to issue licenses to "[a]n institution of higher education, person or business." "Thus," according to OAG, "issues of federal pre-emption may arise." The memorandum of understanding used by the Kentucky Department of Agriculture appears to circumvent the issue noted by OAG by establishing licensees under its industrial hemp program as agents of KDA.

According to NMDA, historically the US Drug Enforcement Agency (DEA) has been responsible for providing federal permits to growers for cultivation of hemp but has not done so except in rare cases for research plots. NMDA states DEA has not issued such permits since 1999, even to those states legalizing hemp production.

OAG notes in analysis for a similar bill Subsection E (page 2, lines 20 through 24) allows licensure for "commercial or research and development purposes…"; however, Subsection C (page 2, lines 4 through 9) contemplates licensure for research and development purposes. OAG suggests clarification may be required to resolve this conflict. OAG also suggests clarification of whether the word "commercial" as used in Subsection E is limited to research. If not, according to OAG, HB 280 may conflict with the Agricultural Act of 2014, which allows only for growth of industrial hemp for research purposes.

In analysis for a similar bill, OAG states:

> "The bill makes reference to administrative rules that are not yet in place, and if, when they are drafted, they lack clear definitions, or their definitions cause contradictions or ambiguity with existing definitions it could result in unintended consequences or possible loopholes and challenges to criminal laws relating to marijuana."

OAG reports at least 30 states have passed legislation related to industrial hemp. Generally, according to, states have taken three approaches: (1) establish industrial hemp research or pilot programs; (2) authorize studies of the industrial hemp industry; or (3) establish commercial industrial hemp programs. It appears some states' laws establishing commercial industrial hemp programs require a change in federal law or waivers from DEA before those programs can be implemented in the state.

At least 16 states have legalized industrial hemp production for commercial purposes and 20 have passed laws allowing research and pilot programs. Seven states – Colorado, Kentucky, Maryland, Minnesota, North Dakota, Rhode Island, and Virginia – have approved creation of both pilot or research programs and commercial programs. According to OAG, many of the states that have legalized hemp cultivation for commercial purposes specify the state does not allow for violation of federal law. States including California, Indiana, Kentucky, Minnesota, Montana, and Virginia have established a framework for regulating commercial hemp but still consider hemp illegal outside research programs unless federal law changes, according to OAG.

OAG states other limited research indicates in order to protect growers from criminal prosecution, some states provide an affirmative defense for cannabis possession and cultivation charges under controlled substances law for licensed individuals. States may also require licensees to obtain controlled substances registration from DEA for the affirmative defense to apply.

NMDA reports several concerns regarding departmental inspectors' liability when handling hemp samples. First, NMDA anticipates agency staff will handle plant material classified as marijuana (materials with tetrahydrocannabinol levels above the 0.3 percent threshold). NMDA notes concerns that this would subject NMDA staff to prosecution under the Controlled Substance Act. It is unclear whether law enforcement would pursue such charges. NMDA analysis further anticipates challenges in handling, testing, and taking possession and transportation of cannabis-based material in the border area, particularly with regard to federally controlled customs and border patrol check points.

The Colorado Department of Agriculture (CDA) purports more than half of all industrial hemp production in the U.S. in 2016 was in Colorado. As of November 2016, CDA had inspected over 6,000 acres of outdoor hemp production space and 434 thousand square feet of indoor space. Of 197 compliance samples collected by CDA, 150, or about 75 percent, of the samples met compliance standards of less-than-0.3 percent THC levels. To help growers comply with the legal THC limits of hemp, CDA is working with growers to provide seeds of hemp variants known to be below the 0.3 percent threshold.

RELATIONSHIP

HB 280 relates to certain provisions in HB 89. HB 280 duplicates HB 166 and the original version of SB 6a/SCON. Although HB 154 allows for the growing of hemp, similar to HB 280, language providing for commercial development and participation by businesses in the program is not included in HB 154.

OTHER SUBSTANTIVE ISSUES

According to KDA, Industrial hemp is a variety of Cannabis sativa and is of the same plant species as marijuana. However, hemp is genetically different and distinguished by its use and chemical makeup. Industrial hemp refers to cannabis varieties that are primarily grown as an agricultural crop. Hemp plants are relatively low in tetrahydrocannabinol, marijuana's primary psychoactive chemical. THC levels for hemp generally are less than 1 percent.

KDA indicates the hemp global market consists of an estimated 25 thousand products. An estimated 55.7 thousand metric tons of industrial hemp is produced each year, 70 percent of which is produced in China, Russia, and South Korea. Canada had 38.8 thousand licensed acres of industrial hemp in 2011, according to KDA. Canadian exports of hemp seed and hemp products were estimated at more than $10 million, most of which went to the U.S. Industry estimates indicate U.S. retail sales of hemp-based products may exceed $300 million per year.

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