

AMENDED IN ASSEMBLY JUNE 18, 2008

AMENDED IN ASSEMBLY MAY 1, 2008

AMENDED IN SENATE JANUARY 17, 2008

AMENDED IN SENATE JANUARY 9, 2008

SENATE BILL

No. 994

Introduced by Senators Florez, Ashburn, and Steinberg

February 23, 2007

An act to add Article 7 (commencing with Section 1225) to Chapter 3 of Division 2 of the Fish and Game Code, relating to the Delta smelt.

LEGISLATIVE COUNSEL'S DIGEST

SB 994, as amended, Florez. Delta smelt.

Existing law requires the Fish and Game Commission to establish fish hatcheries for the purposes of stocking the waters of California with fish, and requires the Department of Fish and Game to maintain and operate those hatcheries.

This bill would enact the Delta Smelt Preservation and Restoration Act of 2008. The act would require the department to develop a *Delta smelt hatchery* program, ~~established and operated as a mitigation bank available to banking partners in order to obtain take authorization, with prescribed elements,~~ to preserve and restore the Delta smelt. ~~The act would require that the program be designed to establish a sustainable population of Delta smelt sufficient to warrant the species' removal from its listing status, as of January 1, 2009, under the federal Endangered Species Act of 1973 and the California Endangered Species Act.~~ *The program would operate as a mitigation bank that provides take authorizations to banking partners and obtains funding from banking agreements.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 ~~(a) The Delta smelt (*Hypomesus transpacificus*) is a small native~~
4 ~~fish listed as threatened under both the California Endangered~~
5 ~~Species Act and the federal Endangered Species Act. Delta smelt~~
6 ~~live only in the Sacramento-San Joaquin River Delta. Because the~~
7 ~~fish is listed as threatened under the state act, California law already~~
8 ~~prohibits take of Delta smelt unless authorized by the Department~~
9 ~~of Fish and Game. However, the abundance of Delta smelt has~~
10 ~~declined since its listing as “threatened” in 1993, despite the fact~~
11 ~~that it has been a chief beneficiary of at least 1.5 million acre-feet~~
12 ~~of San Joaquin Valley water that is set aside annually for~~
13 ~~environmental protection and tens of millions of dollars.~~

14 ~~(b) The Delta smelt historically were among the most common~~
15 ~~fish in the Sacramento-San Joaquin estuary. Delta smelt abundance~~
16 ~~fluctuates greatly from year to year; however, information from~~
17 ~~seven independent data sets demonstrated a significant decline of~~
18 ~~the Delta smelt population and low population levels from 1983~~
19 ~~to 1992. The total number of Delta smelt is not known; however,~~
20 ~~Delta smelt are considered environmentally sensitive because they~~
21 ~~have a one-year life cycle, unusually low fecundity for a fish with~~
22 ~~planktonic larvae, a limited diet, and reside primarily within the~~
23 ~~interface between salt and freshwater. The Delta smelt is also~~
24 ~~considered by scientists as an indicator of the overall health of the~~
25 ~~Sacramento-San Joaquin Delta.~~

26 ~~(c) In January 2008, the United States Bureau of Reclamation~~
27 ~~and the Department of Water Resources informed a congressional~~
28 ~~subcommittee that their efforts to save the fast-declining~~
29 ~~populations of the Delta smelt are failing.~~

30 ~~(d) Although many factors are known to materially affect Delta~~
31 ~~smelt populations and mortality, to date only water supply cutbacks~~
32 ~~have been used to address declining smelt populations. In 2007,~~
33 ~~federal officials cut back the amount of water pumped to farmers~~
34 ~~and southern California cities to the lowest level to date in an~~
35 ~~attempt to save the Delta smelt. Those cuts created near~~

1 catastrophic circumstances for farmers and growers in the southern
2 central valley and consumers in the form of higher food prices at
3 markets nationwide.

4 ~~(e) Farmers and growers in the southern central valley, northern
5 and southern California water customers, and the state as a whole
6 would collectively feel the significant water shortages and the
7 resulting economic pain if, as happened in 2007, the pumps that
8 send water south from the delta are shut down and limit the delivery
9 of water by 20 percent to 30 percent every year when the Delta
10 smelt populations get dangerously low.~~

11 *(a) The Delta smelt (*Hypomesus transpacificus*) is a small fish
12 native to the Sacramento-San Joaquin Delta. The Delta smelt is a
13 particularly vulnerable species in the Delta, with a typical lifespan
14 of a single year. It has an unusually low fecundity for a fish with
15 a limited planktonic larvae diet. It resides primarily within the
16 interface between the salt and fresh water.*

17 *(b) In 1993, the Delta smelt was listed as threatened and has
18 henceforth been protected under state law pursuant to the
19 California Endangered Species Act.*

20 *(c) There are many known threats to the smelt in the Delta. Loss
21 of habitat, reduced food supply, invasive species, rising
22 temperatures, and toxic contaminants have all been identified as
23 playing a potential role in the decline of Delta smelt.*

24 *(d) It is critical to move forward with the appropriate
25 comprehensive strategy for a sustainable Delta that includes the
26 investments necessary to allow the Delta smelt and other sensitive
27 species to survive and thrive in their native habitat. This goal must
28 be accomplished in a manner that will also provide sufficient and
29 reliable water supplies to meet the public health and safety needs
30 of Californians throughout the state and support California's vital
31 economic interests.*

32 *(e) A long-term comprehensive solution is vital to addressing
33 the myriad of issues affecting ecosystem health and species
34 recovery. However, immediate action is needed to address the
35 critical condition of Delta smelt population. A Delta smelt hatchery
36 is a single element in what should constitute a suite of actions
37 aimed at improving habitat conditions and species recovery. A
38 Delta smelt hatchery can provide near-term benefits to ensure the
39 survival of this key Delta species.*

1 SEC. 2. Article 7 (commencing with Section 1225) is added
2 to Chapter 3 of Division 2 of the Fish and Game Code, to read:

3
4 Article 7. Delta Smelt Preservation and Restoration Act
5

6 1225. This article shall be known, and may be cited, as the
7 Delta Smelt Preservation and Restoration Act of 2008.

8 1226. As used in this article:

9 (a) "Banking partner" means any state, federal, or local public
10 agency, or person, that enters into a written agreement with the
11 department to participate in the Delta Smelt Hatchery Program.

12 (b) "Delta" means the Sacramento-San Joaquin Delta as
13 described in Section 12220 of the Water Code.

14 (c) "Delta smelt" means the Delta smelt (*Hypomesus*
15 *transpacificus*), of the family *Osmeridae*.

16 (d) "Mitigation bank" means a publicly or privately owned and
17 operated fish hatchery in which Delta smelt are spawned and reared
18 for the purpose of *creating refugia populations or for* release into
19 the delta to increase the population of Delta smelt in the delta or
20 for use as stock for scientific studies, and which is constructed
21 consistent with this article to mitigate ~~for~~ *the* adverse impacts on
22 Delta smelt populations caused by the activities of banking
23 partners.

24 (e) "Mitigation banking agreement" means a written agreement
25 between the department and a banking partner that ~~meets the~~
26 *satisfies the incidental take* requirements of subdivision (b) of
27 Section 2081 and that provides a uniform procedure and
28 contribution from each banking partner for receiving mitigation
29 bank credits.

30 (f) "Program" means the Delta Smelt Hatchery Program
31 developed ~~and implemented~~ by the department pursuant to Section
32 1227.

33 (g) "*Refugia*" means *a captive Delta smelt broodstock*
34 *population managed to maintain a genetic population*
35 *representative of the wild population.*

36 1227. The department, ~~in consultation with the Department of~~
37 ~~Water Resources and the University of California,~~ shall develop
38 the Delta Smelt Hatchery Program to preserve and restore the Delta
39 smelt. ~~The program shall be established and operated as a~~
40 ~~mitigation bank available to banking partners in order to obtain~~

1 ~~take authorization pursuant to Section 2081.~~ The program shall be
2 implemented by January 1, 2010, and shall do all of the following:

3 ~~(a) Be designed to establish a sustainable population of Delta~~
4 ~~smelt sufficient to warrant the species' removal from the listing~~
5 ~~status assigned to it as of January 1, 2009, under the federal~~
6 ~~Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.) and~~
7 ~~the California Endangered Species Act (Chapter 1.5 (commencing~~
8 ~~with Section 2050) of Division 3):~~

9 *(a) Design a propagation facility for the following intended*
10 *purposes:*

11 *(1) Establishing a genetic refugia population.*

12 *(2) Developing broodstock for scientific and educational*
13 *purposes.*

14 *(3) Providing a source of fish for supplementation of wild*
15 *populations.*

16 *(b) Identify three potential sites within, or immediately adjacent*
17 *to, the delta that are suitable for the design, construction, and*
18 *operation of a Delta smelt hatchery.*

19 *(c) Result in the design and construction of at least one Delta*
20 *smelt hatchery on a site identified under subdivision (b) by January*
21 *1, 2011.*

22 ~~(d) Identify and implement research methods and strategies to~~
23 ~~help increase the population of Delta smelt.~~

24 *(d) Develop a Hatchery Management Plan that identifies*
25 *hatchery management and implementation strategies to ensure*
26 *the success of the program in meeting its goals. The Hatchery*
27 *Management Plan shall be developed in consultation with the*
28 *University of California and the United States Fish and Wildlife*
29 *Service, and other mediums for scientific peer review, as deemed*
30 *appropriate by the department.*

31 *(e) Establish and operate a mitigation bank available to banking*
32 *partners in order to provide take authorization pursuant to Section*
33 *2081 to participating banking partners.*

34 ~~(e)~~

35 *(f) Adopt guidelines that establish the procedures for entering*
36 *into a mitigation banking agreement, and the cost of participation*
37 *in the mitigation bank.*

38 1228. The department shall enter into mitigation banking
39 agreements with banking partners for the purpose of providing

1 take authorization under Section 2081. Mitigation banking
2 agreements shall meet both of the following requirements:

3 (a) Establish a requirement for the banking partner to participate
4 in the mitigation bank at a level that is roughly proportional to the
5 impact of the banking partner's activity on Delta smelt.

6 (b) Set the financial contribution of the banking partner, together
7 with a method of making financial contributions to the mitigation
8 bank, that provide sufficient certainty that financing is available
9 for that banking partner's share of the annual operations of the
10 Delta smelt hatchery in an amount sufficient to ~~meet~~ *satisfy* the
11 mitigation obligation of the banking partner under the permit issued
12 pursuant to Section 1229.

13 1229. If the department enters into a mitigation banking
14 agreement that ~~meets~~ *satisfies* all of the requirements of this article,
15 the department shall issue a permit authorizing ~~a~~ *an incidental* take
16 under Section 2081 *to participating banking partners*.

17 1230. *Delta smelt reared for refugia populations, scientific*
18 *research, and population augmentation shall be counted towards*
19 *mitigation credits*. Hatchery production in excess of the obligations
20 of mitigation banking partners shall create mitigation credits
21 available to meet the obligations of future activities. *Banking*
22 *credits shall be available to banking partners to satisfy mitigation*
23 *obligations required under the federal Endangered Species Act,*
24 *consistent with a mitigation plan approved by the United States*
25 *Fish and Wildlife Service*.

26 1231. *Funding necessary for the long-term operation and*
27 *maintenance of the program and a Delta smelt hatchery shall be*
28 *provided from revenues received from banking partners. Funds*
29 *provided through banking agreements shall be dedicated to*
30 *program implementation and not used for other purposes*.

31 ~~1231.~~

32 1232. Costs for the planning, design, and construction of a
33 Delta smelt hatchery, including purchase of any necessary lands,
34 easements, or rights-of-ways shall be made from funds allocated
35 by Section ~~1232. Funding necessary for the long-term operation~~
36 ~~and maintenance of a Delta smelt hatchery and the program shall~~
37 ~~be from revenues received from banking partners.~~ 1233. *An audit*
38 *of all funds received for the program shall be conducted every*
39 *three years*.

1 ~~1232.~~

2 1233. The sum of ___ is hereby transferred from ___ to the
3 department for the purposes of implementing this article.
4 Notwithstanding Section 13340 of the Government Code, the
5 money transferred is hereby continuously appropriated, without
6 regard to fiscal year, to the department to implement this article.

7 ~~1233.~~

8 1234. The department may contract with public agencies
9 outside of state government for the planning, design, construction,
10 and operation of one or more Delta smelt hatcheries.

11 *1235. The department may partner with the United States Fish
12 and Wildlife Service in establishing and operating a Delta smelt
13 hatchery, provided that all requirements of this article shall be
14 complied with.*

15 *1236. The department shall cooperate on the development of
16 long-term comprehensive Delta ecosystem solutions to ensure
17 consistency with this article. A program implemented pursuant to
18 Section 1227 shall be included as one of the actions incorporated
19 into any state-adopted comprehensive Delta ecosystem program.*

20 *1237. Notwithstanding any other sections, nothing in this act
21 shall diminish the protections provided to Delta smelt under state
22 law, provide for illegal taking of Delta smelt, or eliminate the
23 requirements for compliance with the California Endangered
24 Species Act.*

25

26

27 **CORRECTIONS:**

28 **Text—Page 6.**

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