



SCIENCE AND ENVIRONMENT DIVISION

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Executive Summary

TO: Mayor and City Council
FROM: Hannah Sanger, Science & Environment Division Manager
DATE: November 21, 2024 Council Meeting
RE: Contract with Swinerton Builders

Council may wish to approve the recommendations of staff and authorize the Mayor's signature on an agreement with Swinerton Builders to accept \$600,000 in mitigation funding to be used for the Centennial Rainey Park wetland and streambank improvements and to authorize the Mayor's signature on all pertinent documents, subject to Legal Department review.

WHEREAS:

Swinerton entered into a consent decree in the case *United States v. Swinerton Builders*, No. 3:24-cv-00274-KAW (N.D. Cal.), resolving allegations that it violated the federal Clean Water Act during the construction of utility-scale solar facilities in, among other places, American Falls, Idaho (the "Consent Decree");

The Consent Decree, among other things, requires Swinerton to commit \$600,000 (the "Mitigation Funds") in funding toward one of two identified projects, including the Centennial and Rainey Parks Wetland Creation Project (the "Project," described in the Consent Decree and in Exhibit A to this Agreement);

The Purpose of this Agreement is to establish the terms on which Swinerton will provide the Mitigation Funds to the City of Pocatello for the purpose of funding the Project.

FUNDING USE:

These funds will help the City complete the Centennial/Rainey Park project. If the project falls through, the City can reallocate the funds elsewhere (and sign a new agreement with Swinerton) per the terms of the consent decree.

MEMORANDUM

TO: Brian C. Blad, Mayor; members of the City Council
FROM: Rich Diehl, Deputy City Attorney
RE: Mitigation Project Funding Agreement with Swinerton Builders (Enviro)
DATE: November 5, 2024

I have reviewed the above-referenced Agreement and it meets with my approval for the Mayor's signature once so authorized by the Council. The City has entered into similar agreements in the past.

Of special note of this particular Agreement; the funds provided by Swinerton for mitigation are tied to a very specific project and those funds have to be used exclusively, and accounted for, on the particular project of the Centennial and Rainy Parks Wetland Creation project.

If you have any questions, please feel free to contact me.

MITIGATION PROJECT FUNDING AGREEMENT

This is an Agreement (“Agreement”) dated _____, 2024 (the “Effective Date”) between Swinerton Builders (“Swinerton”), a California Corporation with its principal business address at 2001 Clayton Road 7th Floor, Concord, CA 94520 and the City of Pocatello, Idaho (“the City”) an Idaho municipal corporation]. In this document, Swinerton and the City may be referred to individually as “Party” or collectively as “Parties.”

RECITALS

- A. Swinerton entered into a consent decree in the case *United States v. Swinerton Builders*, No. 3:24-cv-00274-KAW (N.D. Cal.), resolving allegations that it violated the federal Clean Water Act during the construction of utility-scale solar facilities in, among other places, American Falls, Idaho (the “Consent Decree”);
- B. The Consent Decree, among other things, requires Swinerton to commit \$600,000 (the “Mitigation Funds”) in funding toward one of two identified projects, including the Centennial and Rainey Parks Wetland Creation Project (the “Project,” described in the Consent Decree and in Exhibit A to this Agreement);
- C. The Purpose of this Agreement is to establish the terms on which Swinerton will provide the Mitigation Funds to the City of Pocatello for the purpose of funding the Project.

THEREFORE, the Parties agree as follows:

Part I. Definitions

- A. “Mitigation Funds” means the \$600,000 in funding provided to the City by Swinerton pursuant to Paragraph IV.A of this Agreement.
- B. “Project” means the Centennial and Rainey Parks Wetland Creation Project described in Exhibit A.
- C. “Project Developer” means any entity or organization selected, contracted, or retained by the City to design or implement the Project.

Part II. The City’s Commitment

- A. **Project Investment:** The City will expend the Mitigation Funds provided by Swinerton under Part IV, Section A of this Agreement on the implementation of the Project. The City shall not expend any of the Mitigation Funds on the Project unless the City has secured sufficient funding to design and fully implement the Project. The City must spend the Mitigation Funds exclusively on the design and implementation of the following aspects of the Project: moving or relocating levees, wetland creation, stream creation, stormwater pond construction, or streambank or wetland restoration. The City may not spend the Mitigation Funds to cover administrative expenses or any other purpose or aspect of the Project not identified in the preceding sentence.
- B. **Funds Return:** In the event that the Mitigation Funds have not been fully expended on the Project by July 12, 2027, the City shall return any such unexpended Mitigation Funds to Swinerton no later than July 26, 2027.

- C. Project Performance:** The City will use best efforts to ensure that all Project activities funded by Swinerton under this Agreement are completed as described in Exhibit A.
- D. Inspection:** Upon reasonable advance written request, the City shall make available (a) for inspection by Swinerton, its contractors, attorneys, and agents all books, records, and other materials relating to design, planning, implementation, and outcomes of the Project funded by Swinerton, including such information that Swinerton or its contractors may require in order to assess whether the City is implementing the Project in accordance with the Consent Decree or Exhibit A; (b) for inspection by Swinerton, its contractors, attorneys, and agents all books, records, and other materials relating to the expenditure of the Mitigation Funds provided under this Agreement; and (c) for interviews by Swinerton, its contractors, attorneys, or agents certain key employees of the City who were involved in the design, planning, and implementation of the Project and the expenditure of the Mitigation Funds provided by Swinerton under this Agreement.
- E. Documentation:** The City shall maintain records documenting the activities undertaken to implement the Project; the status of any design or construction work undertaken as part of implementing the Project; and detailed accounting for any expenditure or use of the Mitigation Funds, including the date of expenditure, description of the expenditure or purchase, and all invoices and receipts for each expenditure or purchase.
- F. Third-Party Documentation:** The City agrees to use reasonable best efforts to obtain from the Project Developer and any other organizations or entities involved in designing or implementing the Project those records and other information necessary to fulfill the City's reporting obligations under Part II, Paragraph G of this Agreement.
- G. Semi-Annual Progress Reports:** The City shall provide Swinerton written semi-annual reports describing the status and progress of the Project and the City's expenditure of the Mitigation Funds. The City shall submit such reports to Swinerton for the preceding six months by June 15 and December 15 of each calendar year for the duration of the Agreement, with the first report due December 15, 2024 covering the period beginning from the Effective Date of the Agreement. The semi-annual reports shall include, at a minimum, the following information: a narrative description of activities undertaken to design and implement the Project, the status of any design or construction work undertaken to implement the Project, and a summary of the Mitigation Funds expended since the prior report, including a description of how such funds were expended and how these expenditures advanced the design or implementation of the Project.
- H. Responsibility for Project:** The City, its contractors, and agents shall be solely responsible for the planning, design, permitting, development, construction, implementation and operation of the Project. Swinerton shall have no responsibility under this Agreement for any aspect of the planning, design, permitting, development, construction, implementation, or operation of the Project.
- I. Performance of Operations:** The City shall perform all of its duties and obligations under this Agreement (i) in compliance with all applicable federal, state, county and other laws, statutes, court decisions, rules, regulations, licenses, approvals, permits and other consents (collectively, "Laws and Consents") and (ii) prudently, carefully, in good faith and with due diligence. The City understands that Swinerton has no responsibility for and is not expected to obtain any permit authorization or approval in connection with the Project.

Part III. Representations and Warranties

A. General Representations and Warranties: The City represents and warrants to Swinerton that each of the following is true and correct as of the Effective Date:

1. **Good Standing; Power and Authority.** The City is duly organized as a municipality under the laws of the State of Idaho and has full power and authority to enter into and perform its obligations under this Agreement. The execution and delivery of this Agreement by the City and the City's performance of its obligations under this Agreement have been duly and validly authorized. This Agreement is a legal, valid, and enforceable obligation of the City.
2. **No Conflicts.** Neither the execution and delivery of this Agreement nor the City's performance of its obligations under this Agreement (i) conflicts with, results in a violation of, or constitutes a breach or default under, any provision of Idaho law or Pocatello Municipal Code to the best of its knowledge any mortgage, deed of trust, bond, indenture, other agreement, lease, or other obligation to which the City is a party or by which the City is bound or (ii) violates or is inconsistent with any judgment, order, ruling, injunction, decree, award, or the Laws and Consents of any jurisdiction.
3. **No Litigation.** No litigation, action or suit before any court, governmental agency or arbitrator is pending or, to the knowledge of the City, proposed or threatened, against or affecting the City's performance of its obligations under this Agreement.
4. **No Consents.** Except for consents and approvals delivered and received on or before the Effective Date, no authorization, approval or consent is required for the City's execution and delivery hereof or the City's performance of its obligations under this Agreement.
5. **Disclosures.** The City has not to the best of its knowledge and shall not knowingly furnish to Swinerton any document or information that is false or misleading. To the knowledge of the City, no employee or other representative of the City has failed to provide Swinerton with a true, correct and complete copy of any document and information that Swinerton has asked to review.
6. **Solvency.** The City represents that it is fully solvent and has the financial ability to perform its obligations under this Agreement.

B. Survival of Representations and Warranties: The representations and warranties in this Part III shall survive the execution, performance, expiration and termination of this Agreement and remain in full force and effect, and shall inure to the benefit of Swinerton and its successors and assigns for a period of two years thereafter.

Part IV. Swinerton Builders' Commitments

A. Funding: Within fourteen (14) days of the Effective Date, Swinerton shall provide \$600,000 (U.S. dollars) via wire transfer to the City to spend as provided under this Agreement.

Part VI. Standard Provisions

- A. Limitation of Liability:** Except as otherwise provided herein, in no event shall either party be liable to the other party for indirect, special, incidental, or consequential damages, including but not limited to the loss of revenues or profits, cost of substitute services, loss of opportunity, loss of goodwill, loss of data, governmental sanctions or penalties or claims of third parties, whether such liabilities arise as a result of breach of contract, warranty, indemnity, tort, negligence, strict liability or otherwise; and the City and the Swinerton hereby release each other from any such liabilities.
- B. Choice of Law:** This Agreement shall be governed by the laws of Idaho.
- C. Entire Agreement:** This Agreement, including all provisions, exhibits incorporated as part of this Agreement, and documents incorporated by reference, constitutes the entire Agreement between the Parties. This Agreement is fully integrated and supersedes all previous communications, representations, or contracts, either written or oral, which purport to describe or embody the subject matter of this Agreement.
- D. Amendments:** No amendment, rescission, waiver, modification, or other change of this Agreement shall be of any force or effect unless set forth in a written instrument signed by an authorized representative of each Party.
- E. Severability:** If any term of this Agreement is found to be invalid by a court of competent jurisdiction, then such term shall remain in force to the maximum extent permitted by law. All other terms shall remain in force unless that term is determined not to be severable from all other provisions of this Agreement by such court.
- F. Force Majeure:** Neither Party shall be liable to the other Party, nor deemed to be in breach of this Agreement, for failure or delay in performance arising from a Force Majeure. Provided, that in the event a Force Majeure event prevents the City from completing the Project, the City shall promptly (a) return to Swinerton those portions of the Mitigation Funds that the City has not yet spent, and (b) provide Swinerton with an accounting of how it spent those portions of the Mitigation Funds that the City has already spent. Force Majeure means an event beyond the reasonable control of the affected Party, and which the Party, although it has acted prudently, carefully, in good faith and with due diligence, is unable to prevent or provide against. Force Majeure events include, but are not limited to, acts of God, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, tornadoes, volcanoes, fires, storms, floods, disasters, civil disturbances, droughts, explosions, sabotage, the binding order of any court or governmental body which by exercise of due foresight the Parties could not reasonably have been expected to avoid, changes after the date hereof in Federal, State, or local laws or appropriations, but expressly excluding a Party's financial inability to perform.
- G. Transfer, Assignment, and Delegation:** Any Party wishing to transfer, delegate, or assign this Agreement or any right, duty or obligation hereunder to a third party must first obtain written consent to such assignment from the other Party to this Agreement. Provided, however, that Swinerton may transfer its rights and obligations under this Agreement to its parent, affiliates, or subsidiaries upon written notice to the City. Because Swinerton has entered into this Agreement for the purpose of satisfying obligations imposed by a Consent Decree, Swinerton may in its sole and unlimited discretion withhold, delay or condition its consent to any assignment, delegation or other transfer by the City. This Agreement shall be

fully binding upon, inure to the benefit of and be enforceable by the Parties and their respective successors, assigns and legal representatives. No assignment, delegation or other transfer of any duty or obligation under this Agreement shall operate to release such Party from any of its obligations under this Agreement unless express consent to the release, is given in writing by the other Party.

- H. Interpretation:** In this Agreement, (i) the Part and Section captions are for convenience only and shall not be used in the interpretation hereof, (ii) the words “hereby,” “herein,” “hereof,” “hereto,” “hereunder,” and “herewith” and any other similar references mean and include, unless the context clearly requires otherwise, this Agreement and any amendment, modification or other change hereto adopted in compliance with Part VI, Section D of this Agreement and not any particular provision hereof, (iii) the words “include” and “including” shall be deemed to be followed by the words “but not limited to,” and (iv) Exhibit A hereto is incorporated by reference in and is part of this Agreement.
- I. Continued Performance During Disputes:** During the pendency of any disagreement, dispute, controversy or claim under or relating to this Agreement, each Party shall continue to perform its undisputed obligations hereunder.
- J. Relationship of Parties:** Each Party is an independent contractor with respect to the other. Neither Party intends to create, and this Agreement does not and shall not be construed or applied to create, an agency, joint venture, partnership, association, or any other relationship except that of independent contractors. Neither Party has authority to act as the agent or representative of the other Party or to bind or assume any duty or obligation on behalf of the other Party.
- K. Time of the Essence:** Time is of the essence of this Agreement and every part hereof.
- L. Indemnification:** The City hereby agrees to defend and hold Swinerton harmless from and against any and all losses, costs, expenses, claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys’ fees) arising out of injuries to or the death of any person or persons, including the employees or agents of each party hereto, the employees or agents of their contractors or the employees or agents of any Project Developer, or arising out of loss of or damage to the property of any person or persons, caused or resulting from the illegal or negligent acts or omissions or the intentional misconduct of the City, its contractors, the Project Developer, or any of their employees or agents in the performance of their obligations under this Agreement. The City agrees to reimburse Swinerton for all sums which Swinerton may pay or be compelled to pay in a jointly agreed upon settlement of any claim account covered by this Section, including any claim under the provisions of any workers’ compensation law or similar law, provided; however, that the City shall have no liability to the extent arising from the illegal or negligent acts or omissions or the intentional misconduct of Swinerton.

The City acknowledges that its timely and complete performance of the City’s obligations under this Agreement is necessary for Swinerton to comply with its obligations under the Consent Decree. Consequently, the City hereby agrees to reimburse Swinerton for and hold Swinerton harmless from any liability and costs, including stipulated penalties, attorney’s fees, and contempt sanctions, that Swinerton may incur in the event the City’s breach of any of its obligations under this Agreement causes Swinerton to fail to comply with any of its obligations under the Consent Decree.

- M. Third Party Beneficiaries:** Subject to the rights that may accrue to any successor or permitted assignees of the City or Swinerton, no provision of this Agreement is to be construed as creating any right enforceable by a third party; there are no third party beneficiaries to this Agreement.
- N. Term:** The Term of this Agreement shall commence as of the Effective Date and shall continue until August 31, 2027.
- O. Termination:** Swinerton retains the right to terminate this Agreement, with or without cause, at any time and for any reason. Upon receiving notification from Swinerton that it is exercising its right to terminate, the City shall promptly (a) return to Swinerton those portions of the amount paid to the City pursuant to Part IV, Section A that the City has not yet spent or allocated, and (b) provide Swinerton with an accounting of how it spent those portions of the amount paid pursuant to Part IV, Section A that the City has already spent or allocated. The City may terminate this Agreement immediately upon written notice to Swinerton if Swinerton or any of its named executive officers commit any act that has a material adverse effect on the City's business, results of operations, financial condition, assets, liabilities, or prospects.
- P. Notices, Invoicing and Payments:** All notices under this Agreement shall be in writing, and unless stated to the contrary elsewhere in this Agreement, any such notice shall become effective upon receipt and shall be delivered by certified mail with appropriate postage prepaid, or by hand or by facsimile (with confirmed receipt), and shall be directed to the address of such Party set forth below:

The City Contact Information:

Hannah Sanger
Environmental Administrator

City of Pocatello, Idaho
911 N 7th Avenue
Pocatello, ID 83201
Office: (208) 234-6518
hsanger@pocatello.gov

Swinerton Builders Contact Information:

Frank Foellmer
Executive Vice President

Swinerton Builders
2001 Clayton Road 7th Floor
Concord, CA 94520
Office: (925) 602-6400
FFoellmer@swinerton.com

Part IV. Signatures

The persons signing below represent that they are authorized to enter into this Agreement on behalf of the Party for whom they sign.

City of Pocatello	Swinerton Builders
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By: _____
(Signature)

By: _____
(Signature)

Name: Brian C. Blad

Name: _____
(Please Print)

Title: Mayor

Title: _____

Date: _____

Date: _____

City Contact Information:

Hannah Sanger
 Environmental Administrator

City of Pocatello, Idaho
 911 N 7th Avenue
 Pocatello, ID 83201
 Office: (208) 234-6518
 hsanger@pocatello.gov

Swinerton Builders Contact Information:

Frank Foellmer
 Executive Vice President

Swinerton Builders
 2001 Clayton Road 7th Floor
 Concord, CA 94520
 Office: (925) 602-6400
 FFoellmer@swinerton.com

EXHIBIT A: Centennial and Rainey Parks Wetland Creation Project

Background: The Centennial and Rainey Parks Wetland Creation Project seeks to restore a wetland and side channel to the channelized Portneuf River within downtown Pocatello. Within Pocatello, the health of the Portneuf River has been severely compromised by the historical construction of flood protection levees and a concrete channel, which removed hundreds of acres of wetlands. The Project is a direct outcome and top priority of the Portneuf River Vision Study (2016), which worked across jurisdictions to develop a community-based river restoration vision and prioritize projects to revitalize environmental, recreational, and economic opportunities associated with the Portneuf River.

Project Activities: The Project will accomplish wetland restoration by moving the river's existing riprapped levee, constructed in 1968 by the U.S. Army Corps of Engineers, to enclose an area of City-owned property within Rainey Park. A wetland and side channel will be installed within the levee, along with a stormwater pond to capture the first flush of sediment-laden waters off of City streets. In total, the Project will entail the following:

1. Creating a wetland and stream channel within the flood control levees.
2. Moving riprapped levees to create room for proposed wetland and floodplain.
3. Constructing a stormwater pond to settle out sediment from the river and stormwater in defined areas.
4. Installing Americans with Disabilities Act (ADA)-compliant access down to the river for paddlers and anglers, as well as a pathway through the wetland.
5. Preserving cultural resources (working with the Shoshone Bannock Tribes).
6. Restoring wetlands, streambanks and upland levee areas.
7. Enhancing aesthetics.

Because so much of the habitat along the Portneuf River is degraded within the 6.2 miles of levees and concrete channel, the habitat lift provided by the Project will greatly improve the ecosystem health along the entire river corridor through Pocatello. The project will improve habitat for Yellowstone cutthroat trout, Northern leopard frog, Monarch butterfly, and the Yellow-billed cuckoo. Many of these species are known to use riparian habitats up and downstream of Pocatello, and this project has the potential to create an island of habitat for them within the urban zone. The stormwater pond will create the further benefit of reducing sediment loading into the Portneuf River by approximately two tons per year.

Partners: The proposed project will be implemented by the City of Pocatello, which has been working with the Portneuf Watershed Partnership and associated watershed partners to develop this conceptual plan. The Project is part of a larger park project, which includes a parking lot and park improvements on both sides of the river.