

Background on the Proposed Oakland, California Coal Terminal

The people of Oakland and a broad coalition of labor, environmental, faith, and community groups have been waging a battle for nearly three years to prevent construction of a marine terminal dedicated to coal exports near the Bay Bridge toll plaza in West Oakland. The site of the proposed coal terminal is the West Gateway, a 35-acre corner of the former Oakland Army Base now owned by the City of Oakland. Trains filled with coal destined for the new port would pass by residential neighborhoods to the export terminal which sits in densely populated West Oakland.

In 2013, the City of Oakland granted the developer the right to develop and operate a marine terminal on the site. Before granting approval, the City conducted environmental review as required by California law. At that time, the developer indicated that it would reuse an existing 146,640 square foot warehouse, *a facility that is not suitable for handling of coal*, for export of bulk commodities. The developer communicated with the City about plans for other products at the terminal, but was silent as to any plans involving coal.

In December 2013, Phil Tagami, the lead developer, publicly stated on a corporate website that any “purported plan to develop a coal plant or coal distribution facility as part of the overall Oakland Global development project” was “simply untrue.” He alleged that “[t]he individuals spreading this notion are misinformed” and noted that his company was “publicly on record as having no interest or involvement in pursuit of coal-related operations.”

These public assurances proved false. While Oakland officials and the public remained in the dark, Bank of Montreal (“BMO”), coal company Bowie Resource Partners (“Bowie”), and Tagami were engineering a plan to enable Bowie to operate the terminal for the next 66 years. In 2014, Tagami, through his shell corporation, Oakland Bulk and Oversized Terminal LLC (“OBOT”), entered into a secret agreement with Terminal Logistics Solutions, Inc. (“TLS”), a wholly owned subsidiary of Bowie, granting TLS an exclusive option to sublease the West Gateway and operate the new terminal.



Artist's conception of completed bulk coal terminal, one of several concepts developers have floated. "The West Gateway" makes up part of the former Oakland Army Base and sits about 1,500 feet from the Bay Bridge Toll Plaza. More info at: www.obotjv.com

Involvement by the Bank of Montreal

Public documents have exposed the extensive involvement of BMO Capital Markets, the investment banking subsidiary of the Bank of Montreal, in the OBOT deal. In this \$250 million project, the Bank of Montreal has bypassed the stakeholder engagement with the Oakland community required by the Bank's commitment to the Equator Principles. Working with Bowie, the largest coal producer in Utah, BMO Managing Director Jeffrey Holt played a central role in arranging a deal to construct an Oakland coal terminal. Holt obtained a commitment of \$50 million from the state of Utah to be lent to a consortium of four Utah counties for investment in Terminal Logistics Solutions (TLS), a wholly-owned subsidiary of Bowie Resources. Holt also was on record as planning to market an additional \$200 million of unrated debt to private investors, specifically focusing on pension funds.

BMO had at least two ways to make money on the deal: first, to profit from setting up a \$50 million loan from Utah public funds to TLS via the four counties and second, to profit from placing \$200 million of private unrated debt. Having collected fees from both sources at the outset, the Bank would profit from seeing the deal go through even if TLS went out of business in a few years, leaving public and private investors in the lurch.

Although BMO stood to profit on the deal, Holt secured public appointment as "Strategic Infrastructure Advisor" to four Utah coal-producing counties. The counties were recruited to serve as conduits for investment of public money in TLS through a loan administered by Utah's Community Impact Board. The Community Impact Board disburses rebates of royalties from mining on federal lands to county and local governments in Utah. These funds are distributed to states for projects to mitigate the local impacts of extractive industries operating within their borders. In this case, rather than local mitigation, the funds were intended to aid Bowie, a private coal mining venture, to continue or even expand extractive activities within the four counties by building a privately owned and operated coal export facility in California.

Bowie's plan to operate a marine terminal in Oakland was supposed to be kept under the radar, not shared with the public in Oakland or in Utah. "The script," Holt wrote in an email to Utah government officials and others, "was to downplay coal."¹ But in April 2015, the coal terminal plan burst into public view when the Richfield Reaper, a small century-old Utah newspaper, reported that the Utah Community Impact Board had tentatively approved a \$53 million loan of public funds to the four Utah counties for investment in the Terminal.

Financial details of the coal export plan gradually emerged into public view. An investigative reporter for the East Bay Express published an article recounting Jeffrey Holt's role and another

¹ William Yardley, Coal represents the polluted past – except in the interior West, Los Angeles Times (March 16, 2016) <http://www.latimes.com/nation/la-na-sej-west-coal-20160316-story.html>.

article revealing that TLS, the coal company's agent in Oakland, disguised as a local African-American-run business, offered bribes to ministers and a West Oakland environmental project to support the coal project.² In early 2016, No Coal in Oakland, a grassroots community group opposed to the Terminal, obtained a copy of an email dated March 25, 2015³ from Jeffrey Holt to numerous public officials in Utah. One of the attachments to Holt's email, a "Preliminary Term Sheet,"⁴ provided the first clear roadmap of the deal.

The BMO Term Sheet stated, "TLS will be created as part of the business arrangement between the [four Utah] Counties, Bowie, and any other users [of OBOT] that can be contracted ahead of time [none of which ever materialized], and will own a 66-year operating concession on the terminal from the City of Oakland."

The term sheet also included the following points:

- The four counties would pay in \$50 million and receive preferred (i.e., nonvoting) shares that would pay quarterly returns out of TLS profits.
- Bowie would "contribute throughput guarantees sufficient to secure \$200 million in (unrated) project debt" from pension funds, in exchange for which Bowie would be "the Series A shareholder," a status implying that Bowie would hold valuable shares in TLS while the pension funds who contributed most of the money would own none.

Holt's email also contained an attachment that he described as a "teaser" showing how BMO would market the investment opportunity to potential private investors:

- Describing the facility as "a multi-commodity terminal" the teaser sells the strong project economics by identifying the existence of an "[a]nchor tenant to provide a throughput pledge of approximately four million tons."⁵ The document critically omits that this refers to Bowie's commitment to ship coal through a terminal it would own and operate. The prospective investors, like the City of Oakland, were to be deceived about material facts about who would operate the terminal and what would be shipped through it.

After No Coal in Oakland published a report on Holt's plan to create TLS as part of the "business arrangement" between the Utah Counties and Bowie, Bowie's executive chairman John Siegel admitted to Bowie's "vested interest" in TLS.⁶ Only recently, from court filings, did the public learn that TLS is, in fact, a wholly owned subsidiary of Bowie.

² Darwin BondGraham, Buying Support for Coal, East Bay Express (September 21, 2015) <https://www.eastbayexpress.com/SevenDays/archives/2015/09/21/buying-support-for-coal>.

³ Email from Jeffrey Holt to Utah officials (March 25, 2015), <http://nocoalinoakland.info/wp-content/uploads/2016/03/Jeff-Holt-Email-with-3-Attachments-3-25-2015.pdf>

⁴ Jeffrey Holt, Preliminary Term Sheet, <http://nocoalinoakland.info/wp-content/uploads/2016/03/Jeff-Holt-Preliminary-Term-Sheet-pdf>

⁵ Jeffrey Holt, BMO Capital Markets Teaser, <http://nocoalinoakland.info/wp-content/uploads/2016/03/Jeff-Holt-BMO-Capital-Markets-Teaser.pdf>

⁶ See Brian Maffly, Proponents buried coal's role in Oakland export terminal; now questions remain, Salt Lake Tribune (March 28, 2016) <http://www.sltrib.com/home/3699366-155/proponents-buried-coals-role-in-oakland>

Besides the State of Utah, no other investors in the terminal have been publicly identified, but it appears clear that BMO planned to push the private debt offering towards pension funds. In a presentation to a Utah government body, the Terminal’s advocates explained that “[t]he remaining \$200 million required to complete the terminal will come from third-party lenders, likely one or more North American pension funds.”⁷ The Salt Lake Tribune reported that BMO “is seeking \$200 million from private investors, and is marketing the opportunity to pension funds.”⁸ Carbon County Commissioner Jae Potter, a key proponent of Utah’s investment in the Oakland coal export scheme, also confirmed that BMO is “packaging the needed \$200 million in private investment as unrated debt to be sold to pension funds.”⁹



⁷ Presentation to the Permanent Community Impact Fund Board with Cover Email from Casey Hopes (April 29, 2015) <http://nocoalinoakland.info/wp-content/uploads/2017/04/Casey-Hopes-April-29-2015-email.pdf>

⁸ See Brian Maffly, Proponents buried coal’s role in Oakland export terminal; now questions remain, Salt Lake Tribune (March 28, 2016) <http://www.sltrib.com/home/3699366-155/proponents-buried-coals-role-in-oakland>

⁹ See Brian Maffly, Utah’s coal-export deal still faces high hurdles, Salt Lake Tribune (March 18, 2016) <http://archive.sltrib.com/article.php?id=3633659&itype=CMSID>

Broad opposition from the City of Oakland and its residents

Revelation of the plan to ship coal through Oakland, evoked an immediate uproar in Oakland.¹⁰ Environmental groups quickly built an alliance with labor, faith, economic justice, and other community groups to demand that the City Council consider a ban on coal. In September 2015, the Council held a public hearing on health and safety impacts of storing and handling large quantities of coal, a first step towards passing an ordinance banning use of the proposed terminal for such purposes.



This public hearing and associated documents provided evidence of the possible threats to public health and safety from siting a large-scale coal-handling facility in close proximity to residential neighborhoods and major thoroughfares. Armed with substantial evidence that the project would endanger the health and safety of the West Oakland community, which already experiences disparate health impacts from environmental pollution, the Oakland City Council voted unanimously in July 2016 to ban the storage and handling of coal and petcoke within the city and specifically at the proposed terminal.

Rather than accept the judgment of the Oakland community, the developer, financed by Bowie, sued the City of Oakland, claiming constitutional and contractual violations.¹¹



Although the ongoing litigation may take years to resolve, the Oakland community remains resolutely opposed to the construction of what would become the largest coal export facility on the nation's West Coast. Three extensive expert reports documented the substantial danger this project poses to the health and safety of Oakland residents: a study by an independent Public Health Advisory Panel of physicians and scientists and endorsed by Alameda County's highest

¹⁰ See Brian Maffly, Utah coal: California, here it comes -- and not everyone is happy, Salt Lake Tribune (April 27, 2015) <http://www.sltrib.com/home/2425141-155/utah-coal-california-here-it-comes?fullpage=1>;

<http://ww2.kqed.org/news/2015/07/30/a-dust-up-in-oakland-over-plan-to-ship-coal-through-new-terminal>

¹¹ See Darwin BondGraham, Plan to Ship Coal Through Oakland Was Years in the Making, East Bay Express (Dec. 13, 2017) <https://www.eastbayexpress.com/oakland/plan-to-ship-coal-through-oakland-was-years-in-the-making/Content?oid=11569212>.

ranking public health official;¹² a second study by Environmental Science Associates, a multidisciplinary environmental consulting firm;¹³ and a third by Dr. Zoe Chafe, an epidemiologist.¹⁴

In addition to warnings about health and safety risks, the City received testimony that the project was likely to do substantial and ongoing economic harm to the City of Oakland. In September 2015, Tom Sanzillo of the Institute for Energy Economics and Financial Analysis, prepared a comprehensive analysis of the economics of the coal terminal project. His report was submitted by Earthjustice at the Oakland City Council's public hearing in September 2015. Sanzillo's analysis explored what was publicly known about the financial aspects of the proposal to ship coal through Oakland, as well the economics of the coal industry, and concluded that, "[f]rom Day One, the coal component of the [Oakland Army Base] project will be a financial drain on the City of Oakland, and will remain so for the foreseeable future."¹⁵



¹² Public Health Advisory Panel, An Assessment of the Health and Safety Implications of Coal Transport through Oakland, June 14, 2016, <http://www2.oaklandnet.com/w/oak059227>; .Dr. Muntu Davis, Alameda County Health Officer, letter concurring in the findings of the Public Health Advisory Panel, <http://www2.oaklandnet.com/w/oak059343>.

¹³ Environmental Science Associates Report, Report on the Health and/or Safety Impacts Associated with the Transport, Storage, and/or Handling of Coal and/or Coke in Oakland, Including at the Proposed Oakland Bulk and Oversized Terminal in the West Gateway Area of the Former Oakland Army Base, June 23, 2016 <http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK059404>

¹⁴ Report Prepared for Councilmember Kalb from Zoe Chafe Ph.D., Analysis of Health Impacts and Safety Risks and Other Issues/Concerns Related to the Transport, Handling, Transloading, and Storage of Coal and/or Petroleum Coke (Petcoke) in Oakland and at the Proposed Oakland Bulk and Oversized Terminal, <http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK059408>

¹⁵ Tom Sanzillo, Coal Markets and Plan to Move Coal Through the Oakland Army Base Redevelopment, Testimony Prepared for Oakland Public Hearing (September 21, 2015) <http://nocoalinoakland.info/wp-content/uploads/2016/03/TomSanzilloReport-9-21-2015.pdf>

Bank of Montreal’s documented violation of the Equator Principles¹⁶

An expansion of infrastructure with planned distribution of up to 10 million tons of coal per year has the potential to adversely affect the lives of people in Utah, California, the destination countries where the coal will be burned, and, ultimately, people everywhere through its climate and pollution impacts.¹⁷ As such, it is imperative for financiers and advisors to apply the Equator Principles in partnership with their clients to identify, assess, and manage environmental and social risks and impacts of such an undertaking in a structured way. Bank of Montreal has been a signatory to the Equator Principles since 2005. In BMO’s own statement on Responsible Lending,¹⁸ they state their intent to “avoid dealing with borrowers who have poor environmental risk management track records”.

As an "Equator bank" BMO has signed on to adhere to the ten principles spelled out in the Equator Principles framework,¹⁹ which is meant to serve as a minimum standard for due diligence. "Project Finance Advisory Services" is among the financial products where signatories are responsible to monitor their own compliance with the Equator Principles. Although BMO represented itself as an advisor to the four counties, its actual client was Bowie. BMO provided Project Finance Advisory Services to aid Bowie on a project with total capital costs in excess of \$250 million, and there was no apparent effort to comply with the Equator Principles.

BMO did not require its putative client, the four counties, or its actual client, Bowie, to conduct an environmental and social assessment to address the relevant environmental and social risks and impact of the proposed coal terminal. Under Equator Principle 2, the assessment must provide an “adequate, accurate and objective evaluation and presentation of the environmental social risks and impacts, whether prepared by the client, consultants or external experts.” No such assessment of the proposed coal terminal was prepared. For all projects, in all locations, when combined Scope 1 and Scope 2 emissions are expected to be more than 100,000 metric tons of CO₂ equivalent annually, an alternatives analysis must be conducted to evaluate alternatives that are less Greenhouse Gas (GHG) intensive. The developer claims the right to ship up to at least 9 million metric tons of coal per year, which, upon combustion, would result in GHG emissions of approximately 15 million metric tons CO₂ equivalent—150 times the threshold requiring alternative analysis. No alternatives analysis has been prepared.

Under Principle 5, BMO must require its client to demonstrate effective stakeholder engagement as an ongoing process in a structured and culturally appropriate manner with affected communities

¹⁶ Bank of Montreal’s Equator Principles Association membership is documented on the Association’s website at <http://www.equator-principles.com/index.php/members/>

¹⁷ Scientists have established that pollutants from burning coal in China drift across the Pacific and are significant problems in California, and probably don’t stop here. <https://www.nytimes.com/2014/01/21/world/asia/china-also-exports-pollution-to-western-us-study-finds.html>

¹⁸ Bank of Montreal, <https://www.bmo.com/home/about/banking/corporate-responsibility/customers/responsible-lending>

¹⁹ See Equator Principles, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

and, where relevant, other stakeholders. As mentioned above, three extensive expert reports have documented that the health and safety of residents of West Oakland will be adversely affected by the project. Nonetheless, stakeholder engagement has been nil. The requirements of Principle 5 are explicit:

For Projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation process. The client will tailor its consultation process to: the risks and impacts of the Project; the Project's phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation.

To facilitate Stakeholder engagement, the client will, commensurate to the Project's risks and impacts, make the appropriate Assessment Documentation [as discussed above in relation to Principle 2] readily available to the Affected Communities, and where relevant Other Stakeholders [a category that includes local authorities and non-governmental organizations with an interest in the project].

BMO has ignored potentially significant adverse impacts on Oakland and has made no effort whatsoever to engage in an informed consultation and participation process with the disadvantaged and vulnerable community of West Oakland. BMO has provided no assessment documentation to the affected communities or the City of Oakland or non-governmental organizations with an interest in the project.

Conclusion

No Coal in Oakland and supporting allies are publicly calling on the Bank of Montreal and its subsidiary BMO Capital Markets to publicly pledge to refrain from advising on or arranging financing for the proposed coal terminal in Oakland, California. A letter sent to Darryl White, CEO of the Bank of Montreal was signed by No Coal in Oakland, the West Oakland Environmental Indicators Project, 350.org, Friends of the Earth Canada, Friends of the Earth USA and Rainforest Action Network. The letter, sent ahead of the Bank's annual general meeting on April 5th, outlines the reputational, financial and environmental risks of financing a coal export terminal in Oakland, California.