

# THE VALUE OF HISTORICAL RESEARCH IN SOIL AND GROUNDWATER CONTAMINATION MATTERS

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Whether defending against CERCLA claims, identifying PRPs to site contamination, or allocating costs in NRD matters, environmental practitioners can often benefit from knowledge gleaned from targeted historical research. In fact, depending on the complexities of the case, environmental practitioners should consider working directly with professional historians who can provide valuable contextual knowledge about the history of particular industries, companies, and the federal and state agencies that documented and regulated them, as well as expertise in navigating idiosyncratic records-keeping systems at federal, state, and local records repositories. This article presents a historian's perspective on the applicability of historical research in soil and groundwater contamination matters and argues that attorneys should consider using professional historians in such matters. It then summarizes some key resources and records collections that historians often consult when researching soil and groundwater contamination matters, with particular attention given to records that can be found at the National Archives and at state and local records repositories.

Almost 200 years ago, James Madison wrote that, "Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives."<sup>1</sup> His words are certainly applicable in the context of soil and groundwater contamination matters, as knowledge of a site's history coupled with an understanding of the government's historical oversight role at the site can strongly inform attorneys' legal strategy. For example, historical knowledge can help attorneys to (1) identify the universe of potentially responsible parties (PRPs) to site contamination, (2) negotiate more equitable allocations for site cleanup costs, and (3) better inform their negotiating stances with EPA, state regulatory agencies, and other PRPs.

In complex soil and groundwater contamination matters with multiple PRPs to site contamination, environmental practitioners should also consider adding professional historians to their legal team. Professional historians have training and experience in thinking analytically about the various "moving parts" of history—that is, historians have the ability to identify not just what happened at a site or along a waterway over time, but also the ability to identify the historical private or public entities that likely generated and maintained records documenting past events of interest. Historians also know the appropriate protocol for gaining access to these records as expeditiously as possible.

While there have been many articles and much opinion offered as to the proper use of historians in the courtroom,<sup>2</sup> this article focuses on an overview of the types of historical records that can be dispositive in soil and groundwater contamination matters. Obviously, the particulars of your case will dictate the historical records of interest to you; nevertheless, what follows is a general discussion of the federal, state, and local records that can frequently be of use in such matters.<sup>3</sup>

## FEDERAL GOVERNMENT RECORDS

The federal government historically regulated many American industries and collected records on almost every aspect of American industrial life. Thus, almost any soil or groundwater contamination matter could benefit from research into historical federal government records. Because of the challenges involved in conducting such research, though, attorneys should consider working with professional historians with experience researching historical federal government records. For, in most cases, professional historians who are expert at conducting research into federal government records collections are more likely to find to find a broader array of relevant records, quicker, than a research neophyte.

Before conducting such research, historians first ask questions regarding the records of interest. What federal agencies may have created records of interest? What type of records did they create? What records did

they retain? Where are these records today? In asking these questions, professional historians apply their contextual knowledge of the history of the federal government to target the records of specific potentially relevant government agencies. For example, when researching a former military or industrial site that historically operated during World War II, many historians know to turn to records of the Bureau of the Budget's War Projects Unit (WPU). Only in existence from 1940 to 1945, the WPU's primary function was to report to the president on the status of defense construction projects. In performing its duties, WPU staff inspected the construction of military and industrial facilities across the country and assessed the productive capacity of plants constructed with federal funding. The National Archives currently maintains the site inspection files generated by WPU inspectors—files that include real property information, company overviews, and records related to the construction, operation, and maintenance of military and private industrial facilities. These files can be especially valuable in researching individual PRPs to site contamination, as they can provide insights into a PRP's historical manufacturing operations, known waste discharges, and the federal government's contractual/regulatory relationship with individual PRPs.

What follows is a survey of some federal government records collections and repositories that often contain historical

records of interest to the environmental practitioner.

### National Archives Records

Created in 1934, the National Archives (formally known as the National Archives and Records Administration [NARA]) is best known for preserving the so-called “Charters of Freedom” (i.e., the Declaration of Independence, Constitution, and Bill of Rights) in the Rotunda of the National Archives Building in Washington, DC. However, NARA is also charged with preserving and making available to the public federal government records of permanent historical value. While only about 5% of all the records generated by the federal government are deemed to have “permanent historical value,” this still amounts to over 9 billion pages of textual records, 20 million photographs (aerial and ground-level), and 7 million maps, charts, and architectural drawings stored at dozens of NARA archival facilities, federal records centers, and presidential libraries across the country. As NARA likes to boast, if laid side to side pages in its holdings would circle the Earth over 57 times.

Because of the volume of its records collections, researching NARA records is unlike conducting research at any other archival facility. First, a couple of thoughts on what the National Archives does not have: a card catalog or electronic index to all its records, open shelving where researchers can browse boxes to locate records of interest, or full-text searchable finding aids.<sup>4</sup> Instead, the National Archives organizes its records into over 580 record groups, each of which comprises the records of a major government agency/entity and can contain thousands of pages of documents, maps, and photographs organized using a variety of filing schemes.

Despite these challenges, conducting research into federal records at NARA facilities can be immensely rewarding in a variety of legal matters, but especially in soil and groundwater contamination cases. Through diligent research into NARA records, researchers can find copies of a trove of potentially relevant historical records, including correspondence, corporate filings, site inspection reports, government manuals and specifications, site plans, aerial and ground-level photographs, and even contracts.<sup>5</sup> In fact, researching at

NARA should be a *sine qua non* in most CERCLA matters where attorneys attempt to establish the federal government’s liability as a historical owner, operator, arranger, or transporter at a site.

While there is no single NARA record group that should be searched for all soil or groundwater contamination matters, on past projects historians have located useful information for such cases within historical records of various military branches, the Department of the Interior, the Federal Trade Commission, the Interstate Commerce Commission, and many of the “alphabet soup” of federal agencies created during the government’s World War II-era industrial mobilization efforts.<sup>6</sup> Many legal matters can also benefit from a review of federal court case files, which NARA maintains at its regional archival facilities and which can contain a wealth of information about a site’s operational and corporate history.

### Other Sources for Historical Federal Records

The National Archives, though, is not the sole source for historical federal government records; indeed, depending on the nature of the case some litigation matters could benefit more from targeted research at other federal libraries and records repositories, such as the Air Force Historical Research Agency, Army Heritage and Education Center, Department of Interior Library, Federal Trade Commission Library, Library of Congress, National Agricultural Library, National Museum of American History Library, or U.S. Geological Survey Library.

Of these, the Library of Congress merits special attention due to the sheer breadth of its collections. For example, the library houses one of the world’s largest collections of historical trade and scientific literature, which provide access to a wide array of obscure industrial journals that can often provide critical information about a PRP’s historical manufacturing operations. The library also contains an unparalleled collection of historical maps and atlases, including Sanborn fire insurance maps, U.S. Geological Survey quadrangle maps, U.S. Coast and Geodetic Survey coastline maps, and city/county maps and atlases.

Finally, attorneys can sometimes benefit from researching congressional records. For example, it can be quite challenging to

research the historical owners of manufactured gas plants, especially for utility companies dating back to the 1920s and 1930s when a complex skein of holding companies controlled much of America’s power industry. Historical congressional records, though, can help the modern-day historian unravel this web of corporate holding companies.

In 1928, Congress tasked the Federal Trade Commission (FTC) with investigating utility holding companies and untangling their complicated financial structures. Following a comprehensive investigation, FTC reported its findings to Congress at a series of congressional hearings, with the resultant transcripts, reports, and exhibits being published in a series of 101 volumes. These volumes can be found today at various federal libraries, including the FTC Library in Washington, DC, and can provide detailed financial and corporate information on many of the country’s historical utility companies.<sup>7</sup>

### STATE AND LOCAL GOVERNMENT RECORDS

Most soil and groundwater contamination matters can also benefit from research into historical state and local government records. One of the challenges in conducting such research, however, is that different state and local governments historically created and maintained different types of records; and, records that exist in one jurisdiction do not necessarily exist in other jurisdictions. As with federal government records, then, when researching state and local records historians start by identifying the agencies that may have historically kept records of interest, what records they created and preserved, and where those records are now. In general, records from the following state and local offices/agencies are worth reviewing in soil and groundwater contamination matters:

- Assessor (tax assessments)
- Environmental Commission (site studies and spill reports)
- Fire (site inspection reports)
- Health (public health complaints)
- Industrial Hygiene (occupational health investigations)
- Municipal/County/State Archives (official government records)

- Municipal/County Clerk (real estate records and city/county council minutes and records)
- Planning (maps and surveys)
- Public Service Commission (reports from utility companies and other regulated industries)
- Public Works (sewer maps and plans)
- State Department (company incorporation records)
- Surveyor (maps and aerial photographs)

Outside of the records available at these government agencies, there are numerous other state and local records sources that may be of use in environmental litigation matters, including newspapers, court records, and records from state/local historical preservation offices, which maintain copies of local environmental assessment reports and historic building surveys.

Again, there is no comprehensive checklist of state and local records repositories or sources to consult when researching such matters; instead, historians must dedicate themselves to old-fashioned “detective work” in order to identify and follow leads to potentially relevant records collections. For example, in Massachusetts historians often consult the published annual reports of the State Health Department (which date back to the nineteenth century) for information on public health and pollution nuisance complaints. While a complete collection of these published reports is available in various libraries in the state, researchers with knowledge of Massachusetts records know that the state’s Department of Environmental Protection (DEP) Library also maintains a collection of the waste inspection surveys that the Health Department historically used to produce these annual reports. In fact, for some sites the DEP Library even maintains copies of the field notes that were used to produce the waste inspection surveys. In short, careful detective work can often lead researchers to hitherto unknown, but valuable, records collections.

#### **HISTORICAL PHOTOGRAPHS**

When researching soil and groundwater contamination matters, sometimes the old adage is true: a picture is worth a thousand words. What follows is a discussion of the value of historical aerial- and ground-level

photographs and, more importantly, where to find them.

#### ***Aerial Photographs***

Beginning in the 1930s, federal and state agencies and private companies blanketed the United States with aerial reconnaissance flights. These aerial photographs can provide valuable clues about everything from the changing historical footprint of industrial sites to the location of sewer outfalls to evidence of the placement of dredge spoils.

In addition to well-known federal government collections of historical aerial photographs (e.g., the National Archives, U.S. Geological Survey, and the U.S. Department of Agriculture’s Aerial Photography Field Office), there are numerous state and local collections of historical aerials. These are typically found within records of the state or local planning department, or sometimes at a state archives or historical society (e.g., the New Jersey State Archives has an excellent collection of aerial photographs of New Jersey from the late-1940s).

Because of the utility of aerial photographs, though, environmental practitioners should not solely confine their research to public sources. Instead, attorneys should work with a professional aerial photography vendor who has access to, or knowledge of, private collections of historical aerial photographs and, as importantly, can provide timely, high-resolution digital copies of aerial photographs.<sup>8</sup>

#### ***Ground-level Photographs***

Ground-level photographs can also be useful in environmental litigation matters, as they can establish a PRP’s presence at a site at a particular point in time and even depict the location of waste piles and other site-specific features of interest. In researching these photographs, historians typically review records at state and local historical societies, college and public libraries, and local government offices, with the understanding that some jurisdictions have better ground-level photograph coverage than others. For example, the Washington State Archives maintains records from the King County (Seattle) Land Use Survey of the late-1930s, which originated from a project by the King County Assessor’s Office to survey all properties in King County for tax assessment purposes. As part of this assessment, King County

officials photographed nearly every structure in King County, copies of which are maintained at the Washington State Archives.<sup>9</sup>

#### **HISTORICAL NEWSPAPERS**

Historical newspaper articles represent another key source that historians target for PRP-specific information in soil and groundwater contamination matters, including information on the dates a PRP was at a site, its historical manufacturing operations (e.g., raw materials, finished products, waste byproducts, etc.), names of corporate officials and employees, changes in corporate governance, contract awards, site inspections, and pollution/nuisance complaints.

Over the past decade, newspaper research has become infinitely easier to conduct with the full-text searchable digitization of many newspapers, including national “newspapers of record” like the *New York Times*, *Wall Street Journal*, and *Washington Post* and major regional newspapers like the *Boston Globe*, *Cleveland Plain-Dealer*, *Los Angeles Times*, and *New Orleans Times-Picayune*. The most insightful newspaper articles about specific PRPs, though, are most likely from local newspapers. The challenge in researching most local newspapers is that they are rarely digitized or indexed and, as a result, can be difficult to access. When faced with this situation, historians turn to newspaper clippings files that are typically found at local libraries and historical societies. These clippings files, which were created by the yeoman efforts of past librarians who clipped articles from local newspapers and organized them into subject-specific vertical files, often represent the only time-effective means to research historical issues of local newspapers.

A final place to search for historical newspaper articles are at so-called newspaper “morgues,” which are in-house clippings files that many newspapers kept for use by their reporters. In some instances, newspapers still maintain their morgues, with access typically restricted to official newspaper use. Some defunct newspapers, though, have donated their morgues to university libraries or state archives. For example, the University of California-Berkeley maintains the print and photograph morgue of the *San Francisco Examiner*, whereas the University of Texas-

Austin maintains the photograph morgue of the *New York Journal-American*.

## HISTORICAL MAPS AND ATLASES

Historical maps can provide a veritable treasure trove of information to environmental practitioners, showing historical topographical features, property owners, and the existence of particular buildings at industrial sites. Most environmental practitioners are familiar with Sanborn fire insurance maps, which depict the commercial, industrial, and residential sections of more than 12,000 American cities from ca. 1867 to 1970. Since Sanborn surveyors examined the same cities again and again over a span of decades, Sanborn maps can be readily used to identify PRPs and to trace changes over time at industrial sites.

Environmental practitioners should not necessarily confine their cartographic research to Sanborn maps. Depending on the site of interest, city and county atlases, real estate plat maps, U.S. Coast and Geodetic Survey (CGS) coastline maps, and U.S. Army Corps of Engineers (COE) dredging maps could also provide useful information. While city and county atlases and real estate plat maps are often found at local libraries and historical societies or within the collections of local government agencies, CGS coastline maps and COE dredging maps are typically found in various federal records repositories.

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Mr. Swisdak has provided expert reports, affidavits, and sworn depositions on several litigation research projects and has served as an expert witness at trial, with particular expertise in the practice areas of environmental law and toxic torts. He has published articles and lectured frequently on the use of historical research in legal cases. Topics include “Researching Past Uses of New York Industrial Sites,” “The Value of Historical Research to In-House Counsel,” and “Digging Deeper: Uncovering the Hidden Potential of Historical State and Local Records.”

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## PUBLIC RECORDS REQUESTS

A final tool that professional historians use when researching soil and groundwater contamination matters is public records requests (i.e., federal Freedom of Information Act [FOIA] requests and their state equivalents). Enacted in 1966, FOIA established the public’s statutory right of access to federal government information, with federal agencies only allowed to deny access when records are subject to any of ten specific exemptions (e.g., national security concerns, personal privacy, or proprietary business information). Following 9/11, the federal government restricted access to many previously releasable government records due to national security concerns. On his first full day in office, though, President Obama issued an executive order that reversed this policy and stated that federal agencies “should adopt a presumption in favor of disclosure” in handling FOIA requests.

Despite the new presumption for disclosure, lengthy FOIA delays are still commonplace at many federal agencies. Thus, FOIA requesters were encouraged when the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007 was enacted. In part, the OPEN Government Act established the federal government’s Office of Government Information Services (OGIS) to act as the “federal FOIA ombudsman,” facilitating communication between FOIA requesters

and federal agencies and mediating FOIA disputes. Thus, when FOIA requesters feel that agencies have wrongfully withheld certain records, or have been uncommunicative in responding to a request, they can solicit help from OGIS.

The fact remains, however, that the success of many FOIA requests is still largely dependent on the quality of the request itself, with more specific requests more likely to yield responsive records than a request for “any and all” records on a particular topic. Indeed, when preparing FOIA requests, environmental practitioners should think of themselves as a modern-day Geppetto, guiding an anonymous records official (who probably knows little about your topic, and cares even less) as they conduct research on your behalf into their agency’s records.

## CONCLUSION

Most environmental litigation matters can benefit from targeted historical research, which can provide valuable site- or issue-specific knowledge that attorneys can use to inform their legal strategies. Moreover, depending on the complexities of the case, environmental practitioners should consider working directly with professional historians with appropriate contextual knowledge and expertise researching federal, state, and local records collections.

<sup>1</sup> James Madison to W. T. Barry, August 4, 1822, in Gaillard Hunt, ed., *The Writings of James Madison* (New York: G. P. Putnam’s Sons), 1900-1910, Volume 9, 103-109.

<sup>2</sup> On the use of history in law, and especially historians as expert witnesses, see, *inter alia*, Matthew J. Festa, “Applying a Usable Past: The Use of History in Law,” 38 *Seton Hall Law Review*, 479 (2008) and Jonathan D. Martin, “Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts,” 78 *New York University Law Review* 1518 (2003). Also see Nathan A. Schachtman’s various blog posts on the topic (<http://schachtmanlaw.com/category/historian-testimony/>) and the *Historians as Experts Wiki* webpage created by William Childs (<http://masstort.org/mediawiki>).

<sup>3</sup> For general insights into the utility of historical research in various environmental litigation matters, see Michael C. Reis, “The Historian’s Valuable Role in Environmental Litigation,” with W. David Wiseman, Jr., *Environmental Litigator* (April 28, 2011), 12-14 and Michael C. Reis, “Searching in the Past: Dusty

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Documents That May Prove the Case Can Be Found by Historians,” *Legal Times* (March 10, 2003). Also see various articles that I have authored on the subject, including “The Value of Historical Research to In-House Counsel,” *ABA In-House Counsel Committee Newsletter* 11, no. 1 (June 2009), 4-7; “Researching Past Uses of New York Industrial Sites,” *Environmental Law in New York* 20, no. 5 (May 2009), 75-81; and, “Researching Corporate Genealogy,” *ABA In-House Counsel Committee Newsletter* (forthcoming).

<sup>4</sup> While NARA does employ highly knowledgeable archivists who can be of great assistance in helping to locate records, these archivists will not conduct research on your behalf. Thus, it is highly quixotic to submit a FOIA request to NARA asking for copies of “any and all” records in their holdings relating to a particular topic. While such requests may yield some records, archivists cannot possibly search all potentially relevant record groups in responding to your request.

<sup>5</sup> According to federal records retention schedules, federal government contracts can be destroyed six years and three months after final contract payment. Yet, careful research at National Archives facilities and other federal records repositories can often yield copies of historical contracts and/or contract correspondence. For example, the Navy Department Library in Washington, DC, has a large collection of historical U.S. Navy shipbuilding contracts from the mid-twentieth century.

<sup>6</sup> For a discussion of historical federal records associated with wartime mobilization efforts, see Michael C. Reis, “Wartime Mobilization and the Newark Bay Home Front Environment: A Case Study Revealing Opportunity for Federal Leadership in Resolving Mega Site Problems,” *Environmental Claims Journal* 18, no. 4 (Fall 2006).

<sup>7</sup> As importantly, NARA maintains a large collection of the background materials from these hearings, including subpoenaed board minutes, organizational charts, and corporate records that the FTC used to prepare its reports to Congress. These records provide another layer of detail about the utility companies investigated by the FTC.

<sup>8</sup> Private aerial photography vendors such as Aerial Archives also have professional contacts that can be consulted to locate historical aerial imagery no longer commercially available (e.g., imagery held by heirs or others unable to make their collections commercially viable), as well as the ability to certify imagery obtained from government agencies (even when those agencies do not provide this service themselves). Finally, private vendors can also gain access to high-resolution satellite imagery, which can be particularly useful in matters stemming from the past couple of decades when satellite imagery acquisition became more frequent than aerial photography acquisition.

<sup>9</sup> A similar collection exists at the New York City Municipal Archives, as from 1939 to 1941 the New York City Department of Taxes also photographed nearly every building in the five boroughs for tax assessment purposes.