Legal Consequences of Deteriorating Underground Infrastructure

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Drinking water is typically delivered through a system of underground pipes. Waste water, both sewage and stormwater, is typically removed through underground infrastructure. Much of this infrastructure is old and has not been maintained. The result is system failures, contamination, and property damage from events such as sinkhole formation. A myriad a legal issues arise from these system failures. Neither ownership of underground systems nor responsibility for maintenance and repairs are clear. The party or parties responsible for paying for the cost of system failures is often even less clear. Under such circumstances the potential for costly litigation and fines for violation of environmental statutes is ever present. Determination of the correct legal regime for determining liability may be difficult. Liability may be allocated by contract, statute, or common law tort concepts. Determination of causation of system failures may be difficult, complicating judicial attempts to assign fault. Or statutes may arbitrarily assign fault without regard to the ability of the party to whom fault is assigned to correct underlying problems. Liability is further complicated by sovereign immunity that may protect some governmental owners of underground infrastructure. As a result private parties that would otherwise share liability may be forced to assume more than a fair share. In this environment managing risk is very difficult. Developing insurance contracts that provide adequate protection may be problematical, even if insurers willing to assume the risks can be found. This presentation will summarize what is known, looking specifically at ownership issues, theories of liability, the impact of sovereign immunity, regulatory liability, and insurance questions. Areas for additional research will be identified.