

Legal Consequences of Deteriorating Underground Infrastructure

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Scope of the Problem

- \$276.9 billion over next 20 years for drinking water systems
 - CBO estimate - \$170 to 493 billion
 - Over \$20 billion for NC
- Sewer
 - Sanitary
 - Storm
- Other
 - Gas
 - Electricity

Examples

- DC - Lead contamination - ongoing
 - 75 ppb (15 ppb action level)
- NYC – May 20 2008
 - 85 year old main broke at 5th Ave & W. 57th
 - Foundations of 4 buildings damaged
- New Jersey – May 2
 - ½ million customers of the Elizabethtown Water Company without water after 5-foot diameter main breaks

Liability of Providers

- Contamination
 - Safe Drinking Water Act [42 U.S. 300f *et seq.*]
 - Regulatory (federal & state – delegated program)
 - Citizen suits [42 U.S. 300j-8]
 - Enforce fines on behalf of government
 - Attorney fees and costs
 - No private damages
 - Private damages under state law
 - Sovereign immunity
 - SB 1259 (SL 2008-140)
 - » Applicable to all public water systems however owned
 - » All water sold 'as is'

Liability of Providers

- Quantity/Disruption of service
 - Safe Drinking Water Act
 - Regulatory liability
 - Citizen suit (?)
 - Private damages under state law
 - Sovereign immunity
 - SB 1259 (SL 2008-140)
 - » Applicable to all public water systems however owned
 - » All water sold 'as is' – are express contract provisions unenforceable?

Liability of Providers

- Damage to property
 - Inverse condemnation
 - N.C.G.S. §40A-51
 - 24 month statute of repose
 - » Date of taking (in character of trespass or nuisance)
 - » Conclusion of project, whichever is later
 - Negligence actions not preempted by N.C.G.S §40A-51
 - Three-year statute of limitation

Vulnerability Assessments & Ownership

- 42 U.S. §300i-2.
 - Applicable to community water systems serving more than 3,300 persons
 - Certification and copy of vulnerability assessment to EPA
 - Assessments are a one-time effort
 - Exempt from disclosure to state, regional, or local government
 - Nothing submitted to EPA may be used or disclosed in a civil lawsuit
- Ownership of underground infrastructure

Selected Bibliography

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