

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>PENNSYLVANIA-AMERICAN WATER COMPANY,</b>	:	
<b>Plaintiff</b>	:	
<b>and EVELYN ANDREWS, TRUSTEE, and</b>	:	
<b>EDWARD M. and JUANITA KUBERT,</b>	:	<b>No. 3:99cv2135</b>
<b>Plaintiff-intervenors</b>	:	
	:	
<b>v.</b>	:	<b>(Judge Munley)</b>
	:	
<b>JACK RICH, INC., Defendant and Third-Party</b>	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>EXXON CORP. and its successor,</b>	:	
<b>EXXON MOBIL CORP., CENTRAL</b>	:	
<b>HIGHWAY OIL, and AMERADA HESS</b>	:	
<b>CORPORATION,</b>	:	
<b>Third-Party Defendants</b>	:	

.....

**MEMORANDUM**

Before the court for disposition is the plaintiff’s motion to dismiss defendant’s counterclaim. For the purposes of this motion, the plaintiff is Pennsylvania-American Water Company, and the defendant is Jack Rich, Inc. The matter has been fully briefed and argued, thus rendering it ripe for disposition. For the reasons that follow, the motion will be granted.

**Background**

As discussed more specifically below, plaintiff has brought an environmental lawsuit, asserting that the defendant’s underground storage tanks leaked in July 1998 causing contaminates to seep into the ground.

The plaintiff filed an amended complaint in April 2001. Defendant answered in January 2002. The answer included defendant’s counterclaim alleging negligence on the part

of the Water Company. By the time that defendant asserted the counterclaim, fact discovery had closed, and expert reports had been due. Subsequently, the plaintiff filed the instant motion to dismiss the counterclaim. For the reasons that follow, the motion to dismiss will be granted.

### **Discussion**

Counterclaims are provided for in Fed.R.Civ.Pro. 13. Rule 13 permits several different types of counterclaims, however, the parties are in agreement that to be proper in the instant case, we must find that the defendant has pled a “compulsory” counterclaim. To determine if a claim is a compulsory counterclaim under Federal Rule of Civil Procedure 13(a)<sup>1</sup>, it must be determined whether the counterclaim bears a logical relationship to plaintiff’s claim. We must determine if the defendant’s claim involves: 1) many of the same factual issues as the plaintiff’s claim; 2) the same factual and legal issues as the plaintiff has raised; or 3) offshoots of the same basic controversy between the parties. Xerox Corp. v. Van Dyk Research Corp., 576 F.2d 1057, 1059 (3d Cir. 1978).

The Third Circuit Court of Appeals has explained as follows:

(A) counterclaim is logically related to the opposing party’s claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of

---

<sup>1</sup>In pertinent part, Fed.R.Civ.Pro. 13(a) provides as follows:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

the same factual issues, or the same factual and legal issues, or whether they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action.

Id. at 1059 (quoting Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961)).

Consequently, to make the determination as to whether defendant has pled a compulsory counterclaim, we must first discuss the claims that are raised by each party. Plaintiff's complaint alleges a cause of action under the federal Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA"), 42 U.S.C. § 6901 et seq.; the Federal Water Pollution Control Act (hereinafter "Clean Water Act"), 33 U.S.C. § 1251 et seq., the Pennsylvania Storage Tank and Spill Prevention Act (hereinafter "Storage Tank Act"), 35 P.S. § 6021.101 et seq., the Pennsylvania Clean Streams Law, (hereinafter "Clean Streams Law"), 35 P.S. § 691.601 et seq. and certain Pennsylvania common law claims. Compl. ¶ 2.

The complaint alleges that the defendant's facility leaked approximately four thousand (4000) gallons of gasoline from an underground storage tank. Gasoline and petroleum-related compounds were released into the groundwater system from which the water company draws its water. Moreover, the plaintiff claims that a plume of contaminants is moving in the groundwater toward its production wells. Compl. ¶ 1. The release of contaminants occurred on or about July 21, 1998.

Defendant's counterclaim sounds in negligence and involves, *inter alia*, the performance of work by the plaintiff around the area where the release of pollutants

occurred. The defendant claims that: the water company cut piping and airlines associated with the groundwater remediation system at the site; a water company employee backed a truck over a monitoring well causing damage to it, and causing a Jack Rich employee to suffer a chipped tooth; water company workers spilled gasoline near a monitoring well; the water company paved over monitoring wells, and negligent paving caused a Jack Rich employee to twist her ankle. These actions complained of by the defendant occurred primarily in the summer and autumn of 2002.

It is apparent that the claims asserted by the defendant are wholly different from those alleged by the plaintiffs. They involve a different time frame and different facts. The counterclaim involves distinct legal theories and the jury would be forced to make factual determinations that are unrelated in any way to the plaintiffs' claims. Discovery, which has closed, would have to be re-opened for development of the facts surrounding the defendant's allegations. Adding these claims to the current lawsuit, would thus merely serve to draw out a case that is already almost three years old. Moreover, summary judgment motions have already been filed and briefing has commenced on them. To halt the proceedings now to reopen discovery on the new claims and allow time for filing dispositive motions would not be in the interest of justice and the prompt disposition of the plaintiffs' original claims.

In addition, to the claims addressed above, the defendant avers that the plaintiff was negligent in not knowing that numerous other petroleum releases, by parties other than Jack Rich, have occurred near the water company's well field. More particularly, paragraph 4 of the counterclaim reads as follows: "Additionally, [defendant] believes, and therefore avers,

that Plaintiff was negligent in not knowing that numerous other petroleum releases, by parties other than [defendant], have occurred near and, in some cases, in even closer proximity to [plaintiff's] well field. Despite having this knowledge, [plaintiff] only seeks damages against [defendant].” Plaintiff argues that this allegation is a “negligent failure to sue” claim that is not cognizable under Pennsylvania law. Defendant asserts that this claim supports the negligence cause of action.

Defendant expands on this negligence claim in its brief. The brief explains that it is the defendant’s position that the plaintiff is seeking to recover from the defendant for all past harms which have occurred to its groundwater. It argues that the plaintiff was negligent in not realizing that others helped to cause the harm. Defendant has cited no cases that would support such a cause of action. In a footnote, it cites the case of Muhammad v Strassburger, 587 A.2d 1346 (Pa. 1991) for the proposition that a plaintiff’s failure to sue all responsible parties for their harm may, in fact, support a negligence claim. A review of the Muhammed case, however, indicates that it is a legal malpractice action and thus distinguishable from the instant case. Defendant’s claim that plaintiff was negligent for seeking damages only from itself, appears to be in the nature of a defense and goes to whether the plaintiff will be able to meet its burden of proof. It is not a separate cause of action. In fact, the defendant alleges the negligence of the plaintiff as an affirmative defense. See e.g. Seventh Affirmative Defense and Tenth Affirmative Defense. Accordingly, dismissal of the counterclaim is appropriate.

For the reasons set forth above, we find that the defendant has not pled a compulsory

counterclaim. Consequently, the plaintiff's motion to dismiss the defendant's counterclaim will be granted. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>PENNSYLVANIA-AMERICAN WATER COMPANY,</b>	:	
<b>Plaintiff</b>	:	
<b>and EVELYN ANDREWS, TRUSTEE, and</b>	:	
<b>EDWARD M. and JUANITA KUBERT,</b>	:	<b>No. 3:99cv2135</b>
<b>Plaintiff-intervenors</b>	:	
	:	
<b>v.</b>	:	<b>(Judge Munley)</b>
	:	
<b>JACK RICH, INC., Defendant and Third-Party</b>	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>EXXON CORP. and its successor,</b>	:	
<b>EXXON MOBIL CORP., CENTRAL</b>	:	
<b>HIGHWAY OIL, and AMERADA HESS</b>	:	
<b>CORPORATION,</b>	:	
<b>Third-Party Defendants</b>	:	

.....

**ORDER**

**AND NOW**, to wit, this 6th day of June 2002, the motion to dismiss counterclaim [109-1] is hereby **GRANTED**. The counterclaim filed by Defendant Jack Rich, Inc. is hereby **DISMISSED**.

**BY THE COURT:**

\_\_\_\_\_  
**JUDGE JAMES M. MUNLEY**  
**United States District Court**

Filed: June 6, 2002