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Calling Foul: Deficiencies in Approaches to Environmental Whistleblowers and Suggested Reforms

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Calling Foul: Deficiencies in Approaches to Environmental Whistleblowers and Suggested Reforms

Emily Becker*

Abstract

Whistleblowers could facilitate the regulation of the environmental sector at little to no cost to the taxpayer. Often, potential whistleblowers have timely access to information that would enable them to avert or minimize environmental damage and to protect our communities. However, existing federal and state regulations fail to adequately protect environmental whistleblowers and to incentivize potential environmental whistleblowers. These failures unjustly penalize whistleblowers and discourage potential whistleblowers. This article uses research findings and a case study to illuminate these failings and to argue for reforms that would better protect and incentivize whistleblowers.

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I. Introduction

The film *Erin Brockovich* tells the true story of a whistleblower who “brought a town to its feet and a corporation to its knees” by fighting against the Pacific Gas and Electric Company—and winning.¹ In the final scene, Brockovich struts into her brand new office, and her boss hands her a bonus check for \$2 million dollars.² The audience leaves the film with the sense that the hero did the right thing and got rewarded for it. Though an inspiring tale, this film plays into the myth that if a whistleblower has “the goods on the folks that are doing wrong” then he or she “almost always succeeds.”³ In reality, the typical whistleblower is “brutalized the entire way.”⁴ One study of whistleblowers found that after blowing the whistle: “82% [of whistleblowers] experienced harassment, 60% were fired, 17%

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1. A.O. Scott, *Erin Brockovich: High Ideals, Higher Heels*, N.Y. TIMES (Mar. 17, 2000), <http://www.nytimes.com/movie/review?res=9805eed8163af934a25750c0a9669c8b63> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

2. ERIN BROCKOVICH (Universal Pictures 2000).

3. Eugene Russo, *The Plight of the Environmental Whistleblower*, THE SCIENTIST ONLINE (Jan. 17, 2005), <http://www.the-scientist.com/?articles.view/articleNo/16170/title/The-Plight-of-the-Whistleblower> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

4. *Id.*

lost their homes, and 10% admitted to [having] attempted suicide”—a far cry from a swank office and a big check.⁵

This paper analyzes existing legal approaches to environmental whistleblowers and concludes that existing laws do not adequately protect whistleblowers and do not provide sufficient incentives for potential whistleblowers.⁶ Specifically, the weaknesses in federal and state statutes addressing environmental whistleblowing include: (1) relying on an anti-retaliatory model rather than an incentives-based model and (2) using an overly limited definition of whistleblowing that excludes (a) whistleblowers who report violations of “scientific integrity” and (b) whistleblowers who disclose to the media or to their supervisors.⁷ The federal approach falls short by (3) providing an overly short statute of limitations.⁸ Most state approaches fail by (4) offering whistleblowers insufficient remedies, including (a) not penalizing supervisors who engage in retaliatory practices and (b) failing to protect whistleblowers from blacklisting and/or employment instability following their disclosures.⁹

The purposes of this paper are to: (1) outline the benefits of whistleblowing, (2) provide an example of a real-life whistleblower, (3) examine the limitations of existing approaches to protecting environmental whistleblowers, and (4) recommend changes to these approaches. The scope of this paper is restricted to the legal protections available to environmental whistleblowers in the United States under federal and state statutory schemes. The Part II defines whistleblowing, examines the contributions made by whistleblowers, analyzes the current status of

5. Gerard Sinzduk, *An Analysis of Current Whistleblower Laws: Defending A More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1655 (2008).

6. See *infra* notes 178–**Error! Bookmark not defined.** (stating that the existing whistleblowing regulation scheme requires statutory changes that would provide more persuasive incentives and stronger protections).

7. See *infra* notes 130–166 (discussing the shortcomings of failing to provide incentives to whistleblowers and also difficulties created by overly narrow definitions of whistleblowing in both state and federal law).

8. See *infra* notes 173–177 (stating that a longer statute of limitations would provide whistleblowers more time to evaluate reporting options and take opportunities to protect themselves).

9. See *infra* notes 169–**Error! Bookmark not defined.** (outlining the failure of state whistleblowing statutes to adequately deter supervisors from punishing whistleblowers).

whistleblowers, and explores the role of whistleblowers in the environmental context.¹⁰ Part III describes the experiences of environmental whistleblower Fardin Oliaei, former Senior Research Scientist and Coordinator of the Emerging Contaminants Program at the Minnesota Pollution Control Agency (MPCA).¹¹ Part IV reviews existing laws applicable to environmental whistleblowers and suggests changes to those laws.¹²

II. Whistleblowing and Environmental Disputes

Who keeps Americans safe from corporate and industrial wrongdoing? Is it government agencies charged with protecting the public? Is it auditors responsible for monitoring industries? Is it media personnel hunting for a good story? Is it insiders who risk their jobs to protect the public? While all of these entities play a role in detecting wrongdoing, recent research suggests that nontraditional actors like the media and industry employees play a greater role than government regulators.¹³ This section sheds light on what a whistleblower is and how whistleblowers help keep the public safe.¹⁴ It begins by defining whistleblowers.¹⁵ It then explores the main types of whistleblowers and their motivations.¹⁶ Next, it examines the importance of whistleblowers within the United States.¹⁷ The fourth subsection analyzes the

10. See *infra* Part II (describing whistleblowing in environmental law and its benefits).

11. See *infra* Part III (illustrating the difficulties presented to whistleblowers by analyzing Fardin Oliaei's experiences in this role).

12. See *infra* Part IV (suggesting reforms to federal and various state laws that would improve reporting and enforcement).

13. See I.J. Alexander Dyck, Adair Morse, & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2226 (2010) (identifying the media as a key player in corporate governance by exposing improper activities).

14. See *infra* Part II (stating the benefits created by whistleblowing, such as increased industry accountability).

15. See *infra* Part II(A) (providing a standard definition of whistleblowing).

16. See *infra* Part II(B) (analyzing the various actors who typically act as whistleblowers, such as auditors and journalists).

17. See *infra* Part II(C) (describing the benefits created by whistleblowing in the United States).

consequences of whistleblowing for an individual whistleblower. The final subsection explores the unique challenges faced by environmental whistleblowers.¹⁸

A. Defining Whistleblowing

The term “whistleblower” finds its roots in an old practice of the English police officers, who would blow a whistle to alert other officers and the public that a crime was being committed nearby.¹⁹ The term has evolved and today generally refers to a member of an organization who takes steps to inform others of ethical or legal violations that are being or have been committed by or within that organization.²⁰ There is no consensus on the precise definition of a whistleblower, with sources disagreeing over: (1) what type of “wrong” (from improprieties to immoral conduct to concrete violations of law) may be reported by a whistleblower; (2) whether a whistleblower must act in good faith; and (3) whether a whistleblower ought to report misconduct to a supervisor, a government agency, the media or some combination of these outlets.²¹ In this paper, the term “whistleblower” refers to an individual who reports actual or potential misconduct (inclusive of violations of “scientific integrity”) within a government agency or company that poses a real or potential threat to the public interest.²² Part IV(3) examines the benefits of incorporating a more expansive

18. See *infra* Part II(D) (listing the many dangers deterring potential whistleblowers, such as employment retaliation and blacklisting).

19. See *Winters v. Houston Chronicle Pub.*, 795 S.W.2d 723, 727 (Tex. 1990) (noting that “[t]he term is derived from the act of an English bobby blowing his whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger”).

20. See Peter D. Banick, *Case Note: The “In-House” Whistleblower: Walking the Line Between “Good Cop, Bad Cop”*, 37 WM. MITCHELL L. REV. 1868, 1873 (2011) (stating that whistleblowers are “employees who . . . with a reasonable belief that their assertions are accurate, report, disclose, or otherwise make known to parties internal or external to the organization any violation of law by their employers . . . for the purpose of exposing such wrongdoing”).

21. See *id.* at 1872–73 nn.20–21, 23 (outlining various areas of disagreement over the definition of “whistleblowing”).

22. See *infra* note **Error! Bookmark not defined.** (incorporating violations of “scientific integrity” into the definition of whistleblowing)

definition of whistleblowing into existing laws.²³

B. Who Detects Wrongdoing?

Many people assume that auditors and regulators are paid to detect fraud in most instances.²⁴ However, a recent study found that nontraditional whistleblowers actually detected more fraud than these traditional actors.²⁵ Whistleblowers, including employees of organizations committing fraud and media personnel, exposed 30% of the fraud cases studied.²⁶ Auditors, on the other hand, detected only 10% of fraud cases, and the Securities and Exchange Commission (SEC) detected just 7% of fraud cases.²⁷ The numbers are even starker in the healthcare industry, with whistleblowers responsible for detecting 41% of fraud cases in that sector.²⁸ These figures underscore the important role that whistleblowers play in protecting the public.

Though the extent of whistleblowers' contribution to fraud detection is initially surprising, a deeper analysis of incentives and differential access to information helps explain why so many employees and members of the media become whistleblowers.²⁹ The first group—employees of organizations engaging in wrongdoing—has easy, low-cost access to information as a natural byproduct of working inside the organization.³⁰ Many

23. See *infra* Part IV(B) (describing the benefits of expanding the definition of whistleblowing so that many different actors are protected).

24. Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323, 323 (2007) (noting that “a growing body of literature addresses paying rewards to effective capital market gatekeepers”).

25. See Dyck et al., *supra* note 13, at 2224–26 (concluding that a substantial amount of whistleblowing is conducted by actors that did not traditionally embody reporting roles).

26. See *id.* at 2214 (finding that media personnel account for 13% of reporting and employees account for 17%).

27. See *id.* (stating that individuals in primarily financial and legal roles do not engage in a substantial amount of total reporting).

28. See *id.* at 2215 (finding that 41% of reported frauds in the health care industry are exposed by employees).

29. See *id.* at 2214–15 (noting that traditional discussions of whistleblowing “ignore differences in the costs of identifying and gathering fraud-relevant information”).

30. See *id.* at 2214 (explaining that “[e]mployees, industry regulators, and analysts gather a lot of relevant information as a byproduct of

employees also blow the whistle in order to avoid personal liability for fraud being committed within their organization.³¹ Positive monetary incentives, such as those offered by *qui tam* suits that give whistleblowers a portion of the proceeds of fraud detection, also motivate employees to become whistleblowers.³² In fact, positive monetary incentives substantially increase the likelihood that an individual employee will blow the whistle on his or her employer.³³ Unfortunately, financial incentives exist in a limited number of sectors, including the healthcare sector where whistleblowers detect 41% of fraud cases, but largely excluding the environmental sector.³⁴ Part IV(B)(1) examines the benefits of providing monetary incentives to encourage potential whistleblowers in the environmental sector to go public.³⁵

The second group—media personnel—has a positive reputational incentive to expose fraud because it makes a compelling news story.³⁶ Unlike the incentives for employees, journalists' reputational incentive increases as the size of the fraud increases.³⁷ Indeed, value-weighting the data on fraud cases to reflect the amount of money involved increases the distribution of the media's role in fraud detection from 13% to 24%, but has no effect on the distribution of employee's role in fraud detection.³⁸

their normal work”).

31. *See id.* at 2216 (stating that “[f]or many employee whistleblowers the more important benefit is avoiding the potential legal liability that arises from being involved in the fraud”).

32. *See id.* at 2214–16 (discussing the incentives created by giving those who bring information a large percentage of the money recovered as a result).

33. *See id.* at 2215–16 (concluding that “[m]onetary incentives for fraud revelation appear to play a role regardless of the severity of the fraud”).

34. *See id.* (noting that “in health care (an industry where suits are more likely to provide a financial reward for whistleblowers because government’s procurements account for a significant percentage_of revenues) 41% of frauds are brought to light by employees”).

35. *See infra* Part IV(B)(1).

36. *See id.* at 2214 (describing the reputational incentive behind exposing fraud).

37. *See id.* (explaining that “[a] journalist who uncovers a fraud receives national attention, which increases his career opportunities”).

38. *See id.* (finding that “[v]alue-weighting creates only one change in the distribution: the media become much more important (24%), suggesting they mainly get involved in the biggest cases”).

Interestingly, both employees and media personnel report a surprising percent of fraud cases despite having relatively low financial incentives when compared to the resources spent on official monitors like auditors and regulators.³⁹ This suggests that increasing incentives for employees and media personnel might be more cost-effective than increasing spending on official monitors.⁴⁰

C. Importance of Whistleblowers

Employees and media personnel that blow the whistle help identify wrongdoing that might never be detected by auditors or regulators.⁴¹ Even in cases where the wrongdoing would eventually become known, whistleblowers often help identify the misconduct early.⁴² By doing so, they reduce the cost of subsequent investigations and ensure that the fraud has a smaller impact than it would have had otherwise.⁴³ Moreover, the very presence of potential whistleblowers in a workplace likely deters misconduct from ever occurring.⁴⁴

Whistleblower's contributions are not only descriptively good; they are also quantifiably valuable. As of 2007, "60 percent of the Department of Justice's cases of fraud against the federal government were initiated by whistleblowers, resulting in recovery of over \$20 billion for the taxpayers."⁴⁵ Whistleblower

39. See *id.* (stating that "actors, who do not own any residual claim in the firms involved and are often not considered important players in the corporate governance arena, play a key role in fraud detection").

40. See *id.* at 2251 (concluding that monetary rewards should be increased in order to incentivize whistleblowing from individuals who can easily access and divulge information).

41. See *Dolan v. Cont'l Airlines*, 563 N.W.2d 23, 26 (Mich. 1997) (noting that "[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses").

42. See *Sinzdak*, *supra* note 5, at 1635 (observing that employees "can alert employers to problems before those problems escalate").

43. See *id.* at 1636 (finding that "information provided by whistleblowers can substantially reduce the cost to the public of detection and investigation of wrongdoing or corruption").

44. See *id.* at 1635–36 (observing that "[t]he presence of whistleblowers may also help deter misconduct in the first instance").

45. Joel D. Hesch, *Whistleblower Rights and Protections*:

claims against the pharmaceutical industry recovered \$12 billion from 2001 to 2011.⁴⁶

D. Status of Whistleblowers

Despite the importance of contributions made by whistleblowers, whistleblowers often suffer severe consequences for their actions.⁴⁷ The study cited in the beginning of this Article—finding that 82% of whistleblowers experienced harassment, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicides—is not alone in highlighting the negative consequences whistleblowers face.⁴⁸ Other negative consequences include being blacklisted from future employers, facing social ostracism from coworkers, and experiencing psychological strain.⁴⁹ Many whistleblowers report that, “[i]f I had to do it over again, I wouldn’t.”⁵⁰ Perhaps it is not surprising that whistleblowers are rare, representing less than two percent of all employees.⁵¹ It is likely that many people do not even consider blowing the whistle because of fear of reprisals.⁵² The

Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form A Beautiful Patchwork Quilt, 6 LIBERTY U. L. REV. 51, 53 (2011).

46. See *id.* (identifying the large amounts of money available to whistleblowers via high-profile *qui tam* claims).

47. See Sinzduk, *supra* note 5, at 1655 (stating that “employees cannot necessarily assume that their employer is ready and willing to solve problems brought to its attention”).

48. See *id.* (citing the large number of whistleblowers who are negatively affected by reporting fraud).

49. See Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 95–96 (2007) (describing the breadth of negative consequences that whistleblowers face after reporting).

50. Dyck, *supra* note 13, at 2216.

51. See Laura Simoff, Comment, *Confusion and Deterrence: The Problems That Arise from A Deficiency in Uniform Laws and Procedures for Environmental “Whistleblowers”*, 8 DICK. J. ENVTL. L. & POL’Y 325, 327 (1999).

52. See Mary Rowe & Corinne Bendersky, *Workplace Justice, Zero Tolerance and Zero Barriers*, in NEGOTIATIONS AND CHANGE, FROM THE WORKPLACE TO SOCIETY (Thomas Kochan and Richard Locke eds., 2002), available at http://ombud.mit.edu/sites/default/files/documents/zero_zero.pdf (explaining that “the organizational culture, if it is hierarchical and oriented toward punishment, may, ironically, inhibit willingness to act or to come forward”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

backlash faced by whistleblowers suggests that existing protections under the law are insufficient,⁵³ that our legal regime offers insufficient incentives for potential whistleblowers, or a combination of both.⁵⁴

E. Environmental Whistleblowers

Though regulating any industry is difficult, regulating the environmental industry poses unique challenges.⁵⁵ Whistleblowers are important in all sectors, but whistleblowers play a crucial role in the environmental sector.⁵⁶ Though all whistleblowers face obstacles, there is a particular subset of challenges that many whistleblowers in the environmental sector must face.⁵⁷ This subsection explains: (1) the challenges of regulating the environmental sector,⁵⁸ (2) the potential for

53. See OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA FACT SHEET: YOUR RIGHTS AS A WHISTLEBLOWER (2013), available at https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf (providing that an employee can file a complaint with OSHA if an employer retaliates against the employee for whistleblowing while working in certain "protected activities") (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

54. See OFFICE OF THE WHISTLEBLOWER, U.S. SEC. AND EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf> (explaining that it can be inferred that the relatively small growth in the number of whistleblowers reported indicates that the Act has not provided a significant incentive to report misconduct) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

55. See U.S. ENVTL. PROT. AGENCY, REGULATORY INFORMATION BY SECTOR (2014) ("Most business sectors are affected by a number of major environmental statutes and regulations.") (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

56. See Theo Emery, *With Tips From Whistle-Blowers, More Hands on Deck in Pollution Cases*, N.Y. TIMES, Feb. 13, 2012, at A11, available at http://www.nytimes.com/2012/02/13/us/whistle-blowers-help-us-fight-ocean-dumping.html?_r=0 (explaining that without whistleblowers it would be nearly impossible to stop pollution dumpers) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

57. See *id.* (explaining that the working environment on ships does not allow for a worker to turn in their employer without some kind of safety net).

58. See *infra* Part II(E)(1).

whistleblowers to increase compliance with environmental regulations,⁵⁹ and (3) the unique difficulties environmental whistleblowers face.⁶⁰

1. Challenges of Regulating the Environmental Sector

The environmental sector is difficult to regulate because: (1) environmental dangers can be hard to monitor;⁶¹ (2) enforcement of environmental regulations tends to be costly and is often dependent upon industry self-reporting;⁶² (3) regulated entities often have a financial incentive not to comply with environmental laws;⁶³ and (4) environmental harm is time-sensitive and difficult to reverse.⁶⁴

Part of this difficulty enforcing environmental regulations comes from the very nature of environmental harms, which tend to be hard to detect and trace back to their source.⁶⁵ Another challenge comes from the fact that emission levels may vary over space and time.⁶⁶ A further challenge comes from the fact that many small polluters that are individually difficult to monitor can collectively pose a very real threat.⁶⁷ These difficulties make

59. See *infra* Part II(E)(2).

60. See *infra* Part II(E)(3).

61. See NAT'L CENTER FOR ENVTL. ECON, U.S ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES, ch. 4 at 16 (2014) (hereinafter "PREPARING ECON. ANALYSES") (explaining that the identification of a solution to different environmental problems depends on how difficult the source of the problem is to pinpoint) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

62. See *id.* at 2 ("All efficient policies are cost-effective, but it is not necessarily true that all cost-effective policies are efficient.")

63. See Jonathan S. Shefftz, *EPA's Economic Benefit Analysis Policy and Practice*, 19 NAT. RES. & ENV'T 74, 74 (2004) (illustrating that there are "financial incentives" for the facility to avoid compliance).

64. See PREPARING ECON. ANALYSES *supra* note 61, ch. 4 at 2 (2014) (describing that pollution levels can vary over time and the resulting damages can vary by location).

65. See *id.* at 15 (explaining that identifying a solution to different environmental problems depends on how difficult the source of the problem is to pinpoint).

66. See *id.* at 16 (indicating that one question to ask when assessing the solution to an environmental problem is whether the pollutant varies across time and space).

67. See E. Somanathan & Thomas Sterner, *Environmental Policy Instruments and Institutions in Developing Countries*, in ECONOMIC DEVELOPMENT AND ENVIRONMENTAL STABILITY: NEW POLICY OPTIONS 238 (Ramón

environmental controls highly technical, posing another challenge: Regulators must have expertise and access to high-tech tools to establish effective pollution regulation controls based on the type of pollutant.⁶⁸

Because of the challenges of enforcing environmental regulations, government-regulated monitoring efforts are expensive.⁶⁹ In an effort to reduce the cost of enforcement, some regulatory approaches, such as subsidies, deposit-refunded systems, and information disclosure, shift the burden of proof onto the regulated industry.⁷⁰ Though less costly, these approaches make regulators dependent on industry self-reporting and create the potential for an industry to misreport its pollutant levels.⁷¹ The potential that self-reported data will be misreported or that industries will subvert official monitoring by engaging in illegal practices, such as tampering with monitoring equipment or dumping illegally, poses a serious threat because industries often profit from noncompliance.⁷² Under the theory of efficient breach, companies may be willing to break environmental laws

López & Michael A. Toman eds., 2006) (summarizing the problems posed by small polluters by explaining that “[i]t is the nature of such polluters that they are hard to regulate by several of the conventional instruments used for bigger industries”).

68. See Robert W. Crandall, *Pollution Controls*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (Library of Economics and Liberty ed. 2008), available at <http://www.econlib.org/library/Enc/PollutionControls.html> (“Because each pollutant has many sources, the EPA often sets literally hundreds of maximum-discharge standards for any single pollutant.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

69. See THE LAW AND ECONOMICS OF THE ENVIRONMENT 207 (Anthony Heyes ed. 2001) (explaining “government enforcement policy that requires a significant amount of monitoring expenditures” is the most practical option to regulate pollution, despite suggestions “to reduce the need for expensive government monitoring”).

70. See *id.* at 208 (outlining alternative innovations to reduce the cost of government monitoring and the financial effects they may present).

71. See *id.* at 207 (“One innovation is to require firms to self-report any violation of pollution standards. Voluntary reporting is rewarded with more lenient treatment.”).

72. See John Livernois & C. J. McKenna, *Truth or Consequences: Enforcing Pollution Standards with Self-Reporting*, 71 J. PUB. ECON. 415, 415 (1998) (“Theory suggests that firms comply with pollution laws when the cost of compliance is less than the expected penalty for noncompliance and not otherwise.”).

where noncompliance is less costly than compliance because regulations go under-enforced.⁷³

Not only are environmental harms hard to monitor, costly to regulate, and susceptible to “efficient breach,” environmental harms are also time-sensitive.⁷⁴ Indeed, environmental harms jeopardize public health, and the longer harms continue, the greater health risk these harms pose.⁷⁵ Moreover, it is usually far easier to prevent an environmental harm than to clean up after one; some environmental harms are effectively irreversible.⁷⁶ Thus, regulators often need to act quickly to be effective.

2. Whistleblowers Can Facilitate Regulation of the Environmental Sector

Whistleblowers can help regulators overcome the aforementioned challenges. First, whistleblowers that work as employees of regulated industries have the technical skills and knowledge that make them effective internal monitors.⁷⁷ Moreover, whistleblowers increase compliance with little or no additional cost to the taxpayer because they are private citizens rather than official monitors.⁷⁸ By increasing “the likelihood that

73. See *id.* (suggesting that firms comply with regulations only when the resulting penalty for noncompliance will cost them more than implementing the changes would).

74. See *United States v. State Dep’t of Transp.*, No. C05-5447RJB, 2012 WL 3814924, at *21 (W.D. Wash. Feb. 7, 2007) (concluding that “time-sensitivity is the most important factor” in determining EPA classification).

75. See Gerard Hoek et al., *Long-Term Air Pollution Exposure and Cardio-Respiratory Mortality: A Review*, 12 ENVTL. HEALTH, no. 43, 2013, at 1 (“There is growing evidence of mortality effects related to long term exposure . . . to ambient pollution.”).

76. See PREPARING ECON. ANALYSES, *supra* note 61, at 4–19 (indicating that “[g]eneral pollution prevention efforts” are the second most popular voluntary initiative, after “energy efficiency and climate change programs”).

77. See Hesch, *supra* note 45, at 53 (relaying the anecdote of employee-whistleblowers who helped bring the Enron and WorldCom misconduct to light and were lauded as heroes).

78. See Kent D. Strader, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed In False Claims Act Cases?*, 62 U. CIN. L. REV. 713, 718 (1993) (citing whistleblowing as a *qui tam* action and explaining that the term “means that the party bringing the action is doing so for the government’s interest as well as his own private

polluters will be penalized,”⁷⁹ whistleblowers can quell the danger of efficient breach by helping to ensure that noncompliance is more costly than compliance.⁸⁰ Finally, internal whistleblowers often learn of violations as they are happening and can act quickly to contain or even prevent a time-sensitive environmental harm.⁸¹ Likewise, whistleblowers in the media can write a quick article that alerts community members of potential threats before regulators have time to act.⁸² In these ways, environmental whistleblowers have the potential to increase compliance with environmental laws.

3. Challenges Faced by Environmental Whistleblowers

Despite the need for whistleblowers in the environmental sector and the financial savings they can provide, several features of the environmental sector make being an whistleblower especially challenging.⁸³ One problem is that most definitions of who is considered a “whistleblower” cover only individuals who report on traditional types of misconduct, such as waste, fraud, abuse of authority, and actions that pose an imminent threat to public health and safety.⁸⁴ However, potential environmental

interest”).

79. Cody McBride, *Making Pollution Inefficient Through Empowerment*, 39 *ECOLOGY L.Q.* 405, 428 (2012).

80. *See id.* (explaining that increasing the chance that polluting facilities will be fined or otherwise penalized eliminates the attractiveness of efficient breach).

81. *See* Strader, *supra* note 78, at 718 (“Employees of a company or organization usually have the best access to information about wrongdoing, and consequently know more than the best-conceived government inspection system.”).

82. *See* Sheila Coronel, *Leaks, Whistleblowers, and the Media’s Right to Report*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (Aug. 15, 2014), <http://gijn.org/2014/08/15/leaks-whistleblowers-and-the-medias-right-to-report/> (describing the story of a reporter who blew the whistle on misconduct in an SEC executive session through media stories and spurred the government to launch an investigation) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

83. *See* Strader, *supra* note 78, at 718 (“Whistleblowers have the potential to save the federal government billions of dollars, *help preserve the environment*, and protect the health and safety of the public.”) (emphasis added).

84. *See e.g.*, Hesch, *supra* note 45, at 64 (indicating that the

whistleblowers often encounter wrongdoing not covered by protective statutes, such as the suppression of results of emissions analyses and the use of skewed methodologies or inferior data.⁸⁵ Relatedly, because scientific findings can be uncertain and contentious, potential environmental whistleblowers may be unclear as to whether they can or should publish controversial work in journals or newspapers.⁸⁶

Second, the environmental sector has what is known as a “revolving door” problem, a phrase that describes how individuals often work both as regulators and as employees of regulated industries during their career.⁸⁷ Though there is a benefit to having experience in both sectors, often “revolving-door officials develop or direct policies that benefit a former or prospective employer.”⁸⁸ Even those that do not actively attempt to benefit an employer may be unduly cautious in what they are willing to say or do because they are concerned about their job prospects.⁸⁹

Third, while whistleblowers in other industries may be able to stop wrongdoing by reporting internally, it is much more difficult for environmental whistleblowers to rely on internal

Whistleblower Protection Act protects approximately 2.5 million federal workers, but excludes “the Postal Service, Postal Rate Commission, Government Accountability Office, and National Imagery and Mapping Agency”).

85. See *id.* at 64–65 (explaining that whistleblowers may be deterred from reporting misconduct when reporting the particular misconduct in question is not expressly protected by statute).

86. See *Scientific Integrity: Let Science Do Its Job*, UNION OF CONCERNED SCIENTISTS, (Mar. 2012), http://www.ucsusa.org/scientific_integrity (reporting that there are often varying interests at play that can determine whether a piece should be published) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

87. See Michael Halpern and Peter Hansel, *Heads They Win, Tails We Lose: How Corporations Corrupt Science at the Public’s Expense*, UNION OF CONCERNED SCIENTISTS, (Feb. 2012), <http://www.ucsusa.org/publications/catalyst/su12-heads-they-win-tails-we-lose.html#.VFxfd4fnmGk> (highlighting a study that revealed the way “companies change their messages depending on the audience and underscore[d] the need to hold companies accountable to investors, policy makers, and the public”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

88. *Id.* at 3.

89. See Interview with Fardin Oliaei, Former Senior Research Scientist and Coordinator of the Emerging Contaminants Program at the Minnesota Pollution Control Agency (MPCA), in Cambridge, Mass. (Oct. 20, 2012) (recounting her experience as an environmental whistleblower).

reporting alone. This is because unlike other types of wrongdoing, environmental wrongdoing often has adverse effects on third parties and often creates lingering harms.⁹⁰ Thus, environmental whistleblowers that report internally may inadvertently enable their employers to avoid compensating third-party victims or to avoid paying the costs of environmental cleanup.⁹¹ To ensure that the situation is fully remedied, environmental whistleblowers therefore often need to report externally or otherwise publicize the wrongdoing.⁹²

Finally, because so many people encounter chemicals and pollutants at different stages, environmental whistleblowers come from many different backgrounds.⁹³ They can be employees involved with cleanup of environmental hazards, individuals responsible for storing and disposing of solvents, factory workers, concerned scientists, regulators who feel their work is being silenced, media personnel who learn about contamination from a variety of sources, and others.⁹⁴ In fact, whistleblower protections from environmental laws have been applied to: “a painter who cooperated with an investigation into toxic dumping, a teacher who complained about asbestos in a school house, an engineer who filed reports regarding a shipyard’s noncompliance with hazardous waste regulations, and an employee who told a newspaper reporter about the discharge of sludge into the Cedar Rapids.”⁹⁵ With environmental whistleblowers found in many different sectors, it is difficult to ensure that potential whistleblowers know about applicable laws, including the protections available, the procedure for reporting, and the timeline for the relevant statute of limitations.⁹⁶

90. See Sinzduk, *supra* at note 5, 1651 (highlighting the potential long term problems).

91. See *id.* at 1652 (noting the residual effects of internal reporting).

92. See *id.* at 1661 (suggesting a solution to an internal reporting problem).

93. See Richard E. Condit, *Providing Environmental Whistleblowers with Twenty-First Century Protections*, 2 AM. U. LAB. & EMP. L.F. 31, 33 (2011) (describing the types of people who typically file whistleblowing reports).

94. See *id.* (providing examples of whistleblowers).

95. William Sanjour and Stephen M. Kohn, *Environmental Whistleblowers: An Endangered Species*, ENVTL. RESEARCH FOUND. (Feb. 1994).

96. See Condit, *supra* note 93 (highlighting problems that

III. Fardin Oliaei: A Case Study in Environmental Whistleblower Laws

In 2000, Fardin Oliaei was working as a Senior Research Scientist and Coordinator of the Emerging Contaminants Program at the Minnesota Pollution Control Agency (MPCA).⁹⁷ Her job was to investigate the dangers posed by emerging contaminants (a term for any artificial or naturally-occurring chemical that is not typically monitored but has the potential to enter the environment and pose a danger to the environment or human health).⁹⁸ Oliaei was one of the first scientists in the state to express concern about the environmental and health risks posed by perfluorinated chemicals (PFCs), “a family of synthetic compounds that 3M manufactured for use in waterproofing agents, non-stick cookware, fire-fighting foam, and food packaging.”⁹⁹ She found that PFC contamination had spread throughout the state, with the chemicals turning up everywhere from fish in Voyageur’s National park to drinking water in communities near 3M waste disposal sites.¹⁰⁰

Human exposure to PFCs has been linked with cancer, thyroid problems, and liver damage, but the link is not necessarily causal.¹⁰¹ Though the long-term effects of exposure to PFCs on human health are uncertain, scientists worry because PFCs “accumulate in living tissue and take a long time to break down.”¹⁰² A former 3M chemist described one common form of PFC, perfluorooctane sulfonate or PFOS, as one of the “most insidious pollutants” of recent times in part because it does not degrade, is highly toxic to wildlife, and its environmental sink

whistleblowers encounter).

97. See Interview with Fardin Oliaei, *supra* note 89 (detailing Oliaei’s position).

98. See *id.* (explaining what Oliaei’s research entailed).

99. Mike Mosedale, *PCA Whistleblower in Minnesota Paid a Steep Price*, SAINT PAUL LEGAL LEDGER CAPITOL REPORT, July 14, 2010.

100. See *id.* (detailing the results of Oliaei’s research).

101. See Christopher Lau et al., *Perfluoroalkyl Acids: A Review of Monitoring and Toxicological Findings*, 99 TOXICOLOGICAL SCIENCES 366–94, (2007) (explaining the health risks of perfluoroalkyl acids in the environment).

102. Mosedale, *supra* note 99.

appears to be biota rather than soil or sediment.¹⁰³ Because of the extent of the contamination, the length of time it takes PFCs to break down, and the scientific uncertainty regarding their health effects, Oliaei considered PCFs to be a top priority for research.¹⁰⁴

Despite the scientific basis for concern, Oliaei alleges that MPCA management deliberately deterred her from continuing to research the chemicals.¹⁰⁵ In her words, “since Ms. [Sheryl] Corrigan left 3M to become MPCA Commissioner . . . MPCA top management . . . intentionally minimized the environmental monitoring of PFCs in Minnesota.”¹⁰⁶ When Oliaei publicized her findings on Minnesota Public Radio, top management disciplined her and threatened to fire her if she continued to speak out about the issue.¹⁰⁷ She explains that the pressure to be silent was so great that “PFC was a forbidden word. During my last three years at the agency, the managers told me, ‘Fardin, don’t mention PFC or you will lose your job.’”¹⁰⁸

Ultimately, Oliaei resigned from MPCA and pursued a lawsuit citing violations of the First Amendment, federal civil rights statutes, and the Minnesota Human Rights and Whistleblower Acts.¹⁰⁹ After her resignation, Oliaei received a settlement of \$325,000 (or three years of her salary), but that money quickly dwindled.¹¹⁰ As of 2012, she has been unable to find employment in her field, with several interviewers informing her that they had been pressured into not hiring her.¹¹¹ Though Oliaei has been “constantly applying for jobs,” she now believes she was “naively optimistic” and that she has “been blacklisted from any possible job.”¹¹² She reports that one potential employer

103. See Fardin Oliaei, *Fardin Oliaei Explains Why She Resigned*, MINNESOTA PUBLIC RADIO (Feb. 2, 2006), http://news.minnesota.publicradio.org/features/2006/02/05_sommerm_fardinsletter/ (providing reasons for why Oliaei spoke out about PFCs) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

104. See *id.* (explaining why PCFs were important to Oliaei).

105. See *id.* (detailing the reaction she got to her research).

106. *Id.*

107. See Mosedale, *supra* note 99 (explaining the pressure she felt at work).

108. *Id.*

109. See *id.* (detailing Oliaei’s claims).

110. See *id.* (explaining her current financial status).

111. See *id.* (hypothesizing why she can’t find work).

112. *Id.*

explained that they could not hire her because, “3M is a powerful company. They drew lines and you crossed them. Now you can never step back inside.”¹¹³ This employer encouraged Oliaei to leave the state to increase her chances of finding a job.¹¹⁴ Eventually, she was forced to sell her prized possession—her home.¹¹⁵ “I hate to say it, but this is the reality: I’m homeless,” said Oliaei, who now lives with a friend out of state.¹¹⁶ “I lost everything. I left the agency with my 49 boxes of PFC research. When I sold the house, I let everything go at an estate sale for almost nothing—except for those boxes. I took those with me.”¹¹⁷

Since her resignation, politicians, regulators, and scientists have become more aware of the dangers posed by PFCs and efforts have been made to clean up the contamination.¹¹⁸ Many insiders attribute these changes to Oliaei’s work. State Senator John Marty, DFL-Roseville, said Oliaei’s efforts “made a big difference . . . [because] ‘I don’t think anyone was paying attention to PFCs before her.’”¹¹⁹ State Rep. Karen Clark, DFL-Minneapolis, furthered, “[e]verything Fardin said when she testified to the Senate has proven to be true. It just took a couple of years to come out . . . I do think Fardin did us all a tremendous public service and she paid dearly.”¹²⁰ Though Oliaei was not recognized for her work while at MPCA, her contributions have since been recognized.¹²¹ Rather than being disciplined, her supervisors, Paul Hoff and Marvin Hora, received recognition for Oliaei’s comprehensive research on PFC and were promoted.¹²²

113. *Id.*

114. *See* Complaint at 10–11, Fardin Oliaei v. Minnesota Pollution Control Agency, *available at* http://www.peer.org/assets/docs/mn/05_16_5_complaint.pdf.

115. *See* Mosedale, *supra* note 99 (detailing the consequences of her resignation).

116. *Id.*

117. *Id.*

118. *See id.* (providing new developments between researchers and the company to monitor the PFCs).

119. *Id.*

120. *Id.*

121. *See id.* (saying that politicians have since praised her work and her contributions).

122. *See* MINNESOTA PUBLIC RADIO, *Toxic Traces*, (2005), <http://news.minnesota.publicradio.org/projects/2005/02/toxictraces/> (saying that Oliaei’s supervisors were later allowed to work on her PFC research project that she had recommended before she was fired) (on file with the WASHINGTON AND

Oliaei's experiences echo some of the obstacles facing environmental whistleblowers as discussed in Part II(E). Specifically, (1) the misconduct Oliaei made public constituted a violation of scientific integrity, involving the suppression of her research and an attempt to silence her; (2) part of the conflict between Oliaei and MPCA management involved a disagreement over her rights to publicize her research; (3) her supervisor, Commissioner Corrigan, previously worked for 3M (a producer of PFCs) and as such exemplifies the "revolving door" problem; and (4) the pollution involved impacts third parties and takes a long time to breakdown, meaning that simply preventing further contamination would not completely resolve the problem. Her experiences also highlight some of the challenges whistleblowers face after going public, including losing their jobs, losing their homes, having difficulty finding other work in the industry, and seeing those who suppressed their research go unpunished.

IV. Analysis of Environmental Whistleblower Laws: Current Status, Limitations, and Suggested Reforms

Though Fardin Oliaei's story does not have a happy ending, there is hope that things can and will change. President Obama signed into law the Whistleblower Protection Enhancement Act of 2012 (WPEA), after it received the vote of every single member of the 112th Congress.¹²³ Though this law only applies to federal employees and does not change the legal protections offered to most environmental whistleblowers, it significantly expands protections for the workers it does cover.¹²⁴ After the bill passed the House, Tom Devine, legal counsel for the Government Accountability Project, stated that the whistleblower rights in this bill are the strongest in history for federal workers.¹²⁵ The unanimous passage of the law suggests that

LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

123. See Dylan Blaylock, *President Signs Whistleblower Protection Enhancement Act (WPEA)*, GOV'T ACCOUNTABILITY PROJECT, 27 November 2012 (describing the level of support the WPEA had in Congress).

124. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 110, 126 Stat. 1465 (eliminating certain less-permissive alternatives for whistleblowers and instructing employers to tell their employees about their rights under the Act).

125. See Blaylock, *supra* note 123 (explaining how strengthened

American lawmakers value whistleblowers and are willing to take steps to ensure that they are protected. Rep. Darrell Issa (R-Calif.) supported passage of the WPEA and he hoped that it “sent a clear message to those who help us protect the American people and their hard-earned tax dollars: [w]e stand beside you.”¹²⁶ Hopefully, lawmakers will send a similar message to environmental whistleblowers by expanding protections available to them.

This Part analyzes the legal approaches to protecting environmental whistleblowers. It begins by providing an overview of the existing laws protecting environmental whistleblowers¹²⁷. It then considers deficiencies in these laws and suggests ways to reform them.¹²⁸ Where applicable, the section identifies portions of the WPEA and other laws that make reforms similar to those proposed here to demonstrate that the suggest reforms are both preceded and feasible.

A. Overview

There are three main sources of law protecting environmental whistleblowers: federal environmental statutes providing for judicial relief, state whistleblower statutes, and state-level tort law.¹²⁹ Because there often are applicable state or federal statutes and because the existence of a statutory remedy often precludes a common law cause of action for wrongful discharge, this paper focuses on the former two forms of protection.

1. Federal Statutes

From 1972 to 1980, Congress amended six environmental protection laws to include protections for environmental

whistleblower rights were by the Act).

126. See *id.* (showing that legislators support the WPEA’s aims).

127. See *infra* Part IV(A) (providing a history of whistleblower laws prior to the WPEA).

128. See *infra* Part IV(B) (outlining current problems and potential solutions to whistleblower protections).

129. See Simoff, *supra* note 51, at 327 (explaining different laws governing whistleblower claims).

whistleblowers.¹³⁰ These six statutes include: the Federal Water Pollution Control Act (“FWPCA”),¹³¹ the Safe Drinking Water Act (“SDWA”),¹³² the Toxic Substance Control Act (“TSCA”),¹³³ the Solid Waste Disposal Act (“SWDA”),¹³⁴ the Clean Air Act (“CAA”),¹³⁵ and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).¹³⁶ These statutes seek to protect whistleblowers from employers who retaliate against them for speaking out against a potential violation.¹³⁷ Federal whistleblowing laws provide protections that are generally more favorable to the employee when compared to state whistleblower protections.¹³⁸ These statutes have a very short statute of limitations that require whistleblowers to file violations with the Department of Labor (“DOL”) within thirty days.¹³⁹

Under the six federal statutes, the whistleblower must establish three elements of the prima facie case: (1) that their employer is covered by the act; (2) that the employee has engaged in protected activity under one of the acts; and (3) that the employee’s terms and conditions of employment have suffered as a consequence of engaging in the protected activity, with a showing of a discriminatory motive by a preponderance of the evidence.¹⁴⁰ The employer can rebut a showing of discriminatory motive by giving legitimate business reasons for allegedly

130. See Hesch, *supra* note 45, at 82 (outlining the statutes that include whistleblower protections).

131. 33 U.S.C. § 1251 et seq. (2014).

132. 42 U.S.C. § 300f et seq. (2014).

133. 15 U.S.C. § 2601 et seq. (2014).

134. 42 U.S.C. § 6901 et seq. (2014).

135. 42 U.S.C. § 7401 et seq. (2014).

136. 42 U.S.C. § 9601 et seq. (2014).

137. See Hesch, *supra* note 93, at 82 (explaining the rationale for enacting these statutes).

138. See Michael A. Zody, *Responding to Environmental Whistleblowers: Listen Carefully to that Sound Coming Round the Bend*, 51 ROCKY MOUNTAIN MINERAL L. INST. § 6.02[1] (2005) (outlining the importance of federal whistleblower legislation and comparing federal whistleblower laws to state laws).

139. See Hesch, *supra* note 45, at 83 (describing the time given to file whistleblower actions).

140. See Simoff, *supra* note 51, at 330–31 (outlining the elements that the whistleblower must prove).

retaliatory conduct.¹⁴¹ The employee then can demonstrate that the discriminatory motive would not have occurred in absence of whistleblowing activities.¹⁴²

The six federal statutes are extremely inclusive; any person in the private or public sector has the right to assert an anti-retaliation claim.¹⁴³ Though broadly applicable to different actors, they only protect whistleblowers from retaliation against actions within the scope of the statute, such as filing formal complaints or providing official testimony.¹⁴⁴ Types of discriminatory action covered by the statute include: termination, demotion, unfavorable references, rescinding of duties, and blacklisting of employees by the employer.¹⁴⁵ It is relatively difficult to win one of these suits in court. An analysis of case decisions of the U.S. Department of Labor's Office of Administrative Law Judges shows that from 2000 through 2010 only seventeen of 127 decided environmental whistleblower cases (slightly over thirteen percent) resulted in some type of relief for the employee.¹⁴⁶

2. State Statutes

Every state and the District of Columbia have enacted some type of a whistleblower protection statute.¹⁴⁷ However, state whistleblower statutes vary widely. Some of the major areas of difference include: the appropriate recipient of a whistleblower's report, the nature of the “wrongdoing” covered by the statute, and

141. See *id.* at 332 (providing an example of a way for an employer to rebut a discrimination claim).

142. See *id.* (stating that the whistleblower has the right of rebuttal in these actions).

143. See Hesch, *supra* note 45, at 83 (providing the types of people who can bring a claim under the statutes).

144. See *id.* at 83–84 (stating that the protections to whistleblowers are not as broad as they seem).

145. See *id.* at 85 (providing list of discriminatory behaviors banned by the whistleblower statutes).

146. See Condit, *supra* note 93, at 52 (showing the difficulty of succeeding in a whistleblower case during this time period).

147. See Rachel Goodson, *The Adequacy of Whistleblower Protection: Is the Cost to the Individual Whistleblower Too High?*, 12 HOUS. BUS. & TAX L. J. 161, 174 (2012) (claiming that every state has a whistleblower protection act).

the available remedies.¹⁴⁸

Because of this variation, it is difficult to speak of state whistleblower statutes as a whole. However, there are observable trends in state approaches. First, the vast majority of states rely exclusively on an anti-retaliation model to protect environmental whistleblowers as opposed to an incentives-based approach that would encourage whistleblowers to go public and to compensate them for doing so.¹⁴⁹ In fact, all state statutes offer some sort of protection provision for employees who face employer retaliation while few offer an incentives-based approach.¹⁵⁰ Secondly, most state statutes limit the definition of a whistleblower in similar ways.¹⁵¹ Only thirteen states protect disclosures to “to any person or organization, including public media,” and only two states cover “communication of scientific opinion or alteration of technical findings.”¹⁵² Thirdly, most state statutes have a consistent approach to remedies with respect to the fact that no states offer “transfer preference for prevailing whistleblower or ban on blackballing” and only 14 state statutes provide for “personnel actions against managers found to have retaliated.”¹⁵³

B. Deficiencies in Existing Approaches and Suggested Reforms

This section identifies deficiencies in existing laws regarding environmental whistleblowers, and it suggests ways that these laws could be reformed. Because many deficiencies

148. See *id.* (providing the difference between state statutes).

149. See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE WHISTLEBLOWER LAWS (2010), available at <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

150. See Sinzdak, *supra* note 5, at 1656-57 (outlining the difference between protections offered to whistleblower employees).

151. See Goodson, *supra* note 147, at 173-74 (explaining the wide variety of ways in which whistleblowers are protected by state laws).

152. PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *State Whistleblower Laws – Overview* (2011), available at <http://www.peer.org/assets/docs/wbp2/overview.pdf> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

153. *Id.*

exist in both federal and state approaches, the deficiencies are divided by subject matter rather than by legal framework with an indication whether a given deficiency applies to both or only to one of the two statutory schemes.¹⁵⁴

1. Failure to Use an Incentives-Based Approach (Federal and State)

Though all six federal statutes and the majority of state statutes rely on the anti-retaliation model, this approach does not provide incentives to encourage potential whistleblowers to go public.¹⁵⁵ Research suggests that anti-retaliation statutes are far less successful at encouraging whistleblowers to go public than statutes that promise a financial reward.¹⁵⁶ As mentioned above, whistleblowers in the healthcare sector (which employs an incentives based approach) report a greater percentage of fraud cases than in other sectors.¹⁵⁷ Moreover, adding an incentives component to existing approaches has been shown to increase the size and number of reports filed.¹⁵⁸ For example, in 2006, the IRS issued a bounty program, Section 7623(b), which provided that whistleblowers would receive a 15–30% bounty of collected revenues if the IRS successfully recovered revenues based upon information brought to light by the whistleblower.¹⁵⁹ In just three years, reporting increased by over 100%—jumping from 2,751 cases in 2007 to 5,678 cases in 2009.¹⁶⁰ Moreover, while there were no IRS collections over \$2 million between 2003 and 2006, there were fifteen collections over \$2 million between 2007 and

154. See generally Goodson, *supra* note 147 (describing the federal and state statutes related to environmental whistleblowers).

155. See *id.* at 170–76 (explaining how federal and state statutes utilize the anti-retaliation model).

156. See *id.* at 166 (discussing how financial incentives have been used effectively to encourage whistleblowing).

157. See Dyck, *supra* note 13, at 2215–16 (emphasizing that whistleblowing is more prevalent in the healthcare industry than elsewhere).

158. See *id.* (suggesting that the addition of financial incentives to whistleblower protection statutes results in increased reporting).

159. See Patrick A. Barthle II, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 WASH. & LEE L. REV. 1201, 1215–16 (2012) (explaining the IRS's bounty revenue program).

160. See Dyck, *supra* note 13 at 2215–16 (describing the success of section 7623(b)).

2009.¹⁶¹ These figures suggest that offering a financial reward to environmental whistleblowers could dramatically increase the amount of wrongdoing detected.¹⁶²

The existing approach to environmental whistleblowers should be reformed by providing environmental whistleblowers whose reporting results in recovery of civil penalties or fines with a portion of the proceeds. The framework for providing funding for such an incentives program already exists.¹⁶³ In 2010, the “EPA reported that it secured over \$150 million in civil penalties and criminal fines and restitution.”¹⁶⁴ Lawmakers could modify this system by offering a portion of the proceeds to whistleblowers that report a violation that results in such penalties or fines.¹⁶⁵ Statistics from other sectors suggest that doing so would increase the net recovery made by the EPA as well as the number of claims filed.¹⁶⁶

Critics of the incentives-based model point out that financial incentives are not always possible in circumstances where the employer is small or the type of infraction committed does not net a substantial fine or civil penalty.¹⁶⁷ Moreover, financial awards are not always appropriate or feasible in circumstances where whistleblowers identify violations of scientific integrity like the suppression of research or the use of inferior data.¹⁶⁸ Thus, the incentives-based model would provide a supplement to but not a replacement for the anti-retaliatory model.¹⁶⁹ A two-pronged approach would ensure that

161. See *id.* (providing data on IRS collections under section 7623(b)).

162. See *id.* (suggesting that financial incentives would increase environmental whistleblowing).

163. See Condit, *supra* note 93, at 55 (explaining that a financial incentive program already exists under the Dodd-Frank Act).

164. *Id.*

165. See *id.* at 55–56 (suggesting that there are alternatives for encouraging whistleblowing).

166. See *id.* (opining that more instances of environmental degradation might be detected if a financial incentive program was implemented).

167. See Goodson, *supra* note 147, at 190 (explaining the limitations of financial incentive programs).

168. See *id.* at 190–91 (indicating that financial incentives are not always appropriate)

169. See *id.* at 192–93 (suggesting that a standardized approach to whistleblower protection would be beneficial).

whistleblowers in all circumstances are protected by the anti-retaliatory model, but would provide incentives that would likely increase the number of whistleblowers who report on a certain class of infractions.

2. *Overly Limited Definition of Whistleblower (Federal and State)*

The federal approach and the majority of state approaches rely on an overly limited definition of whistleblowers.¹⁷⁰ Specifically, the definition of a “whistleblower” used does not include those who blow the whistle by alerting news media or those who post online.¹⁷¹ The definition also does not include individuals that identify violations of the scientific method, such as suppression of data, use of skewed methodologies or use of inferior methods.¹⁷²

The limited definition of a whistleblower poses particular problems for environmental whistleblowers.¹⁷³ First, as mentioned in Part II(E)(3) of this paper, environmental whistleblowers are spread throughout many sectors of the U.S. economy.¹⁷⁴ Unlike potential whistleblowers from other sectors (like the federal government or the financial market), it is logistically difficult to ensure that potential whistleblowers know of the protections available to them.¹⁷⁵ Second, the limited definition keeps environmental whistleblowers from alerting the media of the ongoing harm.¹⁷⁶ Unlike time-consuming internal reporting mechanisms or external administrative remedies,

170. See generally Simoff, *supra* note 51 (describing how state and federal statutes differ regarding protection for whistleblowers).

171. See Russo, *supra* note 3 (noting that whistleblower protection statutes do not include all types of reporting).

172. See *id.* (explaining that whistleblower protection statutes do not cover scientific integrity).

173. See Hesch, *supra* note 45, at 82 (noting that whistleblower protections vary in the environmental sector).

174. See *id.* at 53 (describing the various industries to which environmental whistleblower statutes relate).

175. See *id.* at 83 (explaining how the statute of limitations makes it difficult for employees to learn about the rights and balance the risks associated with whistleblowing).

176. See *id.* at 88 (indicating that the current statutes do not protect public disclosures).

turning to the media is a quick way for whistleblowers to inform a large number of third-party victims of the dangers posed by environmental damage.¹⁷⁷ Finally, the failure to protect whistleblowers that identify violations of the scientific method excludes an important type of misconduct that poses a real danger to the public and ignores the reality facing whistleblowers in the science sector.¹⁷⁸

The definition used should be reformed to include whistleblowers who make disclosures to the media and/or online, and whistleblowers who report violations of “scientific integrity.” “The former change would give whistleblowers easier access to a wider audience and would protect those who speak to the media without understanding the nuances of relevant laws.¹⁷⁹ The latter change would recognize the reality of the situation facing environmentalists and scientists who often witness the production of bad science that falls outside traditional understandings of “misconduct.”

Expanding the definition of whistleblowing to include reports to the media would not be unprecedented.¹⁸⁰ Though uncommon, there are federal statutes that protect whistleblowers that make reports to the media, such as the Federal False Claims Act and the whistleblower protections found in the Occupational Health and Safety Act.¹⁸¹ The original federal Whistleblower Protection Act of 1989 went even further to permit federal employees to report to any person at all.¹⁸² Similar provisions in state and federal statutes for environmental whistleblowers would ensure that more of these whistleblowers are protected from discrimination and that they are more able to make news of environmental wrongdoing available to the public.¹⁸³

177. See *id.* (suggesting that protecting public disclosures would aid potential whistleblowers).

178. See Russo, *supra* note 3 (discussing the problems faced by potential whistleblowers concerned with protecting scientific integrity).

179. See Hesch, *supra* note 45 at 88 (recommending that whistleblower protection statutes be expanded to include media disclosures).

180. See Sinzdak, *supra* note 5, at 1656 (noting that “federal law does protect employees who blow the whistle to the media in some cases”).

181. See *id.* at 1656–57 (stating that the Federal False Claims Act “protects those who make an initial report to the media”).

182. See *id.* (providing background on the practice of providing protection for public disclosures).

183. See *id.* at 1658–59 (explaining why providing whistleblower

Likewise, there are statutes that specifically cover situations faced by whistleblowing scientists.¹⁸⁴ For example, the recently passed 2012 Whistleblower Protection Enhancement Act (“WPEA”) takes steps to protect government scientists from scientific censorship.¹⁸⁵ Section 110, “Disclosure of Censorship Related to Research, Analysis, or Technical Information” defines scientific censorship as, “any effort to distort, misrepresent or suppress research, analysis or technical information” and protects against such censorship when employees reasonably believe that it may cause gross government waste or mismanagement, that may pose a substantial and specific danger to public health or safety, or that constitutes violates the law.¹⁸⁶ By passing the WPEA in fall of 2012, Congress demonstrated willingness to actively protect government scientists from censorship and to recognize the unique challenges scientists face when blowing the whistle. A similar reform to state and federal statutes protecting environmental whistleblowers would ensure that environmental scientists too are explicitly protected from scientific censorship.

3. *Insufficient Remedies (State)*

The anti-retaliatory approach is intended to protect whistleblowers that go public from retaliation by their employers.¹⁸⁷ However, current approaches to whistleblowing legislation fail to protect whistleblowers from job loss or blackballing and to penalize supervisors responsible for engaging in retaliatory practices.¹⁸⁸ Given that 60% of whistleblowers lost

protection for media disclosures would be beneficial).

184. See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 110, 126 Stat 1465 (providing an example of protections for scientists).

185. See *id.* (describing how government scientists are afforded whistleblower protection).

186. *Id.*

187. See OSHA FACT SHEET, *supra* note 53 (2013) (outlining worker rights when an employer retaliates against the worker for whistleblowing).

188. See Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES (Sept. 21, 2012), http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html?pagewanted=all&_r=0 (discussing the consequences whistleblowers are likely to face) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

their jobs after going public, employment security is a very real issue for whistleblowers.¹⁸⁹ However, no state statute provides a “transfer preference for prevailing whistleblowers or a ban on blackballing.”¹⁹⁰ Additionally, research shows that positive and negative pressures regarding whistleblowing can shape behaviors in the workplace.¹⁹¹ However, few states use negative incentives to discourage supervisors from engaging in retaliatory practices in the first place.¹⁹²

State anti-retaliatory statutes should be reformed to provide transfer preference for a prevailing whistleblower and/or a ban on blackballing. Additionally, these statutes could better discourage supervisors from engaging in retaliatory practices by providing penalties for managers found to have retaliated.¹⁹³ These changes would be especially valuable in the environmental sector because they would help address the “revolving door” problem that gives industry the power to influence regulators.¹⁹⁴ Indeed, by reducing potential environmental whistleblowers’ fears of employment instability, these changes would empower public and private employees to speak out against wrongdoing.¹⁹⁵ By increasing potential retaliators’ fears of punishment and potential job loss, these statutes would provide a counterbalance to the power private interests hold by virtue of the “revolving

189. Sinzduk, *supra* note 5, at 1655 (citing a 1992 study of consequences faced by whistleblowers).

190. Public Employees for Environmental Responsibility (PEER), *supra* note 87.

191. See Goodson, *supra* note 130, at 191 (analyzing different corporate policy approaches to whistleblower protections and their effects on employees).

192. See *id.* at 174 (considering the practical effects of current state whistleblower policies).

193. See *id.* at 173–74 (noting the high degree of difficulty whistleblowers face when trying to avoid retaliation).

194. See Halpern & Hansel, *Heads They Win, Tails We Lose: How Corporations Corrupt Science at the Public's Expense*, UNION OF CONCERNED SCIENTISTS, (Feb. 2012), <http://www.ucsusa.org/publications/catalyst/su12-heads-they-win-tails-we-lose.html#.VFxfd4fnmGk> (Explaining the special challenges scientific whistleblowers face) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

195. See U.S. Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, 14 (2011) (discussing a study on whistle blowing and fear of retaliation) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

door.”¹⁹⁶

These types of provisions exist in other laws. The prior version of the WPEA, the Whistleblower Protection Act of 1989,¹⁹⁷ both (1) granted job transfer preference to whistleblowers in filling jobs of equivalent status and tenure as the job held by the whistleblowing employee and (2) provided for disciplinary actions against supervisors. The WPEA did not change the former provision, but did strengthen the latter provision by lowering the burden of proof.¹⁹⁸ Additionally, thirteen state statutes already discipline supervisors in some way.¹⁹⁹ State statutes ought to be modified to better protect whistleblowers and penalize retaliators.

4. *Statute of Limitations Too Short (Federal)*

The six federal statutes covering environmental whistleblowers require whistleblowers to report to the Department of Labor (“DOL”) within thirty days of the violation.²⁰⁰ This statute of limitations does not give whistleblowers enough time to weigh their options and take steps to protect themselves.²⁰¹ Environmental whistleblowers in particular would benefit from an extended statute of limitations.²⁰² Potential environmental whistleblowers come from all walks of life, and many may not be aware of the limited time they have to file a complaint or of the procedure for doing so.

Other statutes have been amended to include a longer

196. See Halpern and Hansel, *supra* note 194 (defining the “revolving door” power struggle faced by environmental whistleblowers).

197. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 3352, 103 Stat. 16 (codifying various protections for whistleblowers from retaliation).

198. See *id.*; see also Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 110, 126 Stat. 1465 (lowering the burden of proof from the WPA of 1989).

199. See Public Employees for Environmental Responsibility (PEER), *supra*, note 152

200. See Condit, *supra*, note 95 at 42 (discussing the statutory limitation).

201. See *id.* at 54–55 (discussing who bears the burden of proof and what the standard is).

202. See *id.* at 54 (describing how a longer time limit would be beneficial).

statute of limitations. The original version of the WPEA, the WPA of 1989, expanded the statute of limitations available to federal employees to 180 days.²⁰³ This reform increased the effectiveness of whistleblower laws in protecting federal employees.²⁰⁴ There is no reason that federal employees should have longer to file a complaint than industry employees, factory workers, concerned scientists, reporters, or other environmental whistleblowers. Indeed, federal workers are probably more likely to know about available protections than industry workers or state government representatives because agencies are required by law to train their employees in their rights and remedies under whistleblower protection laws.²⁰⁵ As such, federal environmental statutes should be reformed to provide environmental whistleblowers with at least 180 days to report retaliation.

IV. Conclusion

Minnesota looks different thanks to Fardin Oliaei. PCF contamination is being cleaned up from waste sites.²⁰⁶ Water supplies are being filtered.²⁰⁷ The public is more aware of PCF contamination and the risks it poses to Minnesota communities.²⁰⁸ Oliaei's actions protected public health and the environment.²⁰⁹ Despite the positive changes she made, Oliaei describes the lessons she learned from her experience by saying:

I had intended to make a positive example [for my

203. See *id.* (noting the increase in the time limit for reporting of the WPEA).

204. See *id.* (discussing the influence of the burden of proof reform of the WPA on other State and Federal regulations).

205. See *Blowing the Whistle*, *supra* note 195, at 14 (2011) (reporting the MSPB's findings on the effectiveness of current whistleblower protections).

206. See *Mosedale*, *supra*, note 102 (reporting the results of a whistleblower in Minnesota).

207. See *id.* (highlighting the benefits of a successful whistleblower in Minnesota).

208. See *id.* (describing the result of a successful whistleblowing in Minnesota).

209. See *id.* (summarizing the outcome of a whistleblower's actions in Minnesota).

kids and my community]. I wanted to stand up for what was right. I wanted to use good science to advance the mission of the MPCA: protecting the public health and environment. Instead, I failed I took my kids home away. I took their security away With what happened to me, I set a negative example for the next generation: if you work in a state agency, keep your mouth shut. Stay quiet because you are going to be destroyed.²¹⁰

Her words suggest that she is much like other whistleblowers, who would not blow the whistle again if they got a “do over.” The reforms proposed in this paper seek to change this bleak situation by providing environmental whistleblowers with the proper incentives and protections to ensure that they would act to protect public health and the environment again and again. Such reforms would set a positive example for future generations: wherever you work, feel free to speak up and speak out because our legal regime will protect and reward you for your bravery.

210. See Interview with Fardin Oliaei, *supra*, note 126 (describing the personal feelings of a whistleblower who had to face enormous consequences).