

UNITED STATES DEPARTMENT OF AGRICULTURE

Climate-Smart Agriculture and Forestry
Partnership Program

86 Fed. Reg. 54149 (Sept. 30, 2021)

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USDA-2021-0010

COMMENTS OF FOOD & WATER WATCH

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Submitted on behalf of the commenter listed above by:

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I. INTRODUCTION

Food & Water Watch (“FWW”) respectfully submits these comments on the Climate-Smart Agriculture and Forestry Partnership (“CSAF”) Program (Docket No. USDA-2021-0010), published by the United States Department of Agriculture (“USDA” or “Agency”) on September 30, 2021.¹

FWW is a national, non-profit, membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people’s health, communities, and democracy from the growing destructive power of the most powerful economic interests. Industrial livestock pollution, including the contributions of industrialized agriculture to climate change, is one of FWW’s priority issues.

FWW strongly urges USDA to abandon a CSAF program that hinges on the creation and facilitation of a carbon offset market, or that incentivizes the production and use of livestock biomethane, also known as factory farm biogas. Despite USDA’s claim that the agency has authority to create such a program, it does not. The Agency may only rely on its discretionary powers to use Commodity Credit Corporation (“CCC”) funds when it aims to expand or develop new markets for *agricultural commodities*. Neither “climate-smart” agricultural production practices, nor industrial livestock waste or waste byproducts constitute “agricultural commodities” as contemplated by the CCC’s enabling statute. Therefore, absent congressional authorization, USDA cannot lawfully move forward with this program.

Furthermore, a CSAF program that allows agricultural operators to generate credits for practices that have dubious climate benefits, and in some cases, outright harmful environmental and public health impacts, is patently arbitrary and capricious. Given the significant environmental impact such a program would have, USDA must conduct a searching review of its proposed CSAF program per the National Environmental Policy Act (“NEPA”). Upon full consideration of the adverse environmental impacts of this proposed action, the Agency will find that the environmental and public health threats associated with the CSAF program, as currently envisioned, far outweigh any potential benefit.

¹ 86 Fed. Reg. 54149 (Sept. 30, 2021). Per the agency’s request to include reference to which questions posed in its request for information the comment addresses, FWW specifically directs this comment to USDA’s questions 2 and 3. *Id.* at 54151 (regarding the scope of the CSAF program and the types of CSAF activities that should be eligible).

II. USDA LACKS THE AUTHORITY TO CREATE THE PROPOSED CARBON OFFSET MARKET

USDA is misguided in its belief that the Commodity Credit Corporation Charter Act of 1933 authorizes it to create a carbon offset scheme that develops new markets for agricultural waste, waste byproducts, and other purportedly climate-smart production and management practices. Simply put, it does not.

The Agency cites as its authority 15 U.S.C. 714c(5),² which gives the CCC the power to “[i]ncrease the domestic consumption of agricultural commodities (other than tobacco) by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, market facilities, and uses for such commodities.” In other words, USDA may only use CCC funds to expand markets for *agricultural commodities*.

The Act defines “agricultural commodities,” somewhat circularly, to include “agricultural commodities, products thereof, foods, feeds, and fibers.” 15 U.S.C. § 714. The Act fails to include any mention of upstream production practices used to create the commodity, or animal waste streams created incident to the commodity. Other federal laws that more explicitly define the term similarly limit it to crops or products derived from those crops. *See e.g.*, 7 U.S.C. § 128a(c) [Agricultural Adjustment Act] (“Agricultural products” include “meat, poultry, vegetables, fruits, and all other agricultural commodities in raw or processed form, except for forestry products or fish. . .”); 7 U.S.C. § 1310(c) [American Agriculture Protection Program] (“the term ‘commodity’ shall include any of the following: wheat, corn, grain, sorghum, oats, rye, barley, flaxseed, and cotton.”).

And provisions of federal law that specifically discuss commodities within the context of CCC operations more specifically define the term to mean edible, agricultural end products. *See* 14 U.S.C. § 1431(b)(2) (“eligible commodities” means “dairy products, wheat, rice, feed grains, and oilseeds acquired by the Commodity Credit Corporation through price support operations . . . and such other edible agricultural commodities as may be acquired by the CCC in the normal course of operations . . .”).³ In sum, nowhere in the CCC authorizing statute, or in any other relevant provision of federal law, do agricultural production practices like conservation tillage, or agricultural waste streams, like animal manure or the methane it produces, fall within the meaning of the term agricultural commodities.

Nevertheless, USDA has attempted to shoehorn its desire to market these non-commodities into its market expansion power by framing the proposed market as one for so-

² *See* 86 Fed. Reg. at 54150.

³ For a full accounting of the way “agricultural commodity” is defined throughout the federal code, *see* Geoffrey Becker, “Agricultural Commodity,” “Agricultural Product,” “Farm Product” and Related Terms: Definitions for Federal Policy, CRS Report RS21370 (Dec. 16, 2002), available at: https://www.everycrsreport.com/files/20021216_RS21370_b0e5b8ba7de4e939c593b8d6cf1927f62d5659ff.pdf.

called “climate-smart agricultural commodities,” which are “produced using farming practices that reduce greenhouse gas (GHG) emissions or sequester carbon.”⁴ However, this creative characterization does not give USDA authority that Congress has not granted it. The purpose of § 714c(e) is to grant USDA power to engage in market activities that would “increase domestic consumption of agricultural commodities.” As such, USDA could properly rely on its § 714c(e) power, for instance, to expand markets for grass-fed beef, organic produce, or other “climate-smart” commodity products, thereby increasing consumption of those products. But that is not what the Agency is proposing. USDA aims to expand markets, not for the commodities themselves, but rather, for the supposed climate benefits achieved through the production of commodity crops, or management of agricultural waste. Doing so would undermine and exceed the congressional intent underlying this USDA discretionary power.

III. USDA MUST CONDUCT A SEARCHING NEPA REVIEW OF THE PROPOSED ACTION

NEPA is America’s “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA ensures that federal agencies “will have available, and will carefully consider, detailed information concerning significant environmental impacts” and that such information “will be made available to the large [public] audience that may play a role in both the decision-making process and the implementation of the decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To this end, NEPA requires federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). As currently envisioned, the CSAF program would commit the Agency to exerting federal control over the development, verification, and sale of agricultural offsets, likely requiring a multi-billion-dollar federal investment.⁵ The proposed action undoubtedly constitutes a major federal action, triggering NEPA review. *See* 40 C.F.R. § 1508.18 (major federal actions include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies,” including “adoption of programs, such as a group of concerted actions to implement a specific policy or plan” that allocate “agency resources”).

NEPA evaluation must take place “before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(a). Such an approach ensures that agencies will take the requisite “hard look” at environmental consequences before approving any federal action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). “It is only when the proposed action ‘will not have a

⁴ 86 Fed. Reg. at 54149-50.

⁵ *See* USDA, *FY 2022 Budget Summary*, 17, available at: <https://www.usda.gov/sites/default/files/documents/2022-budget-summary.pdf> (allocating over \$1.4 billion towards investment in climate smart agriculture, forestry, and clean energy activities).

significant effect on the human environment,' 40 C.F.R. § 1508.13, that an EIS is not required.” *Nat’l Audubon Soc. v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997).

Whenever a question exists as to whether an EIS is required, an agency must ordinarily at least prepare an Environmental Assessment (“EA”), which is used to determine whether the environmental effects of the action are “significant” and therefore require the preparation of an EIS. 40 C.F.R. § 1501.4. An EA is “a concise public document that briefly provides evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact.” *Id.* at § 1508.9. Similar to an EIS, an EA must contain a description of the purpose and need of the proposed action, an analysis of the environmental effects of the proposed action, as well as a range of reasonable alternatives and the environmental effects of such alternatives. *Id.* at § 1508.9(b).

A. NEPA Review is Required Because No Categorical Exclusions Apply to the Proposed Action

USDA has indicated it will rely on the CCC,⁶ and possibly the Farm Service Agency (“FSA”) and Natural Resources Conservation Service (“NRCS”)⁷ to administer the proposed CSAF program. USDA’s NEPA implementing regulations do not categorically exclude any of these agencies from the preparation of an EA or EIS. *See* 7 C.F.R. § 1b.4(b). Therefore, unless the action itself falls under a categorical exclusion, the agency or agencies responsible for administering the CSAF program are subject to NEPA requirements.

No general categorical exclusion applies to the proposed action. USDA has determined that seven categories of activities do not have a significant individual or cumulative effect on the human environment, the most relevant of which is activities like budget proposals, or disbursements “that deal solely with the funding of programs,” and activities related to “trade representation or market development abroad.” 7 C.F.R. § 1b.3(a)(2) and (7).⁸ However, these provisions do not apply to the CSAF program and cannot exclude it from NEPA review. The first deals with activities that are “solely” related to program funding, and thus cannot apply to the CSAF program, which requires Agency action beyond pure funding, including but not limited to credit verification and market facilitation. And while exclusion 7 applies to market

⁶ *See* 86 Fed. Reg. at 54149.

⁷ USDA, *Climate-Smart Agriculture and Forestry Strategy: 90-Day Progress Report*, 8 (May 21, 2021), available at: <https://www.usda.gov/sites/default/files/documents/climate-smart-ag-forestry-strategy-90-day-progress-report.pdf>.

⁸ The full list of USDA exclusions is: (1) routine activities related to personnel or administrative functions, (2) activities like budget proposals, or disbursements, that deal solely with the funding of programs, (3) research activities that are clearly limited in context and intensity, (4) educational programming, (5) enforcement and investigative activities, (6) advisory and consultative activities like legal counseling, and (7) activities related to trade or market development abroad. 7 C.F.R. § 1b.3.

development activities, these are *only* activities that related to markets “abroad,” not domestic market development, as USDA contemplates here.

While certain exclusions specific to FSA and NRCS actions relate to the funding of specific agricultural conservation and loan activities, no exclusions apply either to factory farm biogas development or broader domestic carbon market development. *See* 7 C.F.R. § 650.6 (NRCS) and 7 C.F.R. § 799.31-32 (FSA).⁹

B. USDA Must Prepare an EIS Because the Proposed Action Will Have Significant Environmental Impacts

The Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA that are “binding on all Federal agencies.” 40 C.F.R. § 1500.3. These regulations instruct that determining whether an action will have a “significant” impact on the environment, thus warranting the preparation of an EIS, requires considerations of both “context” and “intensity.”¹⁰ 40 C.F.R. § 1508.27. The presence of any one of CEQ’s “significance” factors “should result in an agency decision to prepare an EIS.” *Pub. Serv. Co. v. Andrus*, 825 F. Supp. 1483, 1495 (D. Idaho 1993); *see also LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988).

Consideration of a project’s intensity includes evaluation of “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts,” 40 C.F.R. § 1508.27(7). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” *Id.* In addition, “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,” “are likely to be highly controversial,” or “establish a precedent for future actions with significant effects,” are also factors evaluated to determine the significant impact and intensity of a proposed action. *Id.* at 1508.27(4)-(6).

⁹ Even if USDA found certain categorical exclusions to apply to the CSAF program, agency heads may nevertheless “determine that circumstances dictate the need for preparation of an EA or EIS for a particular action,” and therefore must continually “scrutinize their activities to determine continued eligibility for categorical exclusion.” 7 C.F.R. § 1b.3(c). *See also* 40 C.F.R. § 1508.4 (requiring Federal agencies to adopt procedures to ensure that categorical exclusions are not applied to proposed actions involving extraordinary circumstances that might have significant environmental effects). USDA must engage in this “extraordinary circumstances” analysis, which tracks the “significant” environmental impact analysis discussed below, before attempting to apply a categorical exclusion or otherwise evade NEPA review of the proposed program. *See Humane Soc’y of the United States v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C. 2007) (holding that USDA may not avoid NEPA review simply by failing to consider whether a normally excluded action may have a significant environmental impact); *see also CEQ, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*, 5-6 (Nov. 23, 2010). *See also* 7 C.F.R. § 799.34 (listing the extraordinary circumstances requiring further NEPA review of otherwise excluded FSA actions); 7 C.F.R. § 650.6(c) (listing the same for NRCS actions).

¹⁰ “Context” means that the significance of an action must be analyzed in several different contexts (i.e., national, regional, and local significance of the action) and “intensity” refers to the severity of the impact. *Id.*

If there are “substantial questions as to whether a project . . . may cause significant degradation of some human environmental factor,” the agency must prepare an EIS. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Accordingly, in order for a court to find that an EIS is warranted, “a plaintiff need not show that significant effects will in fact occur,” but rather only that there are “substantial questions whether a project may have a significant effect on the environment.” *Nat. Resources Defense Council v. Winter*, 502 F.3d 859, 867 (9th Cir. 2007) (citations omitted). Here, substantial questions exist as to the effects of the proposed action on the environment, triggering USDA’s duty to prepare an EIS.

1. *The Proposed Action Would Have Cumulatively Significant Impacts*

Creation of a carbon offset market for so-called “climate-smart” agricultural practices that include factory farm biogas production will have cumulatively significant impacts by driving the proliferation of factory farms, along with their well-known water and air quality impacts. The factory farm industry is one of the leading known sources of water pollution in the country,¹¹ and its air pollution, and particularly its ammonia emissions, is responsible for over 12,700 deaths each year—more deaths than are attributed to coal-fired power plants.¹² Moreover, the program would exacerbate the environmental degradation issues associated with biogas production itself. Studies have found that the use of anaerobic digesters to generate methane from livestock manure not only increases the ammonia content of waste, but renders the nutrient pollutants found in animal waste more water soluble.¹³ When this digestate is then land applied, it therefore increases the ammonia emissions leading to thousands of premature deaths, while also increasing the risks of groundwater contamination and nutrient run-off into surface waters.

In addition to the anticipated air and water quality impacts from factory farm and biogas facilities, a federally authorized carbon offset market may lead to other localized hot spots of pollution, and even net *increases* in GHG emissions. Indeed, carbon pricing schemes perpetuate and worsen environmental injustice, because polluters that can avoid emissions reductions by purchasing agricultural offsets will continue to burden nearby communities with toxic air and contaminated water. In some instances, fence-line communities experience pollution *increases* with offset programs.¹⁴

Furthermore, over a decade of carbon pricing schemes has shown that offset programs such as cap-and-trade are not meaningfully reducing emissions, and are actually worse than doing nothing. This is in part due to the fact that polluters often purchase offsets for practices that

¹¹ 2017 National Water Quality Inventory Report to Congress, 8, 11, 18 (Aug. 2017).

¹² Nina G. G. Domingo, et al., *Air quality-related health damages of food*, Proceedings of the National Academy of Sciences, 2 (2021), available here: <https://www.pnas.org/content/pnas/118/20/e2013637118.full.pdf>.

¹³ Michael A. Holly et al., *Greenhouse gas and ammonia emissions from digested and separated dairy manure during storage and after land application*, Agriculture, Ecosystems, and Environment, 410 and 413 (2017); NRCS Conservation Practice Standard 366, 6 (Jun. 2017).

¹⁴ FWW, *Cap and trade: More pollution for the poor and people of color*, 1-2 (Nov. 2019).

would likely have been adopted anyway in the absence of carbon pricing schemes.¹⁵ In fact, a 2014 USDA study estimated that roughly half of all payments for conservation tillage were nonadditional, and fertilizer reduction fared even worse. If these practices were incorporated into a carbon offset program, “a large majority of the offset credits generated would be nonadditional” and would result in increased aggregate emissions.¹⁶

2. *The Proposed Action Will Have Highly Uncertain Impacts*

While some environmental impacts are well-known and can be readily anticipated, other impacts associated with an agricultural offset market are highly uncertain; this is another factor for determining the significance of the proposed action’s effects, and further underscores the need for an EIS. 40 C.F.R. 1508.27(5). Methods for quantifying carbon sequestered in soil and biomass remain underdeveloped and inconsistent. A 2018 study that looked at three common methods for measuring soil carbon found that each lead to differing results. Measurements also changed depending on the soil depth from which samples were taken.¹⁷ In fact, no-till farming methods have been shown to store little to no carbon in the soil, depending on the measurement depths.¹⁸

Relatedly, the length of time that carbon is stored in agricultural lands is also uncertain. Rates of decay can vary by the form in which carbon is stored, as well as by geographic and climatic differences. Some carbon compounds persist for thousands of years and others for only a few hours.¹⁹ And land disturbances can cause rapid carbon releases. Change in agricultural management or severe weather events like wildfires can return sequestered carbon more quickly than estimated for purposes of an offset project, undermining program integrity and climate goals.²⁰

¹⁵ This includes the majority of offsets purchased under mechanisms provided by the Kyoto Protocol, as well as those issued under California’s cap and trade program. See Kollmuss, Anja et al, Stockholm Environment Institute, *Has Joint Implementation Reduced GHG Emissions? Lessons Learned for the Design of Carbon Market Mechanisms*, Working Paper No. 2015-07 at 5 (Aug. 2015); Cames, Martin et al. Prepared for DG CLIMA, *How Additional Is the Clean Development Mechanism? Analysis of the Application of Current Tools and Proposed Alternatives*, 10-11 (Mar. 2016), available at: CLIMA.B.3/SERI2013/0026r; Haya, Barbara, University of California, Berkeley, *Policy Brief: The California Air Resources Board’s U.S. Forest Offset Protocol Underestimates Leakage*, 1 (May 2019).

¹⁶ Claassen, Roger et al. USDA Economic Research Service (ERS), *Additionality in U.S. Agricultural Conservation and Regulatory Offset Programs*, ERR-170 at 41-42 (Jul. 2014).

¹⁷ Gross, Cole D and Robert B. Harrison, *Quantifying and comparing soil carbon stocks: Underestimation with the Core Sampling Method*, Soil Science Society of America. Vol. 82. 949-950 (Aug. 2018).

¹⁸ Manley, James et. al., *Creating carbon offsets in agriculture through no-till cultivation: A meta-analysis of costs and carbon benefits*, Climate Change Vol. 68, 41 (Jan. 2005); Baker, John M. et al., *Tillage and soil carbon sequestration: What do we really know?*, Agriculture, Ecosystems, and Environment Vol. 118, 1, 4-5 (Jan. 2007).

¹⁹ EPA, *Terrestrial Carbon Sequestration: Analysis of Terrestrial Carbon Sequestration at Three Contaminated Sites Remediated and Revitalized with Soil Amendments*, EPA-542-R-10-003, 4 (Feb. 2011).

²⁰ Kim, Man-Keun et al., *Permanence discounting for land-based carbon sequestration*, Ecological Economics Vol. 64, 763-4, 768 (2008).

With such highly uncertain and temporary climate benefits, USDA cannot properly move forward without an EIS. This is especially the case where USDA hopes to offset fossil fuel-related GHG emissions with these potentially dubious agriculture offsets, since fossil fuel reservoirs, if left undisturbed, unequivocally trap carbon for millennia.²¹

3. *The Proposed Action Will Have Highly Controversial Impacts*

The controversial nature of pollution trading markets, especially those that rely on factory farm biogas as an offset-generating activity, is undeniable. This controversy is yet another relevant factor for determining the significance of the Proposed Action's effects. 40 C.F.R. § 1508.27(4).

Precisely because the climate benefits of such schemes are dubious at best and non-existent at worst, and often lead to other significant adverse environmental impacts, numerous communities and organizations oppose the expansion of carbon offset markets and factory farm biogas.²² In fact, just last week, four organizations, collectively representing millions of members and supporters nationwide petitioned the California Air Resources Board to exclude factory farm biogas from one of its carbon offset markets, the Low Carbon Fuel Standard, for many of the reasons cited in this comment.²³ Similarly, in April 2021, over two dozen environmental and farmer organizations staunchly opposed federal reliance on factory farm biogas development as a false solution to climate change.²⁴

4. *The Proposed Action Will Establish a Precedent for the Future Development of a Federally Authorized Pollution Compliance Market*

For now, USDA is only focused on the verification and sale of agriculture offsets into voluntary carbon offset markets. However, the proposed action sets a clear precedent for participation in existing or future compliance markets, in which the purchase of USDA-verified offsets can satisfy federal or state environmental requirements. Indeed, USDA officials directing the Agency's climate policy have alluded to a compliance market as the logical next step for the

²¹ Yang, Judy Q. et al., *4D imaging reveals mechanisms of clay-carbon protection and release*, Nature Communications Vol. 12, No. 622, 2 (2021); US Global Research Program, *Second State of the Carbon Cycle Report: A Sustained Assessment Report*, 47 (Nov. 2018).

²² See e.g., FWW, *Off Course: Carbon Pricing Myths and Dirty Truths* (Jun. 2021), available at: https://www.foodandwaterwatch.org/wp-content/uploads/2021/06/IB_2106_AgCarbonOffsets-WEB.pdf; FWW, *Biogas From Factory Farm Waste has No Place in a Clean Energy Future* (July 2019), available at: https://foodandwaterwatch.org/wp-content/uploads/2021/03/ib_1906_biogas_manure-2019-web.pdf.

²³ Vermont Law School Environmental Justice Clinic et al., *Petition for Rulemaking to Exclude all Fuels Derived from Biomethane from Dairy and Swine Manure from the Low Carbon Fuel Standard Program* (Oct. 27, 2021), available at: <https://food.publicjustice.net/wp-content/uploads/sites/3/2021/10/Factory-Farm-Gas-Petition-FINAL.pdf>.

²⁴ Public Justice et al., *Petition to List Industrial Dairy and Hog Operations as Source Categories Under Section 111(b)(1)(A) of the Clean Air Act* (Apr. 6, 2021) available at: <https://food.publicjustice.net/wp-content/uploads/sites/3/2021/04/2021.04.06-Industrial-Dairy-and-Hog-CAA-111-Petition-FINAL.pdf>.

CSAF program.²⁵ The practical effect would be that industrial polluters that would otherwise be required to control or ratchet down their GHG emissions would no longer have to do so, leading to additional impacts to the climate and nearby communities directly burdened by GHG co-pollutants.²⁶

IV. CONCLUSION

FWW urges USDA to abandon elements of the proposed CSAF program that involve the development and expansion of carbon offset markets and incentives for factory farm biogas production. Not only does USDA lack the authority to create such a program in the first place, but the proposed action will also lead to significant and adverse environmental impacts. At minimum, USDA must conduct a thorough NEPA review and prepare an EIS that analyzes the nature and magnitude of those impacts.

Thank you for considering our comments.

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²⁵ Robert Bonnie et al., *Transition Memo: United States Department of Agriculture*, Climate 21 Project 9 available at: https://climate21.org/documents/C21_USDA.pdf. See also, Robert Bonnie et. al., *Rural Investment: Building a Natural Climate Solutions Policy Agenda that Works for Rural America and the Climate*, 43-44 (May 2020) available at: <https://nicholasinstitute.duke.edu/sites/default/files/publications/Rural-Investment-Building-a-Natural-Climate-Solutions-Policy-Agenda.pdf>.

²⁶ Raul P. Lejano et al., *The Hidden Disequities of Carbon Trading: Carbon Emissions, Air Toxics, and Environmental Justice*, *Front. Environ. Sci.* (Nov. 10, 2020), available at: <https://www.frontiersin.org/articles/10.3389/fenvs.2020.593014/full>.