No. 17-526

In the Supreme Court of the United States

CITY OF ROCKINGHAM, NORTH CAROLINA, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's decision to issue a new license for an existing hydroelectric project was rationally explained and supported by substantial evidence concerning the minimum instream flow that the Commission required the licensee to maintain below its power generating facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is reprinted at 702 Fed. Appx. 106. The orders of the Federal Energy Regulatory Commission are reported at 151 F.E.R.C. ¶ 62,004 and 153 F.E.R.C. ¶ 61,056 (Pet. App. 18a-174a).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2017. The petition for a writ of certiorari was filed on October 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The licensing of hydroelectric projects within the jurisdiction of the Federal Energy Regulatory Commission (FERC or Commission) falls under Subchapter I of the Federal Power Act (FPA or the Act), 16 U.S.C. 791a

et seq., which establishes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 180 (1946). The Act authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects located on jurisdictional waters or lands of the United States. 16 U.S.C. 817(1); see 16 U.S.C. 797(e).

The Commission licenses the project that "will be best adapted to a comprehensive plan for improving or developing a waterway." 16 U.S.C. 803(a)(1); see *S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 374 (2006). The Commission must "give equal consideration" to specified power and non-power values in arriving at a licensing decision. 16 U.S.C. 797(e). Each license must include conditions for protecting, mitigating, and enhancing fish and wildlife affected by the project. 16 U.S.C. 803(j)(1). To develop those conditions, state and federal agencies submit recommendations, which the Commission may modify or decline to adopt after giving them due weight in light of the Act's other requirements. See *American Rivers* v. *FERC*, 201 F.3d 1186, 1201 (9th Cir. 2000) (detailing Section 803(j)).

The Commission may relicense an existing project by issuing a "new" license to the same or a new licensee, for a term ranging from 30 to 50 years. 16 U.S.C. 808(e). Applicants for such licenses conduct studies and report on potential impacts to a wide range of natural resources, including fish and aquatic wildlife. 18 C.F.R. 380.3(b); see 18 C.F.R. 4.51. The Commission then reviews those impacts under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

2. This case concerns the relicensing of the Yadkin-Pee Dee Hydroelectric Project (Project), located on the Yadkin and Pee Dee Rivers in North Carolina. *Duke Energy Progress, Inc.*, 151 F.E.R.C. ¶ 62,004 (License Order), on reh'g, 153 F.E.R.C. ¶ 61,056 (2015);[*] Pet. App. 18a. The flow of the Yadkin and Pee Dee Rivers is controlled by seven dams operated by either the U.S. Army Corps of Engineers, Alcoa Power, or Duke Energy Progress, Inc. (Duke). License Order ¶ 13; C.A. App. 2684. The Project, which is owned and operated by Duke, License Order ¶¶ 1-2; C.A. App. 2681, consists of developments associated with the two lowest dams—Tillery on the Yadkin River and Blewett Falls on the Pee Dee River, License Order ¶¶ 12-18; C.A. App. 2684-2685; see C.A. App. 1221 (map), 1234. Both the Tillery and Blewett Falls developments include a dam, a reservoir created by the dam, a powerhouse, and recreation sites. License Order ¶ 14; C.A. App. 2685. The Project was first licensed in 1958 by FERC's predecessor, the Federal Power Commission, for a term expiring on April 30, 2008. License Order ¶ 4; C.A. App. 2681.

The issue raised in the petition for a writ of certiorari concerns the operation of the Tillery development. The Tillery development includes a 16-mile-long, 5697-acre reservoir (Lake Tillery), impounded by a 2752-foot-long dam, and a powerhouse housing four turbine-generator units, for a total installed capacity of 84 MW. License Order ¶¶ 15-16; C.A. App. 2685. The Blewett Falls development is smaller, with a total installed capacity of 24.6 MW. License Order ¶ 19; C.A. App. 2685-2686. Duke operates the Tillery development in load-following mode on weekdays, meaning that power output is adjusted as

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[*] The License Order is reproduced at C.A. App. 2681-2854.

demand for power fluctuates throughout the day. License Order ¶ 24 & n.18; C.A. App. 2687. Tillery either shuts down or greatly reduces electrical output at night and in the early morning, when demand is lowest. *Ibid.* It also does not generally generate power on the weekends. *Ibid.* Under the 1958 license, Duke was required to release a year-round continuous minimum flow of 40 cubic feet per second (cfs) from the Tillery development. License Order ¶ 26; C.A. App. 2687.

3. a. In 2003, Duke's predecessor initiated the process for relicensing the Project. Pet. 4. Using the collaborative relicensing process described in FERC's regulations, 18 C.F.R. Pt. 5, Duke engaged interested stakeholders in planning and executing studies of all resources impacted by the Project, including aquatic and recreation resources—the primary source of petitioners' concerns. See Office of Energy Projects, FERC, *Hydropower Primer* 30 (Feb. 2017), https://www.ferc.gov/legal/staff-reports/2017/hydropower-primer.pdf (describing the pre-filing process).

In April 2006, Duke filed reports and the results of those studies with the Commission as part of its license application. Pet. App. 21a; see C.A. App. 228-689 (License Application). To analyze aquatic habitat needs, Duke used the Physical Habitat Simulation System, a computer-based modeling program, to quantify habitat over a given range of flows. Pet. App. 60a. Three possible outputs of that system are used to determine available habitat: weighted usable area, Index C, and dual flow analysis. *Ibid.* Weighted usable area is an "estimate of the area of suitable habitat that is available to a species and/or life stage per unit length of a stream at a given flow." *Ibid.* Index C is a "summary statistic from a large amount of weighted usable area data." *Ibid.* In

a dual flow analysis, "the availability of suitable physical habitat (weighted usable area) is estimated for the minimum and maximum flows over a time series." *Id.* at 60a-61a. Duke reported its results to the Commission using the Index C methodology, and it also performed a limited dual flow analysis. *Id.* at 61a; see License Order ¶¶ 157-158; C.A. App. 1330, 2728; see C.A. App. 645, 658.

b. After Duke filed its license application, 17 entities such as federal and state agencies, local governments, and environmental organizations—including petitioners—intervened and filed comments. Pet. App. 6a.

Pursuant to 16 U.S.C. 803(j), the U.S. Fish and Wildlife Service submitted to FERC a recommendation for enhanced minimum flows. License Order ¶¶ 126-135; C.A. App. 2716-2719; see Pet. App. 59a; C.A. App. 741. The Fish and Wildlife Service recommended minimum flows for the Tillery Reach (*i.e.*, the stretch of river between the Tillery development and Blewett Falls Lake, see License Order ¶ 27; C.A. App. 2687) of 800 to 1000 cfs from May 16 to January 31, and 1500 to 1800 cfs from February 1 through May 15, to improve American shad spawning. Pet. App. 59a. Petitioners supported that recommendation. *Id.* at 22a, 59a.

Duke reached a settlement with nearly all the stakeholders over virtually all disputed issues, including minimum flows. See License Order ¶ 7; C.A. App. 2683. Petitioners participated in that process but were the only two stakeholders that did not join the final settlement. Pet. App. 6a. The settlement proposed to increase the 40 cfs minimum flow established in the 1958 license to a year-round continuous minimum flow of 330 cfs—more than an eight-fold increase. License Order ¶ 33; C.A. App. 2688-2689. The settlement further proposed that Duke provide a continuous minimum flow of 725 cfs for

an eight-week period in the spring, to support spawning habitat for shad. *Ibid.*

c. Commission staff issued a Final Environmental Impact Statement (Final EIS) addressing the full range of resource issues associated with the Project, including minimum flows in the Tillery Reach. C.A. App. 1329-1342, 1509-1511. The Final EIS described the data received from Duke and evaluated a range of minimum flows. *Id.* at 1330-1331. After noting that the Fish and Wildlife Service's recommendation for enhanced flows was not evaluated in Duke's data because the recommendation was received after Duke's submission, the Final EIS described the Commission staff's own analysis, which compared aquatic habitat impacts under all three flow proposals: the existing flow regime under the 1958 license, the flow regime proposed in the settlement, and the Fish and Wildlife Service's recommendation for enhanced flows. See *id.* at 1332-1341. Where Duke used the Index C output for its analysis and performed a limited dual flow analysis, the Commission relied on a weighted usable area analysis. *Id.* at 1332.

Ultimately, the Commission concluded in the Final EIS that, although both the flow regime proposed in the settlement and the enhanced flows recommended by the Fish and Wildlife Service "would result in a substantial improvement in aquatic habitat over the existing minimum flow," the enhanced flows recommended by the Fish and Wildlife Service offered only a minor incremental improvement over the flow regime proposed in the settlement. C.A. App. 1332; see *id.* at 1509. On balance, the Commission concluded that the "greater annual cost of $1,227,500 for the higher flows recommended"

by the Fish and Wildlife Service (and supported by petitioners) "would not be worth the minor incremental improvement to downstream aquatic habitat." *Id.* at 1511.

d. On April 1, 2015, the Commission, acting through authority delegated to the Office of Energy Projects, issued a new 40-year license for the Project. License Order ¶ 3; C.A. App. 2681; see Pet. App. 25a. The Commission approved the minimum flows for the Tillery Reach proposed in the settlement and recommended by Commission staff in the Final EIS. See License Order ¶¶ 127-135, 153-159, Art. 403; C.A. App. 2716-2719, 2726-2729, 2761. The Commission concluded that the conditions proposed in the settlement would result in a Project that "is best adapted to a comprehensive plan for improving or developing the Yadkin–Pee Dee River system." License Order ¶ 229; C.A. App. 2750. The Commission relied on its staff's analysis, which showed that "Duke's proposed year-round flow of 330 cfs would substantially improve the availability of fish and aquatic invertebrate habitat over existing conditions," while petitioners' preferred flows "would not result in significantly more habitat than Duke's proposed flows." Pet. App. 65a-66a; see *id.* at 60a-62a; License Order ¶¶ 153-159; C.A. App. 2726-2729. After examining the annual costs of each proposal, the Commission determined that the incremental increase in habitat provided by petitioners' preferred flows "did not justify the costs, and [the] recommendation was thus inconsistent with the equal consideration and comprehensive development standards of FPA sections 4(e) and 10(a)(1)." Pet. App. 66a-67a.

e. On rehearing, the Commission affirmed. Pet. App. 18a-174a. Petitioners argued that the Commission "should have required Duke to disclose its [Physical

Habitat Simulation System] models so that staff could validate the study results." *Id.* at 61a. The Commission rejected that argument. *Id.* at 63a. It explained that the Physical Habitat Simulation System "is standard and is generally available, so that, while [the Commission] did not require Duke to provide it, [petitioners] could have readily obtained it." *Ibid.* The Commission further explained that "in its final instream flow report that accompanied its license application, Duke disclosed its input data and the results so that [petitioners] could have challenged any information it believed to be incorrect." *Ibid.*

4. The court of appeals affirmed in an unpublished, non-precedential decision. Pet. App. 1a-17a. As relevant here, the court rejected petitioners' argument that the Commission "failed to complete the record with respect to the continuing impacts of Project operations on fish." *Id.* at 11a. The court explained that petitioners' argument was based on a disagreement with FERC's decision to use the weighted usable area output for the Physical Habitat Simulation System. *Ibid.* The court concluded that FERC had adequately explained its reasons for using the weighted usable area output rather than petitioners' preferred dual flow analysis, and "that decision warrants deference." *Id.* at 11a-12a. The court explained that petitioners' preference for the dual flow analysis "simply amounts to an expression of disagreement" and "provide[s] no basis for [the court] to conclude that FERC's choice was not reasonable." *Id.* at 12a. The court stated that "[t]his is exactly the sort of technical issue for which deference is designed." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 16-28) that in determining the license requirements for minimum flows in the Tillery Reach, the Commission relied on a modeling methodology that was "not shared with the agency, and not placed in the record," and thereby "ma[de] it impossible" for the court or the public "to discern the decision-making path of the agency." Pet. 18. That contention does not merit this Court's review. The Commission adequately explained its choice of methodology for analyzing the impacts of various proposed flows on aquatic habitat below the Tillery Dam, and the court of appeals properly deferred to Commission's reliance on its own experts to determine minimum stream flow requirements.

1. a. Under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, an agency order may be set aside if it is unsupported by substantial evidence or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. 706(2)(A) and (E). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985) (citation omitted). "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course * * * is to remand to the agency for additional investigation or explanation." *Id.* at 744.

In this case, the court of appeals correctly concluded that the Commission's decision was supported by substantial evidence and was not arbitrary or capricious. The court explained that the Commission properly chose to utilize the weighted usable area output from the Physical Habitat Simulation System and adequately explained why it chose that method over the dual-flow analysis output. Pet. App. 11a-12a. The court explained that FERC had "reasonably explained its choice of technical methodology" and that petitioners had "provide[d] no basis for [the court] to conclude that FERC's choice was not reasonable." *Id.* at 12a.

b. Petitioners contend (Pet. 16-20) that the Commission's decision not to require Duke to submit its water-flow model to the agency prevented the court of appeals from discerning the Commission's decisionmaking path and made it impossible to determine whether the agency's decision was arbitrary or capricious. That contention does not warrant this Court's review.

i. As an initial matter, petitioners did not present this argument to the court of appeals. In the court below, petitioners primarily argued that the Commission selected the wrong methodology for its analysis, and (to a lesser extent) that the Commission should have required Duke to provide its complete water-flow model to petitioners. Pet. C.A. Br. 33-43. Now, petitioners contend that Duke did not disclose data sufficient to allow the Commission to conduct its *own* analysis of minimum flows. That issue was not presented or passed upon in the court of appeals, and the Court's "traditional rule" therefore precludes a grant of certiorari. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

ii. In any event, petitioners misapprehend the factual record. As petitioners acknowledge (Pet. 12-13),

Duke used the Physical Habitat Simulation System, which is available to the public, to quantify habitat for the minimum flows in the proposed settlement. Petitioners complain (Pet. 13) that the software cannot analyze the effects of a given flow on habitat until it is "customized with inputs specific to a river, which then allows [the software] to function as a water-flow model for that river." *Ibid.* But as FERC explained in its rehearing order and as petitioners acknowledge (*ibid.*), "Duke disclosed its input data," including the water flow and river characteristics that Duke used to develop its model, and petitioners thus "could have challenged any information [they] believed to be incorrect." Pet. App. 63a; see C.A. App. 610-665 (explaining Duke's modeling inputs and outputs). The "inputs specific to [the] river, which then allows [the software] to function as a water-flow model for that river," were thus not missing from the record, as petitioners contend (Pet. 13).

Furthermore, the Commission did not rely on Duke's water-flow model "sight-unseen" (Pet. 18-19) or fail to independently perform its own calculations (Pet. 6). The Commission, like petitioners, possessed the unchallenged input data that Duke used to determine available habitat for the flows proposed by the settlement using the Physical Habitat Simulation System. The Commission's professional staff of fishery biologists, aquatic ecologists, and other specialists used those data to analyze how the three competing flow proposals—existing flows under the 1958 license, flows proposed by the settlement, and flows recommended by the Fish and Wildlife Service—would impact aquatic habitat. C.A. App. 1332 (referencing weighted usable area curves developed by Commission staff for each of the competing flow proposals). The Commission also analyzed the data

using the weighted usable area method—a different output method than the Index C and limited dual flow analysis performed by Duke. Pet. App. 61a-62a; see also C.A. App. 1332-1341. Petitioners' suggestion (Pet. 18-19) that the Commission "outsourced" its licensing decision to Duke is thus refuted by the record.

Nor did the Commission "prevent[] meaningful public participation" (Pet. 19) by declining to require Duke to provide petitioners with additional information about its model. Petitioners acknowledge that they had access to the modeling software used by Duke (Pet. 14-15), the inputs Duke entered into that system (Pet. 13), and the services of "the nation's leading water-flow experts" (Pet. 6) throughout the proceeding. Petitioners have never challenged any of Duke's input data. Pet. App. 63a. They could have used that data to analyze the different flow proposals, just as the Commission's staff did.

c. Petitioners contend (Pet. 20-26) that this case presents an opportunity for the Court to announce that agencies cannot "decide cases based on scientific methods that are not placed in the record or made available to the parties" (Pet. 5)—referred to by petitioners as "black box" decisionmaking. According to petitioners (Pet. 25-28), condemnation of such decisionmaking is necessary to allow for meaningful judicial review and thereby prevent agencies (or private parties) from usurping the judicial function.

For the reasons discussed above (pp. 10-12, *supra*), this case does not present the Court with an opportunity to "condemn[] 'black box' decisionmaking by federal agencies" (Pet. 25) because Duke's analysis of the effects of its proposed minimum flows was performed pursuant to a publicly available software program using input data that Duke provided to the Commission and to

the public. The Commission's scientific analysis of Duke's proposed flows against the current flow requirements and the enhanced flows recommended by the Fish and Wildlife Service was adequately explained. Pet. App. 61a-62a; C.A. App. 1332. And the court of appeals properly deferred to the agency's scientific analysis of the proposals. Pet. App. 12a (concluding that FERC "reasonably explained its choice of technical methodology" and that "[t]his is exactly the sort of technical issue for which deference is designed"). This Court recently recognized that the narrow scope of judicial review provided in the APA is appropriate and justified. See *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016) ("Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice. FERC satisfied that standard.").

Petitioners are wrong to suggest (Pet. 21) that FERC has engaged in a "pattern" of "passively relying on scientific methods and other evidence from license applicants." Petitioners' citation (*ibid.*) to three cases involving remands to the Commission over the course of almost 50 years does not demonstrate any pattern of unreasoned agency decisionmaking. The Commission licensed or relicensed hundreds of hydroelectric projects during that time, and the cited decisions are unrelated to the issues in this case, except at only the highest level of generality. See *Udall* v. *Federal Power Comm'n*, 387 U.S. 428, 450 (1967) (remanding for further consideration of certain factors in the licensing decision but expressing "no opinion on the merits"); *Green Island Power Auth.* v. *FERC*, 577 F.3d 148, 162 (2d Cir. 2009)

(holding that the Commission erred in applying a procedural regulation concerning intervention); *Scenic Hudson Pres. Conference* v. *Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965) (remanding licensing decision that pre-dated both the National Environmental Policy Act and amendments to the Commission's licensing procedures), cert. denied, 384 U.S. 941 (1966).

Nor have petitioners demonstrated (Pet. 21-22) that what they describe as "black box" decisionmaking is a "pervasive problem" across federal agencies. Petitioners cite an assortment of unrelated court decisions (Pet. 22-24) spanning a period of over 40 years, which hold that in the particular circumstances of those cases, agencies provided inadequate reasoning or explanations for their decisions. Those decisions do not demonstrate any pattern or practice of widespread agency error that requires this Court's intervention. To the contrary, the small number of cases petitioners identify supports the conclusion that courts of appeals are already able to identify, through a "searching and careful" inquiry, agency decisions that contain inadequate reasoning and can therefore be classified as arbitrary and capricious. *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971)). Petitioners do not identify a conflict among the courts of appeals or with a decision of this Court on the question presented in the petition for a writ of certiorari. Review of the court of appeals' unpublished decision is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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