

No. 17-526

In the Supreme Court of the United States

CITY OF ROCKINGHAM, NORTH CAROLINA AND
AMERICAN RIVERS, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND U.S.
SECRETARY OF COMMERCE, ET AL., RESPONDENTS

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

**BRIEF IN OPPOSITION
TO CERTIORARI FOR RESPONDENT
DUKE ENERGY PROGRESS, LLC**

STEFFEN N. JOHNSON
Counsel of Record
JOHN A. WHITTAKER, IV
KIMBERLY OGNISTY
PAUL N. HAROLD
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Respondent Duke Energy Progress, LLC

QUESTION PRESENTED

This case concerns the renewal of a license for a hydroelectric project in North Carolina. Since 1958, respondent Duke Energy Progress, LLC, has operated two hydroelectric facilities on the Pee Dee River. This case concerns only one: the Tillery Dam and a 19-mile stretch of river known as the Tillery Reach.

After a nine-year-long proceeding, the Federal Energy Regulatory Commission issued a 174-page Order renewing the license with dozens of conditions, including a condition that Duke Energy release a minimum amount of water into the Tillery Reach. This Order—and a subsequent order and clarification on rehearing—reflected FERC’s careful consideration of a comprehensive record and consultation with both numerous public entities—including federal, state, and local agencies—and private groups, including petitioners. The Order also reflected the terms of a state water quality certification that, per the Clean Water Act, must precede the issuance of any license.

Petitioners preferred a higher minimum flow level into the Tillery Reach and argued that FERC should have used a different scientific method for evaluating the effect of flow levels on fish and other aquatic resources. In a unanimous, unpublished decision, the Fourth Circuit denied the petition for review.

Against this backdrop, the question presented is:

Whether this Court should grant review of the Fourth Circuit’s decision where FERC not only chose a reasonable scientific method, but also relied exclusively on material in the record, and petitioners did not raise their “black box” decisionmaking theory below.

CORPORATE DISCLOSURE STATEMENT

Respondent Duke Energy Progress, LLC, is a limited liability company organized under the laws of the State of North Carolina. Duke Energy is a wholly owned, indirect subsidiary of Duke Energy Corporation, which is a publicly held corporation whose shares are traded on the New York Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT.....	3
A. Tillery Dam and Tillery Reach	3
B. Instream Flow Incremental Methodology	4
C. North Carolina issues a Water Quality Certification for the discharge from the Tillery Development.....	6
D. FERC renews Duke Energy’s license to operate the Tillery Development.....	7
E. FERC considers, and rejects, petitioners’ request for rehearing.	8
F. The Fourth Circuit’s decision	10
REASONS TO DENY THE PETITION	11
I. The petition rests on a waived argument and mischaracterizations of the decisions below.	11
A. By not raising it below, petitioners waived the position that FERC engaged in “black box” decisionmaking.	11
B. FERC did not base its decision on materials or methods not in the record.....	13

C. Petitioners fail to challenge the true basis of the decision below, and that failure prevents the Court from resolving their question presented.	14
II. The question presented is narrow, fact- bound, non-recurring, not in conflict with other circuits' decisions or this Court's precedents, and otherwise unworthy of review.....	16
A. The decision below is narrow and fact- bound.	16
B. The decision below does not present a question of national importance.....	17
C. The decision below is not the subject of a conflict with the decisions of other circuits or this Court.	20
III.The Fourth Circuit's decision is both correct and sensible.....	21
CONCLUSION	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144 (1970)	13
<i>Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.</i> , 462 U.S. 87 (1983)	11, 22
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993)	12
<i>Delta Air Lines, Inc. v. August</i> , 450 U.S. 346 (1981)	2, 13
<i>Duke Energy Progress, Inc.</i> , 151 FERC ¶ 62,004 (Apr. 1, 2015)	8, 18–19
<i>Encinco Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016)	21
<i>Hughes River Watershed Conservancy v. Johnson</i> , 165 F.3d 283 (4th Cir. 1999)	16
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	21
<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002 (2017)	15
Statutes	
16 U.S.C. 803(a)(1)–(2)	4
33 U.S.C. 1341	6

Other Authorities

S. Ct. R. 10	2
S. Ct. R. 14.1(a)	15

INTRODUCTION

The petition for certiorari rests on the premise that FERC relied on, and the Fourth Circuit blessed, “black box” administrative decisionmaking under which the agency’s scientific method is outside the record and the public cannot discern the basis for its decisions. *E.g.*, Pet. 5 (FERC “rel[ied] on a scientific method that is not in the record”); Pet. 7 (the court below “allowed FERC to determine: (1) what aspects of the licensing decision were subject to judicial review; and (2) the extent of that review”). That premise is doubly false.

One searches the Fourth Circuit’s unanimous unpublished opinion in vain for any suggestion that agencies may rely on evidence outside the record. The phrases “black box” and “proprietary” appear nowhere in that opinion, as petitioners did not argue below that FERC relied on extra-record material. They argued just the opposite—that FERC should have used a scientific model that would have required respondent Duke Energy Progress, LLC (“Duke Energy”) to submit further data not in the record. Strikingly, the petition cites the opinion below only seven times, and never for any point related to “black box” decisionmaking. Pet. 9, 12, 15, 20. That is because the court never passed on the question presented here, let alone held that agencies may rely on extra-record material.

Neither did FERC. Specifically, in evaluating the effects of the project at issue on fish and other aquatic resources, FERC did not “rel[y] on the predictions from Duke Energy’s proprietary water-flow model” or any other proprietary or extra-record scientific data that were not disclosed and available to the public. Pet. 14, 5. In fact, FERC did not rely on *any* “analyses conducted by Duke.” App. 61a. Rather, FERC selected a

different scientific method. App. 60a–63a. Moreover, the Fourth Circuit upheld that selection as a “reasonabl[e] * * * choice of technical methodology” (App. 12a), and petitioners do not challenge that decision.

It thus turns out that petitioners’ “question presented” is not really presented at all. Rather, the petition rests on a theory not pressed below and misrepresentations of both FERC’s and the Fourth Circuit’s rulings. That alone warrants denying review, as questions that “w[ere] not raised in the Court of Appeals” are “not properly before [the Court].” *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). What petitioners dub a “double black box” (Pet. 27) is actually a “double misrepresentation.” However troubling one finds the specter of an agency decision based on non-public data, this case involves no such decision.

Once this becomes clear, nothing remains of the petition. Petitioners do not attempt to show a conflict among the circuits or with this Court’s precedents. They suggest only that the decision below will have a notable impact on “Rockingham and the surrounding region” (Pet. 5)—which even taken at face value does not raise a matter of national importance. No other stakeholder that took part in the proceedings below—including an array of agencies, environmental and recreational groups, property owners, companies, and ordinary citizens—challenged the outcome. Not surprisingly, no *amici curiae* support the petition.

In sum, the petition fails to satisfy Rule 10. The decision below is a fact-bound ruling that carefully applies settled law to FERC’s well-supported findings and scientific judgments. That ruling breaks no new ground, and petitioners waived the theory pressed in the petition. Certiorari should thus be denied.

STATEMENT

A. Tillery Dam and Tillery Reach

Since 1958, respondent Duke Energy and its predecessors have operated two hydroelectric dams and related facilities on the Pee Dee River in North Carolina. These facilities, licensed by FERC in 1958 as the “Yadkin Pee Dee Hydroelectric Project No. 2206,” have an electric generating capacity of 108.6 megawatts. App. 4a. The project also includes associated recreational sites owned by Duke Energy. App. 4a.

The petition concerns only the larger of these dams: Tillery Dam. Tillery Dam is responsible for 84 megawatts of the project’s 108.6 megawatt capacity, and is located upstream from the Blewett Falls Dam. App. 4a. The 19-mile stretch of river between the Tillery Dam and Blewett Falls Lake is known as the Tillery Reach.

Because Tillery Dam operates as a peaking facility—generating electricity when demand is high, but not when demand is low or moderate—water flow through the Dam and into the Reach varies with the demand for electricity. Water flow through the Reach also depends on releases from dams further upstream and inflows from the Uwharrie River, a tributary of the Pee Dee River. App 29a–31a.

Although petitioners offered input on various aspects of the project’s renewed license, their petition concerns so-called “black box” inputs underlying just one methodology that can be used for “evaluat[ing] how incremental changes in flow affect fish habitat in the project reaches.” App. 60a. As explained below, however, FERC did not use that methodology.

B. Instream Flow Incremental Methodology

Before issuing (or renewing) a license for a hydroelectric project, Section 10(a) of the Federal Power Act requires FERC to develop a record on all aspects of “beneficial public uses” related to the comprehensive development of any affected waterway. 16 U.S.C. 803(a)(1)–(2). These beneficial public uses include “recreation” as well as “enhancement of fish and wildlife.” *Ibid.*

One proxy for the effect of various potential flows on fish and other aquatic resources is the habitat available at particular flow levels. And a common method by which licensees provide FERC with the information needed to assess a project’s effect on aquatic resources is called “Instream Flow Incremental Methodology,” which evaluates how incremental changes in flow affect habitat.

One standard scientific model that licensees and others use to quantify fish habitat over a range of flow levels is called the Physical Habitat Simulation System (“PHABSIM”). The U.S. Fish and Wildlife Service developed a publicly available version of this model, and derivative versions of the PHABSIM system are likewise readily available. In general terms, the PHABSIM model produces an output called Weighted Useable Area (“WUA”)—essentially the area (in square feet) available for habitat. In some cases, that output is used, along with time-series data, as inputs in either an “Index C” or “Dual Flow” analysis that provides further information on available habitat. FERC generally uses one or more of these methodologies in assessing the incremental effect of a project’s operations on aquatic resources through an Instream Flow Incremental Methodology evaluation.

More specifically, *Weighted Useable 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.” App. 60a. The inputs used to create the Weighted Useable Area output typically include mathematical representations of cross-sections of the river’s reach. FERC relied on WUA in reaching its decision here.

Index C “is a summary statistic from a large amount of WUA data at the low end of the range of habitat quality that is intended to isolate the flow conditions that limit habitat quality.” *Ibid.* An Index C analysis uses WUA results, but also requires as inputs time-series data that include the duration of each flow level over the course of a day. FERC did not rely on Index C outputs here.

Dual Flow is an estimate of the availability of suitable habitat for the minimum and maximum flows over a time series. *Ibid.* Like Index C, Dual Flow also requires time-series data as inputs. Thus, the primary difference between the Weighted Useable Area output and the Index C and Dual Flow outputs is that the latter two include a time-series input of the duration of certain flow levels over the course of a day. FERC did not rely on Dual Flow outputs here.

Throughout the petition, petitioners refer to a “‘proprietary’ water-flow model.” *E.g.*, Pet. i, 5–6, 13, 14, 15, 18, 19. Because petitioners did not articulate their “black box” decisionmaking theory below, it is not entirely clear to what petitioners refer. Indeed, although the decisions below turned on FERC’s choice between outputs and its reasons for that choice (*e.g.*, App. 12a, 60a), the petition devotes no more than a footnote to the three PHABSIM outputs (Pet. 13 n.6).

Petitioners’ repeated statements about a “proprietary” model may be referring to Duke Energy’s time-series duration data, which are proprietary and can be inputs for the Index C and Dual Flow outputs.¹ As noted, however, FERC chose to rely on the Weighted Useable Area output, an approach that does not use time-series duration data. App. 60a–63a. Had FERC chosen to rely on the Index C or Dual Flow outputs, it presumably would have asked that Duke Energy’s time-series duration data be made part of the record. In any event, these time-series duration data were made available for inspection by petitioners and several other parties below who were members of an in-stream flow study working group. C.A. App. 652.

C. North Carolina issues a Water Quality Certification for the discharge from the Tillery Development.

Under Section 401 of the Clean Water Act, FERC may not issue a license until the State where the project is located issues a water quality certification (or waives certification); and any conditions in that certification must be included, without modification, in FERC’s license. 33 U.S.C. 1341. Further, any challenges to the substantive requirements in the certification must be raised through the state administrative and judicial process. *Ibid.* Accordingly, when Duke Energy asked FERC to renew its license, it simultaneously sought a state water quality certification.

¹ Duke Energy treats its time-series duration data as proprietary because it could be used by competitors or electricity market traders to discern strategic information about Duke Energy’s methods for generating electricity to meet demand.

In 2008, North Carolina’s environmental authorities issued a water quality certification for the renewed license. See App. 7a. The certification imposed numerous conditions, including, as relevant here, minimum instream flows for aquatic resources in the Tillery Reach. See App. 28a.

Although those flows were consistent with a settlement agreement between Duke Energy and other stakeholders, petitioners disagreed with them and filed litigation challenging them at the state level. But a North Carolina Administrative Law Judge upheld the certification, as did the panel that decided petitioners’ administrative appeal. The Superior Court of Richmond County and North Carolina Court of Appeals both affirmed. App. 7a. Petitioners did not seek certiorari in the North Carolina Supreme Court.

When petitioners initiated their state appeal of the water quality certification, they ceased participating in the FERC proceedings. Only after that appeal failed—more than four years later, in 2013—did they re-engage in those proceedings and begin filing motions to challenge the record that FERC had created—again, because they objected to the instream flows proposed in the settlement agreement filed with FERC as part of the license renewal application.

D. FERC renews Duke Energy’s license to operate the Tillery Development.

FERC’s 2015 decision to renew Duke Energy’s license was the result of a comprehensive nine-year proceeding. In reaching its decision, FERC not only consulted with numerous federal, state, and local agencies, but also considered all objections and suggestions—as well as a record consisting of thousands of pages.

App. 3a; App 21a–26a.² The many conditions that FERC imposed on Duke Energy’s renewed license thus grew out of its consultation with other federal and state authorities and its consideration of comments from numerous public and private intervenors.

Among those conditions were minimum instream flows, i.e., a minimum amount of continuous water flow into the Tillery Reach. See *Duke Energy Progress, Inc.*, 151 FERC ¶ 62,004, 64,056–64,057 (Apr. 1, 2015). The license requires “a continuous year-round minimum flow at the Tillery Development of 330 cfs [cubic feet per second].” *Id.* ¶64,056. In addition, if and when American shad pass Blewett Falls Dam, that minimum must increase to 725 cfs for eight continuous weeks every year during the American shad’s spawning season. *Id.* ¶64,057. Further, in consultation with state and federal authorities and the City of Rockingham, Duke Energy is also required to release “1,750 acre-feet of water (about 884 cfs released over a 24-hour period) annually, in addition to the 330-cfs minimum flow discussed above, from Tillery Dam to enhance recreational boating in the Tillery reach” during peak recreation season. *Id.* ¶ 64,027.

No agency or intervenor—except petitioners—objected to FERC’s decision and reasoning regarding the required minimum instream flows. App. 18a.

E. FERC considers, and rejects, petitioners’ request for rehearing.

Petitioners sought rehearing of Duke Energy’s new license and objected to the license conditions regarding

² By FERC’s decision, we refer to its ruling as amended on rehearing—the version included in the petition appendix. The rehearing proceedings are discussed below (at 8–9).

minimum instream flows to the Tillery Reach. App. 18a. Specifically, petitioners argued that FERC failed to complete an instream flow study because FERC staff relied on the “Index C” output that Duke Energy presented in its application, but had never run the PHABSIM model with the requisite time-series data to recreate the Index C output. App. 61a.

As FERC explained in denying rehearing on this point, however, “Commission staff did not use Index C,” but “[i]nstead * * * used Weighted Useable Area,” which “was appropriate.” *Ibid.* FERC also observed that, although it did not require Duke Energy to provide the PHABSIM model, that model is publicly available and petitioners could have “readily obtained” it. App. 63a. FERC further noted that Duke Energy disclosed its input data to allow FERC and any other party to run the PHABSIM model and generate the Weighted Useable Area output. *Ibid.* Indeed, petitioners have never disputed that both the PHABSIM model and the inputs for the Weighted Useable Area output were publicly available.

In response to petitioners’ argument that FERC should have relied on the Dual Flow Analysis, FERC explained that, based on its scientific judgment, it “selected Weighted Useable Area to assess the instream flow study because it enabled staff to study a whole suite of species across a range of sites” that “[t]he parties to the relicensing were interested in.” App. 62a. FERC further explained that it chose not to rely on Dual Flow Analysis because “[w]here, as here, the high (i.e., peaking) flow is established, and the focus is on the low flow, there is no reason to perform a Dual Flow Analysis.” *Ibid.*

F. The Fourth Circuit’s decision

Petitioners sought review in the Fourth Circuit, arguing that FERC erroneously relied on an invalid Index C output and an incomplete Weighted Useable Area output, rather than a complete Dual Flow Analysis output. According to petitioners, Index C was invalid and Dual Flow Analysis was incomplete because Duke Energy had not filed the time-series data that could be used to produce additional Dual Flow Analysis outputs. Additionally, petitioners asserted that Weighted Usable Area was a poor measure of the development’s effect on aquatic resources. Petitioners did not assert, however, that any data underlying the Weighted Use Area output—the methodology actually used by FERC—were missing from the record.

In a careful, unpublished opinion authored by Judge Niemeyer, the Fourth Circuit unanimously denied the petition for review. App. 11a–12a. As to whether FERC completed the record concerning the impacts of project operations on aquatic resources, the court explained that this issue ultimately concerned “a disagreement with the output FERC used in quantifying habitats over variable river flow”—specifically, FERC chose Weighted Usable Area, but petitioners preferred Dual Flow Analysis. App. 11a. As the court recognized, however, FERC “reasonably explained its choice of technical methodology” and petitioners “provide[d] no basis * * * to conclude that FERC’s choice was not reasonable”—only “an expression of disagreement.” App. 12a. The court went on to explain that FERC’s choice “represents a sort of ‘scientific determination’ to which ‘a reviewing court must generally be at its most deferential’”—that this was “exactly the sort of technical issue for which deference is designed.”

App. 15a, 12a (citing *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

REASONS TO DENY THE PETITION

I. The petition rests on a waived argument and mischaracterizations of the decisions below.

The petition rests on the notion that FERC engaged in, and the court below blessed, “black box” administrative decisionmaking. That is false, and the Fourth Circuit’s unanimous unpublished ruling did not adopt the legal principle that petitioners criticize. In fact, that principle is not even discussed in the decision below, and for good reason: FERC fully disclosed the grounds for the license renewal—never relying on materials or methods outside the record—and petitioners never suggested otherwise below. Indeed, petitioners waived the argument pressed in the petition.

Certiorari should be denied.

A. By not raising it below, petitioners waived the position that FERC engaged in “black box” decisionmaking.

No less than a dozen times, petitioners assert that the decision below sanctioned “black box” agency decisionmaking. Pet. i, 5, 7, 16, 18, 19, 20, 21, 24, 25, 27, 28. By their lights, the ruling below permits “agencies [to] decide cases based on scientific methods that are not placed in the record or made available to the parties.” Pet. 5. In reality, however, neither the Fourth Circuit nor FERC based its decision on materials “not placed in the record or made available to the parties” (*ibid.*)—much less adopted a rule encouraging such an approach. FERC simply employed a scientific method different from the one that petitioners advocated, and

the Fourth Circuit properly upheld FERC's choice of scientific methods as reasonable.

But petitioners have an even bigger problem. One reason the opinion below never mentions the issue of "black box" decisionmaking is that, in their briefs below, petitioners never suggested that FERC engaged in such decisionmaking. Nor did they contend below that "the scientific method upon which FERC relied was absent from the record, withheld from the parties, kept out of public view, and unverified by FERC itself" (*ibid.*)—a remarkable assertion that surely would not have escaped the Fourth Circuit's notice.

Petitioners' theory below was far more pedestrian. Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), they maintained that the "inferior scientific methods" on which FERC relied were "not reliable" for "estimat[ing] the total impact of Project operations on aquatic habitat." Pet. C.A. Br. 36 (Dkt. 44). Petitioners urged that "Dual Flow could estimate such impact," faulting FERC because it "did not run the [Dual Flow] model to complete the output, direct the licensee to file the model so as to permit other parties to do so, *or otherwise use this output as the basis for the new license.*" *Ibid.* (emphasis added). In essence, petitioners argued that FERC chose the wrong model—"that FERC should have used the Dual Flow Analysis"—and that FERC should have required Duke Energy to submit data relevant to a model that it did not use. App. 12a, 61a.

In fact, not only was the question presented in the petition not pressed below, but petitioners now argue the *opposite* of what they contended below: that FERC "shield[ed] Duke Energy's water-flow model from examination" and "denied [them] * * * the opportunity to

expose any flaws in the scientific method *on which the agency ultimately relied.*” Pet. 19 (emphasis added). Having told the Fourth Circuit that FERC did not “use [Dual Flow Analysis] as the basis for the new license” (Pet. C.A. Br. 36 (Dkt. 44)), petitioners cannot now complain that FERC erred in “ultimately rel[ying]” on it (Pet. 19). As this Court has often explained, where “[a] petition for certiorari present[s] [a] question” that “was not raised in the Court of Appeals,” it “is not properly before [this Court].” *Delta Air Lines*, 450 U.S. at 362; see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (collecting cases holding that “[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them”). That rule applies with even greater force where the petitioners argue the opposite of what they argued below.

Petitioners’ “black box” decisionmaking theory was not raised or analyzed below and reverses their earlier position concerning the basis for FERC’s decision. For that reason alone, review should be denied.

B. FERC did not base its decision on materials or methods not in the record

Quite apart from petitioners’ waiver of the question presented, certiorari should be denied because FERC did not rely on “proprietary” data in determining the necessary instream flows for fish. See App. 61a. Far from “rel[ying] on Duke Energy’s proprietary water-flow model” (Pet. 14), FERC used a scientific methodology that did not require considering any of Duke Energy’s proprietary data. *Ibid.* Of the various methods for “evaluat[ing] how incremental changes in flow affect fish habitat,” Duke Energy “us[ed] Index C and

provided a limited Dual Flow Analysis, whereas Commission staff assessed Duke’s instream flow study using Weighted Useable Area.” App. 60a–61a. To state the obvious, FERC did not, in *declining* to rely on Duke Energy’s Index C and Dual Flow Analysis, “outsource[] its decisionmaking to Duke Energy.” Pet. 18.

The “results” of the Weighted Useable Area analysis, as well as “the underlying assumptions and data,” were all in the record. Pet. 14. The software used to conduct that analysis “is generally available” and can be “readily obtained.” App. 63a. Duke Energy disclosed the data underlying the analysis in its license application. App. 63a. And although petitioners insist that “neither they, nor FERC, nor anyone else could run the model to evaluate the validity of the results” (Pet. 14), FERC ran its own Weighted Useable Area analysis. C.A. App. 1,330–1,340. So did petitioners, who as part of their request for rehearing before FERC “prepared several tables showing Maximum WUA values *based on data disclosed [by] Duke.*” C.A. App. 3,206 n.270 (emphasis added). Thus, FERC did not “utilize an undisclosed scientific method” (Pet. 5)—just one that petitioners dislike.

C. Petitioners fail to challenge the true basis of the decision below, and that failure prevents the Court from resolving their question presented.

Petitioners’ true disagreement with the decisions below concerns FERC’s choice of a scientific method different from their preferred method. Whether FERC chose a reasonable method for “evaluat[ing] how incremental changes in flow affect fish habitat in the [Tillery Reach],” however, is a narrow, fact-specific question that petitioners did not properly raise below and

do not raise now. App. 60a; App. 12a. That precludes the Court from reaching their question presented.

Petitioners asserted below “that FERC should have used the Dual Flow Analysis” and required Duke Energy to submit more data relevant to such an analysis. App. 12a, 61a. Having correctly identified their problem with FERC’s choice, however, petitioners did no more than “express[] [their] disagreement.” App. 12a (“The petitioners’ argument * * * simply amounts to an expression of disagreement; they provide no basis for us to conclude that FERC’s choice was not reasonable.”). This mere “expression of disagreement” would not preserve a challenge to the reasonableness of FERC’s choice of methodology even if petitioners now pressed such a challenge (which they do not). *Ibid.*

Because petitioners failed to preserve and to present to this Court a challenge to FERC’s choice, resolving their question presented could not change the outcome of this case. For petitioners to obtain their desired result—higher minimum flows into Tillery Reach—petitioners would have needed to argue on appeal below that FERC’s selection of Weighted Useable Area was unreasonable and that FERC should have chosen a different method that shows that higher minimum flows are required. Even below, however, petitioners did no more than “express[] [their] disagreement” on these points, and they argue neither point now. *Ibid.* As this Court “do[es] not entertain arguments that were not raised below and that are not advanced in this Court,” those failures are fatal to the petition. *E.g., Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017); see also S. Ct. Rule 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

In any case, even if petitioners' disagreement were preserved and presented here, it would not warrant review. FERC's "reasonably explained * * * choice of technical methodology" is not an issue warranting certiorari, as it is narrow, fact-bound, and not otherwise a matter of national importance. App. 12a. For these reasons too, certiorari should be denied.

II. The question presented is narrow, fact-bound, non-recurring, not in conflict with other circuits' decisions or this Court's precedents, and otherwise unworthy of review.

Once it becomes clear what the record shows and what FERC and the Fourth Circuit actually decided, nothing remains of the petition. The question *actually* presented is narrow, fact-bound, not the subject of a circuit split or conflict with this Court's precedents, and not otherwise important—a point confirmed both by the fact that the unanimous decision below was unpublished and by the absence of any *amici curiae*.

A. The decision below is narrow and fact-bound.

To begin with, the Fourth Circuit's unpublished decision did not purport to lay down a new rule of law, to chart new territory, or to limit prior precedent. The court's approval of the scientific methodology selected by FERC turned not on the law—which was not in dispute—but on facts specific to the Tillery Reach.

The court began from the uncontested premise that "agencies are entitled to select their own methodology as long as that methodology is reasonable." App. 12a (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1999)). Applying that rule, the court correctly held that FERC made a

reasonable “choice of technical methodology” in light of the facts and arguments before it. App. 12a.

Specifically, FERC selected Weighted Useable Area to assess the instream flow “because it enabled staff to study a whole suite of species across a range of sites.” App. 12a (quoting App. 62a). Weighted Useable Area analysis allowed FERC to target the species and sites that “[t]he parties to the relicensing were interested in.” App. 62a. FERC chose not to rely on Dual Flow Analysis because “that analysis is best used ‘to assess habitat availability where there is a potential trade off between the high- and low-flow limiting factors,’ and thus, was not well suited to this context, where high flow was not at issue.” App. 12a (quoting App. 62a). As FERC understood, where, as here, “the focus is on the [minimum] flow, there is no reason to perform a Dual Flow Analysis.” App. 62a–63a.

These context-specific factual considerations present no question of national importance. And they certainly do not implicate petitioners’ grand theories of “black box” decisionmaking or the “separation of powers”—the central themes of the petition.

B. The decision below does not present a question of national importance.

Petitioners’ only suggestion that the ruling has notable impact is limited to a 19-mile stretch of river and “the neighboring region’s economy and natural resources.” Pet. 3. But this Court reviews only matters of national, not regional, importance. And in any case, petitioners exaggerate the significance of the decision below.

1. In attempting to inflate the importance of their case, petitioners overstate the environmental and economic effects of the project at issue. The petition says

the instream flow levels set by FERC will “all but eliminate[] the economic opportunities that the river would bring to the region.” Pet. 4; see also Pet. 5 (complaining of “substantial harm to Rockingham and the surrounding region”); Pet. 4 (“This case involves * * * the future of the neighboring region’s economy”); Pet. 5 (“FERC’s decision will unnecessarily constrain the region’s economic opportunities”); Pet. 8 (“Rockingham seeks to rebuild its economy”). Indeed, the effects of instream flow levels on “recreation” such as canoeing and swimming were petitioners’ sole “reasons for intervening.” Pet. 10. And they transparently urged the court below to require FERC “to provide the ‘best or most extreme’ recreation development.” App. 13a.

Contrary to petitioners’ rosy predictions, however, FERC made an unchallenged factual finding that demand for recreational use of the Tillery Reach is “low.” App. 73a–74a. And in any event, FERC’s choice of one instream methodology over another to assess fish habitat had no impact one way or another on FERC’s analysis of the Reach’s suitability for recreational use.

Relying on its expertise, FERC selected scientific models to evaluate the effect of instream flows on habitat availability for aquatic resources. These complex models are “tools for analyzing and summarizing data on the flow-habitat relationship,” not recreational use such as kayaking. 151 FERC ¶ 64,026. They are also necessary for calculating and comparing the available habitat for various species at various life stages and flow levels. App. 62a n.68 (noting that FERC studied “29 species/life stages/habitat types,” including “a range of anadromous and resident fish species * * * , their specific life stages * * * , general and specific habitat types that could apply to several species * * * , and juvenile aquatic insects and other invertebrates”).

FERC's models are not necessary to study the effect of flow height on recreation. The issue there is simply whether the particular instream flow yields a flow height that permits boating. The typical method for assessing that is measuring the water surface elevation at different flows for selected sites along the river considered to be potential navigation hazards. No "proprietary" data or methods are needed. Pet. 6.

Petitioners' emphasis on recreational uses of the Tillery Reach is misleading for another reason: Duke Energy's state water quality certification already both required Duke Energy to release additional flow during peak recreation season and placed an upper limit on such recreational flow releases. App. 69a. As FERC explained in its rehearing decision: "Because the recreational flows are a condition of the water quality certification, [FERC] could not modify those flows even if [it] found, which [it] d[id] not, that higher recreation flows would be in the public interest." App. 71a. Thus, even if FERC had chosen petitioners' preferred scientific method for assessing instream flows for fish habitat, that choice would not have changed FERC's evaluation of recreational uses of the Tillery Reach.

2. The only remaining impact of the decision below is its effect on aquatic resources in the 19-mile Tillery Reach. As noted, even if this effect were substantial, it would not amount to a national concern that justified this Court's review. But the effect is minimal.

As FERC found, the instream flow levels that petitioners recommended would yield only an "incremental increase in available habitat" of "about 25 percent." 151 FERC ¶ 64,026. FERC staff further concluded that "there does not appear to be a large difference in the percentage of the maximum habitat that would be

available” under petitioners’ proposed flows as compared with Duke Energy’s. C.A. App. 1,332. Indeed, the minimum flow requirements imposed by the renewed license already reflect what FERC described as “a substantial improvement in aquatic habitat over the existing minimum flow” under Duke Energy’s earlier license. C.A. App. 1,332. Not surprisingly, petitioners are the only party—among a diverse array of environmental groups, property owners, for-profit corporations, government agencies, members of the public, and even other recreational associations—that challenged the outcome. And no *amici curiae* support the petition.

C. The decision below is not the subject of a conflict with the decisions of other circuits or this Court.

Even if the decision below had blessed “black box” administrative decisionmaking, petitioners make no attempt to show that the decision conflicts with the precedents of other circuits or this Court.

Instead, petitioners invite the Court “to cement” the principle that the basis for “an agency’s decision * * * must be placed in the record.” Pet. 20. But as we have shown (at 13–14), FERC did not rely on any extra-record evidence, and petitioners’ own cases (Pet. 20–26) confirm that this “fundamental principle” is already settled. Petitioners devote several pages of their petition to citations of decisions admonishing agencies for frustrating public commentary. Pet. 21–26. Not surprisingly, petitioners can point to no case in which *any* court—including the court below—has actually blessed “black box” agency decisionmaking or reliance on extra-record evidence. That too confirms that certiorari should be denied.

III. The Fourth Circuit’s decision is both correct and sensible.

Finally, review is unwarranted because the decision below was correct—both under this Court’s precedent and as a matter of common sense.

Petitioners complain that the Fourth Circuit’s decision signals a break from this Court’s requirement that an “agency must show its work,” so the reviewing court can identify “a rational connection between the facts found and the choice made.” Pet. 17 (quoting *Encinco Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). Not so. As explained above, the decision below satisfied that requirement by determining—based on evidence in the record—that FERC’s choice of methodologies was both “reasonable” and “reasonably explained.” App. 12a. No decision of this Court mandates a contrary assessment of FERC’s choice.

Petitioners imply that the court below showed excessive deference to FERC. *E.g.*, Pet. 20. For example, they fault the court for observing that “these licensing proceedings continued ‘over a period of nine years’ and resulted in ‘a record consisting of thousands of pages’” and for crediting “the agency’s expertise” on “a technical issue.” Pet. 20; see also Pet. 7 (complaining that the panel’s “comments at oral argument confirm that it felt constrained by principles of agency deference”), 20 (same).

The Fourth Circuit, however, showed exactly the deference to FERC that this Court’s precedents require. Lower courts are “not to substitute [their] judgment for that of the agency,” and must uphold agency decisions wherever the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). That is what the court below did here.

Similarly, “[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” *Baltimore Gas & Elec.*, 462 U.S. at 103. Applying these principles, the court below correctly concluded that FERC’s “choice of technical methodology” was “exactly the sort of technical issue for which deference is designed,” that FERC’s choice was “reasonable” and “reasonably explained,” and that petitioners had “provide[d] no basis for [the court] to conclude that FERC’s choice was not reasonable.” App. 12a, 15a.

This last point in particular shows why petitioners’ complaint of excessive deference rings hollow: They gave the court below no reason to doubt FERC’s choice. Their arguments were mere “expression[s] of disagreement” with FERC (App. 12a), not reasons why FERC erred. Thus, even if the law did not require courts to defer to reasonable choices between technical methodologies—and petitioners do not advance such a view—a court faced with a reasoned agency decision and no counterargument has little choice but to affirm the agency’s decision. Petitioners repeatedly assert that the decision below raises “separation-of-powers concerns.” Pet. 8, 25, 26, 27. But if petitioners had their way, courts would be free-ranging policy-makers with plenary review over agency-decisionmaking—a far greater threat to the separation of powers.

In sum, the court below faithfully applied the law. It examined FERC’s choice, the reasons that FERC gave for that choice, and the arguments against it, before unanimously upholding it. There is no basis to

suggest that the court diverged from this Court's precedent—which further confirms that there is no need for review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

STEFFEN N. JOHNSON
Counsel of Record
JOHN A. WHITTAKER, IV
KIMBERLY OGNISTY
PAUL N. HAROLD
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Respondent
Duke Energy Progress, LLC

JANUARY 2018