

No. 21-1155

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAVE THE COLORADO, a Colorado nonprofit corporation, et al.,

Petitioners-Appellants,

v.

LIEUTENANT GENERAL SCOTT A. SPELLMON,

Chief, U.S. Army Corps of Engineers, et al.,

Respondents-Appellees,

and

CITY AND COUNTY OF DENVER,

acting by and through its Board of Water Commissioners,

Intervenor Respondent-Appellee.

On Appeal from the United States District Court for the District of Colorado

The Honorable Christine M. Arguello

Civil Action No. 1:18-cv-03258-CMA

**BRIEF OF AMICI CURIAE BOULDER COUNTY IN SUPPORT OF
PETITIONERS-APPELLANTS AND REVERSAL**

David Hughes
Deputy County Attorney
Boulder County Attorney's Office
P.O. Box 471, Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE BOULDER COUNTY1

AUTHORSHIP AND FUNDING.....2

SUMMARY OF THE ARGUMENT3

ARGUMENT7

 I. The FPA’s exhaustion and direct review provisions do not prevent Boulder County from applying its AAISA regulations to the project.....7

 A. *The district court’s decision deprives even intervenors in the FERC process—like Boulder County—of any meaningful opportunity for judicial review of issues not directly addressed in the FERC permitting process..... 7*

 B. *Boulder County’s AAISA regulations establish an entirely separate process that considers many issues that are not reviewed by FERC and protects important state and local interests. 9*

 C. *Boulder County’s application of its AAISA regulations is the appropriate process for determining state and local impacts related to the project and is separate from the FERC permit. 11*

CONCLUSION14

CERTIFICATE OF COMPLIANCE.....15

CERTIFICATE OF DIGITAL SUBMISSION16

CERTIFICATE OF SERVICE17

TABLE OF AUTHORITIES

Cases

<i>City of Colo. Springs v. Bd. of Cnty. Comm’rs</i> , 895 P.2d 1105 (Colo. App. 1994)	11
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	14
<i>Denver by Bd. of Water Comm’rs v. Bd. of Cnty. Comm’rs</i> , 760 P.2d 656 (Colo. App. 1988)	9, 10, 11
<i>DOT v. City of Idaho Springs</i> , 192 P.3d 490 (Colo. App. 2008).....	11

Statutes

16 U.S.C. § 797(e)	7
16 U.S.C. § 825l(a)	7
16 U.S.C. § 825l(b)	7, 13
16 U.S.C. § 825l(a) and (b).....	3
Colo. Rev. Stat. § 24-65.1-101	4
Colo. Rev. Stat. § 24-65.1-101(1)(c)	9
Colo. Rev. Stat. § 24-65.1-101(2).....	9
Colo. Rev. Stat. § 24-65.1-101, et seq.	9
Colo. Rev. Stat. § 24-65.1-203	9
Colo. Rev. Stat. § 24-65.1-204	10
Colo. Rev. Stat. § 24-65.1-501(1)(a)	10
Colo. Rev. Stat. § 24-65.1-501(4).....	10

Colo. Rev. Stat. § 24-65.1-501(6).....10

Rules

Colo. R. Civ. P. 106(a)(4)13

Other Authorities

Boulder County Community Planning & Permitting Department, *Land Use Code*,
art. 8-202(B) (Feb. 25, 2021), [http://assets.bouldercounty.org/wp-](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf)
[content/uploads/2017/02/land-use-code.pdf](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf).....12

Boulder County Community Planning & Permitting Department, *Land Use Code*,
arts. 8-508-10 (Feb. 25, 2021), [http://assets.bouldercounty.org/wp-](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf)
[content/uploads/2017/02/land-use-code.pdf](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf).....12

Boulder County Community Planning & Permitting Department, *Land Use Code*,
art. 8-511(B) (Feb. 25, 2021), [http://assets.bouldercounty.org/wp-](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf)
[content/uploads/2017/02/land-use-code.pdf](http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf).....12

INTEREST OF AMICI CURIAE BOULDER COUNTY

The Board of County Commissioners of Boulder County (the “Board”) is the governing board for Boulder County (“Boulder County”), a local government of the State of Colorado. The Board approved filing of this brief at a regular meeting on July 27, 2021.

Gross Dam and Reservoir is entirely located within Boulder County, a county with more than 325,000 residents. Denver Water is proposing a dam and reservoir expansion project that may result in additional water for Denver-area residents but will disproportionally impact residents of Boulder County. As the largest proposed construction project in the county’s history, it will impact the land, infrastructure, and environment in Boulder County and will directly affect the homes and lives of many county residents. Noise, odor, and air emissions will negatively impact those who live near the dam. The cutting and removal of hundreds of thousands of trees will exacerbate climate change. Construction traffic along Boulder County’s roads will cause delays and impacts on Boulder County road systems.

Boulder County actively participated in the U.S. Army Corps of Engineers’ (“Corps”) Section 404 process under the Clean Water Act and the National Environmental Policy Act, as well as Federal Energy Regulatory Commission’s (“FERC”) separate regulatory process under the Federal Power Act

(“FPA”). The county provided extensive comments on a wide variety of issues including traffic impacts, wildlife and environmental impacts, climate change, the lack of specific information and plans from Denver Water, and Denver Water’s ability to fill the dam once it was built.

FERC’s approval of the project does not exempt other required permitting or agency review. Specifically, Denver Water still must obtain a Boulder County permit under the county’s Areas and Activities of State Interest regulations before proceeding. These regulations protect the interests of Boulder County residents as recognized by Colorado law when it comes to a massive development project like the dam and reservoir expansion. Boulder County’s interest is ensuring that the project remains subject to county review as authorized by state law and required by county regulations and to confirm that Boulder County’s process is not usurped by the exhaustion and direct review provisions of the FPA.

As shown above, Boulder County and the residents it represents are uniquely situated to assist the Court in understanding the gravity of allowing the proposed project to proceed without Boulder County review and the separate regulatory processes that apply to the project under various federal and state laws.

AUTHORSHIP AND FUNDING

Undersigned counsel is the author of this brief in whole. No party, party’s counsel, or other person contributed money to fund or intended to fund this brief.

All parties have consented to this filing so long as it conforms to applicable court rules.

SUMMARY OF THE ARGUMENT

As a participant in both the Corps' and FERC's separate regulatory processes, Boulder County fully agrees with and supports Petitioners' factual understanding of the distinct nature of those proceedings. Boulder County further supports Petitioners' legal position that the FPA's exhaustion and direct review provisions, *see* 16 U.S.C. § 825l(a) and (b), do not apply to decisions by the Corps or other federal or state agencies not specifically enumerated in the relevant statutory provisions.

Affirmance by the Tenth Circuit, as touched on in Petitioners' brief, could have serious and far-reaching implications for state and local agencies, including Boulder County. It would infringe on these agencies' abilities to perform their duties under federal, state, or local laws. One concrete, real-world example of this is Boulder County's application of its regulations to the dam and reservoir expansion project.

The State of Colorado encourages local governments like Boulder County to adopt regulations that provide for county review of certain development because land use planning and the quality of development affect the health, welfare, and safety of the people of the state and the protection of the environment. *See*

Colo. Rev. Stat. § 24-65.1-101 (the statutory provisions are part of the Areas and Activities of State Interest Act or “AAISA”). Boulder County enacted regulations (the “AAISA regulations”) that allow review of such projects by county staff, the planning commission, and ultimately its elected county commissioners. This review is made according to established criteria and is done through a public quasi-judicial hearing process that solicits public input.

When Denver Water received its Section 404 permit from the Corps in 2016, it did not immediately apply for the required AAISA permit. Instead, in 2018, Denver Water requested that Boulder County exempt the project from county review. When Boulder County determined it would not exempt the project from review, Denver Water sued the county in Boulder County District Court Case No. 2019CV30350. The court affirmed that Denver Water was subject to the county’s AAISA regulations.

Meanwhile, Denver Water proceeded with its FERC application, in which Boulder County intervened. Significantly, even though Boulder County participated in the Corps’ and FERC’s separate regulatory processes, neither agency substantively addressed the issues raised by AAISA and county regulations. Further, because Boulder County had not reviewed the project through its AAISA process, the county could not undertake a thorough or meaningful review of the project, and it could not provide FERC with a county position on the

state and local impacts of the project. To have done so would have been a pre-judgement of issues that were likely to come before the county at a subsequent quasi-judicial hearing through the AAISA process. Understandably, FERC did not directly address state and local impact issues through the issuance of its permit, just as it did not address issues like the highly technical analysis inherent in a Section 404 permit that Congress assigned exclusively to the Corps' jurisdiction, rather than FERC.

Instead of addressing local impact issues, FERC required Denver Water to file post-permit reports on state and local impact issues such as recreation management, traffic control, tree removal, and quarry operation and reclamation. Denver Water was further required to consult with Boulder County regarding these plans, but the county could not meaningfully provide comments because it could not pre-judge issues that were to come before the county in its AAISA process. Because Denver Water did not apply for its AAISA permit until after the FERC order was issued, the AAISA process is the only venue in which Boulder County evaluation can take place.

Although the district court did not address the AAISA regulations, it determined that the FPA's exhaustion and direct review provisions govern determinations by other agencies. A broad application of the district court's decision could mean that Boulder County's participation in the FERC process was

the only opportunity for the county to substantively address state and local issues raised by the Gross Dam and Reservoir expansion project. Such a position would rob Boulder County and its residents of the opportunity to provide meaningful input. In fact, Denver Water recently sued Boulder County in U.S. District Court for the District of Colorado Case No. 21-cv-1907, claiming it is exempt from the county's AAISA review. In its complaint, Denver Water cited the district court decision in this case in support of its claims, arguing that the district court's decision supports its argument that the FPA precludes any local review. Should Denver Water prevail, it would allow Denver Water to withhold information and materials from Boulder County that would allow for meaningful review, and place county officials in the untenable position of providing a formal position on the project without the due process provided through the public hearing process.

In essence, an agency in Washington, D.C. (FERC) would be making a decision that has the greatest impact on local residents without any real opportunity for input from those residents or the local officials who represent them, even though the federal agency has not specifically addressed issues that are of importance to local residents and traditionally within the purview of the local jurisdiction with land use regulatory authority over the area to be affected by the project. As shown below, Boulder County's entirely separate process addresses

different issues and should not be subject to the FPA's exhaustion and direct review provisions.

ARGUMENT

I. The FPA's exhaustion and direct review provisions do not prevent Boulder County from applying its AAISA regulations to the project.

When FERC issues or amends a license under 16 U.S.C. § 797(e), challenges to FERC orders must proceed in the D.C. Circuit or the federal court of appeals where the licensee is located. *See* 16 U.S.C. § 825l(b). Only a party who has intervened in FERC's licensing proceeding may file such challenges. *See id.* § 825l(a). The district court's interpretation of these venue and standing provisions are not limited to appeals of the provisions of a FERC order, but also other agencies including the Corps. For the reasons set forth in Petitioners' brief, Boulder County supports Petitioners' position that distinct proceedings where FERC lacks knowledge and expertise are not subject to 16 U.S.C. § 825l(a) or (b).

A. The district court's decision deprives even intervenors in the FERC process—like Boulder County—of any meaningful opportunity for judicial review of issues not directly addressed in the FERC permitting process.

Not only does the district court's interpretation disrupt, and possibly prevent, substantive legal review of non-FERC decisions like the Corps' Section 404 permit, it can mean that state and local governments are deprived of critical review opportunities. Boulder County's intervention in the FERC process provides one

such example. Denver Water's FERC permit specifies it is required to file, among other plans, an updated recreation management plan, a traffic control plan (including addressing road damage, reducing disruptions to local traffic and transportation, and minimizing traffic-related noise, light, and obnoxious odors), a tree removal plan, quarry operation and reclamation plans, and erosion control and reclamation plans. FERC has not reviewed the types of local impact issues that can be raised by these plans, nor does it have the local knowledge and expertise necessary to evaluate them. Further, Boulder County could not review the adequacy or legality of these plans for purposes of filing an appeal as an intervenor to the proceeding.

After FERC issued its license, Denver Water informed Boulder County that it would drop its appeal of the state court decision and participate in Boulder County's AAISA process and obtain an AAISA permit. Accordingly, Boulder County reasonably believed it would be able to review local concerns once it had complete information about Denver Water's plans through Boulder County's AAISA process. It was only after the FERC license appeal period ran and after the district court issued its decision that Denver Water sued Boulder County on federal preemption grounds and demanded that Boulder County place Denver Water's AAISA application on hold. Denver Water cited the district court's decision in its complaint against Boulder County.

B. Boulder County's AAISA regulations establish an entirely separate process that considers many issues that are not reviewed by FERC and protects important state and local interests.

In 1974, the Colorado General Assembly enacted a legislation concerning "Areas and Activities of State Interest," Colo. Rev. Stat. §§ 24-65.1-101, et seq.; *Denver by Bd. of Water Comm'rs v. Bd. of Cnty. Comm'rs*, 760 P.2d 656, 658 (Colo. App. 1988). In so doing, the General Assembly declared that "land use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state." § 24-65.1-101(1)(c). The purpose of the Act is to describe areas and activities which may be of state interest and establish criteria for the administration of these areas and activities. Further, the Act encourages local governments to designate areas and activities of state interest and to administer and promulgate guidelines for the administration of these areas and activities. § 24-65.1-101(2); *Denver by Bd. of Water Comm'rs*, 760 P.2d at 658-59.

Included among the activities a local government may designate as matters of state interest are site selection and construction of major new domestic water and sewage treatment systems, major extensions of existing domestic water and sewage treatment systems, and the efficient utilization of municipal and industrial water projects. § 24-65.1-203. Once an activity has been designated as a matter of

state interest, any person desiring to conduct that activity must file an application for a permit with the local government of the area in which the activity is to take place. § 24-65.1-501(1)(a). The local government may approve or deny the application based on whether the proposed activity complies with the local government's regulations and guidelines. § 24-65.1-501(4). Criteria for the local government to follow in its administration of these activities are set forth in section 24-65.1-204, and local governments may enjoin any person who does not obtain a permit from conducting the activity. § 24-65.1-501(6); *Denver by Bd. of Water Comm'rs*, 760 P.2d at 658-59.

Like other Colorado counties that have previously applied their AAISA regulations to Denver's water projects, Boulder County intends to apply its AAISA regulations to the Gross Dam and Reservoir expansion project. The State of Colorado "has a demonstrable interest in Denver's water projects to the extent they have an impact on the environment or affect the health, welfare, and safety of the people of the state." *Denver by Bd. of Water Comm'rs*, 760 P.2d at 661. When a water project has impacts outside of the city that proposes it, it may "greatly affect the health, welfare, and safety of Colorado citizens far removed from the City and County of Denver." *Id.* Because the AAISA "empowers local governments to designate such projects as matters of state interest and to adopt regulations to administer these projects, Denver must comply with the Count[y] Regulations and

must obtain permits prior to initiating construction on the projects.” *Id.*

Accordingly, Denver Water should be required to obtain an AAISA permit from the county despite the FERC permit. *See City of Colo. Springs v. Bd. of Cnty. Comm’rs*, 895 P.2d 1105 (Colo. App. 1994) (City of Colorado Springs and City of Aurora required to obtain AAISA permit from Eagle County for water system extension); *Denver by Bd. of Water Comm’rs*, 760 P.2d 656 (Denver Water required to obtain AAISA permit from Eagle and Grand Counties); *DOT v. City of Idaho Springs*, 192 P.3d 490 (Colo. App. 2008) (state transportation department project not exempt from city’s application of AAISA regulations).

C. Boulder County’s application of its AAISA regulations is the appropriate process for determining state and local impacts related to the project and is separate from the FERC permit.

In protecting the state interests identified by AAISA by enacting its regulations, Boulder County identified specific purposes different than those of the FPA. The purpose of the county’s AAISA regulations include, among others, “[r]egulat[ing] projects that would otherwise cause excessive noise, water, and/or air pollution, or which would otherwise degrade or threaten the existing environmental quality within [Boulder] County,” “[p]rotect[ing] the beauty of the landscape,” “[c]onserve[ing] soil, water, forest resources, and Environmental Resources,” and “[e]nsur[ing] that major extensions of domestic water and sewage treatment systems shall be permitted only . . . within the financial and

environmental capacity of the area to sustain . . . growth and development.”

Boulder County Community Planning & Permitting Department, *Land Use Code*, art. 8-202(B) (Feb. 25, 2021), <http://assets.bouldercounty.org/wp-content/uploads/2017/02/land-use-code.pdf>. Through the public hearings process, the county planning commission and the Board consider specific criteria regarding whether to grant a permit, including “[t]he proposal shall not significantly degrade or pose a significant hazard to any aspect of the environment” including air quality, visual quality, surface water quality, groundwater quality, wetlands and riparian areas, terrestrial and aquatic plant and animal life, soils and geologic conditions; “[t]he proposal . . . will not create blight, or cause other nuisance factors such as excessive noise or obnoxious odors;” and “[t]he proposal is in accordance with the Boulder County Comprehensive Plan.” *Id.* at art. 8-511(B).

Like the highly technical issues considered by the Corps under Section 404, the issues in the AAISA regulations can only be adequately addressed by planners and elected officials with the necessary knowledge and expertise related to local impacts. FERC Commissioners in Washington, D.C. lack the knowledge and understanding necessary to evaluate the specific issues raised by Boulder County’s AAISA regulations. Boulder County’s AAISA regulations provide for staff input, agency referrals, a public hearing before the planning commission, and a public hearing before the Board. *Id.* at arts. 8-508-10. It is only through this process,

where complete information is provided and reviewed, and due process is observed, that Boulder County can use its knowledge and expertise to provide its position on local impacts.

The FERC permitting process through the FPA is an entirely separate process that does not substantively consider the local impact issues raised by AAISA. Accordingly, the FPA's direct review provision, which applies to review of a FERC order, is inapplicable to AAISA. *See* 16 U.S.C. § 825l(b); *see also* Colo. R. Civ. P. 106(a)(4) (providing for state court review of quasi-judicial decisions of local governments). Even as a timely intervenor in the FERC proceedings, Boulder County could not have raised AAISA issues before FERC. The FPA's exhaustion provision only allows for an intervenor to apply for a rehearing before FERC when it is "aggrieved by an order issued by the Commission [i.e. FERC]." 16 U.S.C. § 825l(b). However, Denver Water only recently engaged in Boulder County's AAISA process even though it could have applied years earlier. As a result, Boulder County could not determine whether it was aggrieved because it had not yet applied its AAISA regulations or even received important information needed for assessing local impacts. Likewise, an appellate court's consideration of objections is limited to issues raised before FERC in the application for rehearing. *Id.* Even as a timely intervenor, Boulder County could not have raised issues that had not yet arisen. This is in direct

contrast to the situation in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) in which the state had participated in the FERC proceeding and raised the issues that it wished to raise in state court. 357 U.S. at 337-39.

Boulder County's AAISA regulations are but one example of the many potential federal, state, and local review processes that may be circumvented or extinguished by affirmance. The district court's decision would have a significant and highly prejudicial impact on numerous federal, state, and local agencies throughout the United States, despite the fact that Congress chose *not* to apply the exhaustion and direct review provisions to any agency other than FERC.

CONCLUSION

The Corps' Section 404 permit process, much like Boulder County's AAISA process, is separate from FERC permitting and not subject to the FPA's exhaustion and direct review provisions. This Court should reverse the district court and remand for consideration of Petitioners' appeal on the merits.

Respectfully submitted this 20th day of August 2021.

s/ David Hughes
David Hughes
Deputy County Attorney
Boulder County Attorney's Office
P.O. Box 471, Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

I hereby certify that with respect to the foregoing:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 3,140 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

Dated this 20th day of August 2021.

s/ David Hughes

David Hughes
Deputy County Attorney
Boulder County Attorney's Office
P.O. Box 471, Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

Attorney for Amici Curiae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.
2. If required to file additional hard copies, the ECF submission is an exact copy of those documents.
3. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Agent last updated August 20, 2021 and according to the program are free of viruses.

Dated this 20th day of August 2021.

s/ David Hughes

David Hughes
Deputy County Attorney
Boulder County Attorney's Office
P.O. Box 471, Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify the seven printed copies of the amicus brief will be delivered to the Clerk of Court, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257-1823, for delivery to the Court within five business days of the Court issuing notice the filing has been accepted.

s/ David Hughes

David Hughes

Deputy County Attorney

Boulder County Attorney's Office

P.O. Box 471, Boulder, CO 80306

(303) 441-3190

dhughes@bouldercounty.org

Attorney for Amici Curiae