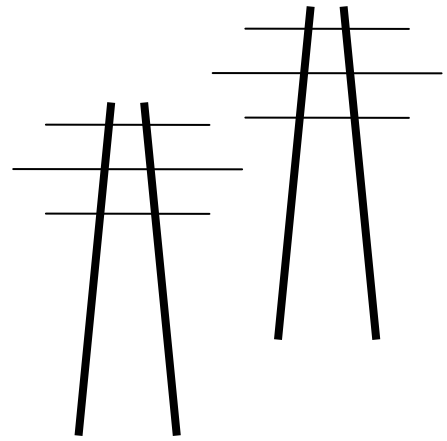


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February 25, 2013

Senate Environment and Energy Committee
State Capitol
St. Paul, MN 55155

Via email and form

RE: S.F. No. 786 – Frac Sand Mining Bill as Introduced

To the members of the Senate Environment and Energy Committee:

FULL DISCLOSURE: I have been peripherally involved in the frac sand issue opposing mining and associated activities here in my home town and county, and am not representing any party in this matter nor am I advocating for any entity in this frac sand fracas. I'm not able to attend the committee hearing for this bill due to a schedule conflict.

I have several concerns about the bill. First, the tax rate in Sec. 9 [298.76], p. 11, is blank. The aggregate rate is a \$0.15/ton aggregate tax, which is assessed on aggregate products which range from roughly \$4.99-\$46.99, from regular sand to boulders. Regular sand prices range from \$4.99 for "Screened Fill Sand," to \$11.99 for "Mason Sand."¹ Frac sand is \$100/ton, more or less.² The tax should be proportionate to the value of the product, expressed as a percentage. Cents to pounds, aggregate tax is 15/4.99-11.99. To be equitable in relation to the aggregate tax, the amount should be at least 5-10 times higher, or at least \$0.75-1.50 per ton for frac sand.

A related concern is that given the sorry state of funding for local governments in this time of budget slashing, that they may regard frac sand as their fiscal savior and latch on to frac sand mining and put the environment, water supply, and health of residents at risk to obtain that revenue. Few local governments are able to stand up against the resources of a mining project proponent. Local governments typically lack the expertise in this new area to reasonably evaluate a project, vet an application, conduct environmental review, or set necessary permit conditions. Any frac sand mining specific legislation must include a means for local governments to assess reasonable costs of permitting to the applicants, with funds available upon application to assure adequate review.

¹ See e.g., Exhibit A, attached, rates of Shakopee Gravel, online at <http://www.shakopeegravel.com/pricing.htm>

² See Exhibit B, attached, As supply meets demand, Wisconsin's frac sand rush slows, Capitol Times, December 15, 2012.

Going through the bill, as introduced, some issues jump up.

5.18 Sec. 3. **[116Y.01] APPLICABILITY.**

5.19 This chapter applies to the counties of Blue Earth, Dakota, Dodge, Faribault,

5.20 Fillmore, Goodhue, Houston, LeSueur, Mower, Nicollet, Olmsted, Rice, Scott, Steele,

5.21 Wabasha, Waseca, Washington, and Winona.

Amend Sec. 3 **[116Y.01] APPLICABILITY.** Chisago County should also be added. Chisago County was site of unlicensed/unpermitted sand handling and transfer station, and suffered impacts of the Wisconsin impoundment failure that contaminated the Wild & Scenic St. Croix River with frac sand waste.

Amend Section 5, **[116Y.03] SOUTHEASTERN MINNESOTA SILICA SAND BOARD**, this must not be limited to southeastern Minnesota. Frac sand deposits and mining are present in a geographic area that extends beyond “southeastern Minnesota.” See the list of counties above, Sec. 3, l. 5.18-5.21, “[**116Y.01] APPLICABILITY.**” This is not acceptable. If there is to be a Silica Sand Board, it must be inclusive of these Counties and anywhere that there are frac sand deposits and/or mines.

Amend Section 5, **Subd. 6, Funding.** (7.19-7.24) It is not reasonable to expect counties to fund this effort. Counties do not have funds for this. The state must provide funds and other resources.

Amend Section 5, adding **Subd. 9. Moratorium.** During the term of the Minnesota Silica Sand Board, there shall be a moratorium on new frac sand mining, processing, handling and shipping permitting. The moratorium shall be for a period of two years to provide time to prepare, adopt and implement a comprehensive land use plan.

Amend Sec. 6. **[116Y.04] PLAN IMPLEMENTATION.**

8.14 Subd. 4. Local land use ordinance must be consistent with plan. The local units

8.15 of government shall adopt and amend existing land use ordinances to be consistent with

8.16 the plan. Local units of government may adopt ordinances that include the minimum

8.17 standards in the plan. Local units of government may enact ordinances that are stricter

8.18 than the minimum standards.

Amend to add: Local ordinances that are stricter than the minimum standards shall control. This language in Plan Implementation needs to be much stronger to assure local governments have control, that their stricter standards will prevail, and it must be short, direct, concise and specific. See [In the Matter of the Application of AWA Goodhue Wind, LLC for a Certificate of Need for a ...](#)³

³ Attached as Exhibit C, and online at <http://www.lawlibrary.state.mn.us/archive/ctapun/1206/opa112229-062512.pdf>.

As for the GEIS in Section 10, **GENERIC ENVIRONMENTAL IMPACT STATEMENT; SILICA SAND MINING, TRANSPORTING, AND FACILITIES**, first, I don't see funding within the bill. The Environmental Quality Board has been neutered by funding cuts and is essentially non-existent, without staff or resources to prepare a GEIS.

Secondly, the scoping should be a minimum of the issues cited, but also have specific language regarding the public scoping process. This is crucial to the credibility of the GEIS document. As language, I suggest prefacing the scoping paragraph in lines 13.22-13.25:

Subd. 2. Scoping. (a) The GEIS shall utilize the Environmental Quality Board's public scoping process, with public notice soliciting comments to the Environmental Quality Board for consideration. Notwithstanding...

Third, the GEIS should include, in Subd. 2, (4) add the specific words "health impacts." Silica sand fine particles are known to be carcinogenic:

(4) existing agricultural, recreational, tourist, ~~and~~ other existing businesses, and health impacts; and

Broader economic picture should be considered

In addition, as the Capitol Times article states, Exhibit B, the frac sand rush is slowing. The state must be cautious not to jump into a boom that will bust and severely affect our state's environment and resources. If indeed fracking is a bubble about to burst, we want to protect our state from being caught holding the bag for bankrupt developers and mining companies. For more info on the gas bubble, see:

[Shale Gas bubble about to burst?](#)⁴

Thank you for your consideration of these issues.

If you have further questions or require additional information, do not hesitate to call.

Very truly yours



Carol A. Overland
Attorney at Law

⁴ Online at: <http://legalectric.org/weblog/8584/>

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Pricing

Effective January 1st, 2012

<u>Product</u>	<u>Contractor Price</u>	<u>Retail Price</u>
Screened Fill Sand	2 \$4.99	1 \$7.00
Coarse Washed Sand	4 \$6.99	3 \$9.00
Class 5 Gravel	6 \$6.99	5 \$14.00
3/4" Minus Shale Rock	8 \$9.99	7 \$26.00
3/4" Washed Concrete Rock	10 \$17.99	9 \$26.00
3/4" Washed Filter Rock	12 \$10.99	11 \$26.00
1 1/2" Washed Filter Rock	16 \$11.99	15 \$26.00
3/8" Round Buckshot	20 \$11.99	19 \$26.00
1/2" Round Rock	22 \$17.99	21 \$26.00
Boulder 18" - 36"	24 \$46.99	23 \$58.00
Rip Rap 6" - 18" (erosion stop)	26 \$19.99	25 \$40.00
Boulder 36"+	30 \$19.99	29 \$40.00
2" - 6" Rock (as available)	34 \$27.99	33 \$40.00
1/4" Washed Pea Rock	36 \$10.99	35 \$26.00
Highly Compactible Sand	38 \$5.09	37 \$7.25
Mason Sand	42 \$11.99	41 \$16.00
Winter Ice Control Mix - made to order in quantity		
Inbound Tandem (10 yds.)	48 \$2.50	47 \$10.00
<i>Black</i>	48a \$10.00	47a \$10.00
Inbound Triaxle (12 yds.)	50 \$3.00	49 \$12.00
<i>Black</i>	50a \$12.00	49a \$12.00
Inbound Quad (15 yds.)	52 \$3.75	51 \$15.00
<i>Black</i>	52a \$15.00	51a \$15.00
Inbound Bellies (17 yds.)	54 \$4.25	53 \$20.00
<i>Black</i>	54a \$17.00	53a \$20.00
Inbound Endump (18 yds.)	56 \$4.50	55 \$22.00
<i>Black</i>	56a \$18.00	55a \$22.00

- All prices are US Short Ton -2,000 pounds and F.O.B. Pit.
- All prices include a \$.15/ton aggregate tax, 6.875% sales tax NOT included
- There is a minimum order of \$15.00 per sand order and a \$40.00 per rock product
- Prices are subject to change without notice.
- Materials are subject to availability.
- All Charge accounts must have a credit application filled out annually

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As supply meets demand, Wisconsin's frac sand rush slows



DECEMBER 15, 2012 6:30 AM • [KATE PRENGAMAN](#) | [WISCONSIN CENTER FOR INVESTIGATIVE JOURNALISM](#)

For more than a year, a 30-foot-tall pile of unwanted sand towered over three acres of Claude Ringlemon's property. The price for the sand dropped as this stockpile was ready for sale, so the 120,000 tons of sand just sat there.

Ringlemon isn't a miner; he runs a cranberry operation north of Tomah, Wis. He jumped into the frac sand frenzy when a mining company offered to dig him a new reservoir in

exchange for the rights to the sand it removed.

Wisconsin's sand is in demand for use in hydraulic fracturing, or fracking, a method of unlocking previously trapped oil and natural gas that has boomed in recent years.

Frac sand mining here has surged in a few years from a handful of sites to almost 100 permitted facilities.

Although no official figures are available, the Wisconsin Center for Investigative Journalism has estimated that the state's frac sand industry will create more than 2,500 jobs. Meanwhile, some residents are concerned about traffic increases, dust pollution and environmental damage.

The sand is valuable, but mining it profitably depends on both the cost of transportation and on market prices, which fluctuate.

"The demand just isn't there," Ringlemon said. "Western Wisconsin is all sand; this is not a scarce commodity. So the big issue becomes logistics. The cost (of transporting the sand) freezes the little guys out."

Trucks finally started hauling the sand away from Ringlemon's land in late November. He said he thinks the company, which he declined to name, had good intentions, but was caught by surprise when the price for sand dropped.

Getting sand to oil and gas operations in North Dakota or Pennsylvania is a serious logistical challenge, said Tom Beekman, regional planning engineer with the Wisconsin Department of Transportation. Sand that's mined far from rail lines or barges may be too expensive.

Large sand mine operators typically sign long-term contracts with both buyers and railroads to produce and sell a steady supply of sand, Beekman said.

Only about a quarter of Wisconsin's operating and developing sand facilities have rail access on site, but most of the largest operations do.

Sand prices range widely depending on grain size, strength and location. But industry experts agree that the prices have come down significantly from the \$100-plus per ton that ignited Wisconsin's mining boom.

For smaller operators who planned for higher prices, the frac sand boom might turn out to be a bust.

The price of frac sand depends on the demand for its use in fracking.

Shale gas production exploded over the past decade, increasing 2,400 percent nationally from 2002 to

2012, according to the U.S. Energy Information Administration. This boom created a surplus of natural gas this year, which lowered gas prices, leading to lower prices for sand.

And as more of the new sand mines in Wisconsin begin production this year, the supply is catching up with the demand.

Beekman said his research shows the nationwide demand for frac sand is likely about 40 million tons a year, and "we might have enough (facilities) in place right now."

Rich Budinger, regional manager for Wisconsin Industrial Sand Co., a subsidiary of Fairmount Minerals, which has three operating Wisconsin sand facilities and one more in development, said price fluctuations are part of natural market cycles.

"If prices continue to drop off, a competitive market will be established," Budinger said. "Experienced companies have seen that before, and we're prepared for it."

According to Wisconsin Center for Investigative Journalism research, eight new mines or processing facilities were proposed during the past four months, compared to more than 60 between June 2011 and June 2012.

Some permitted mine sites have not yet begun construction. Beekman suspects some are waiting to see if sand prices go back up.

The lower prices are not deterring everyone.

Trempealeau County leads the state, with nine mines in operation and 11 more in development. Kevin Lien, the county director of land management, reported applications are still coming in.

"It's not crazy like it was a year ago, but it hasn't let up," Lien said. "I think people are speculating that the drop in price is just economics, and it will come back up."

If planned mines don't develop, landowners may have the most to lose, depending on whether the mining company agreed to pay them up front or provide a share of the profits.

On the other hand, communities rarely make investments to support or entice proposed mining projects, Beekman said, so they have nothing to lose if mine plans fall through.

"The counties that might lose out are those lifting moratoriums, hoping to get new mine development now that they have regulations in place," Beekman said. "They might not because the market is close to saturation."

That may be the case in Dunn County, where a yearlong moratorium expired in October. Cleo Herrick, the county zoning administrator, said the county has yet to receive a single new application.

That's okay with Barb Flom, a Dunn County landowner who turned away a frac sand company interested in her property. She believes mining exacts too high a price on communities.

"I would be happy if the whole industry left," Flom said. "Dirty air, dirty rivers. These are the costs that local citizens are paying."

Most industry experts agree frac sand mining is not going to disappear anytime soon, despite the recent natural gas industry slowdown.

"As long as they allow fracking, I don't see (frac sand mining) going away," said Lance Pliml, president of the Wisconsin Counties Association Frac Sand Task Force.

In fact, Budinger says lower natural gas prices don't necessarily mean bad news for the sand industry.

Affordable energy could lead to a resurgence of American manufacturing. More manufacturing means

Overland - Exhibit B

more demand, long term, for both energy and sand, he said.

Claude Riglemon is just happy that his days in the frac sand industry are almost over. He supports the industry, but he describes his own experience as frustrating.

"I would tell anybody that was going to get involved to be very careful and know who they are dealing with," Riglemon said.

"Right now, it might be a little Wild West, but in a couple of years, the quick-buck operators will wash out. The boom will subside. The big guys will provide the market with what they need."

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2229**

In the Matter of the Application of AWA Goodhue Wind, LLC
for a Certificate of Need for a 78 MW Wind Project and
Associated Facilities in Goodhue County

In the Matter of the Application of AWA Goodhue Wind, LLC
for a Site Permit for a 78 Megawatt Large Wind Energy
Conversion System Project in Goodhue County.

**Filed June 25, 2012
Affirmed
Bjorkman, Judge**

Minnesota Public Utilities Commission
File No. IP-6701/WS-08-1233

Daniel S. Schleck, Natalie Wyatt-Brown, Halleland Habicht P.A., Minneapolis, Minnesota; and

Brian N. Niemczyk, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for relator Coalition for Sensible Siting)

Lori Swanson, Attorney General, Anna E. Jenks, Gary R. Cunningham, Assistant Attorneys General, St. Paul, Minnesota (for respondent Minnesota Public Utilities Commission)

Todd Guerrero, Sten-Erik Hoidal, Christina K. Brusven, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent AWA Goodhue Wind, LLC)

Carol A. Overland, Legalectric, Red Wing, Minnesota (for amicus Goodhue Wind Truth)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the Minnesota Public Utilities Commission's (MPUC's) determination that there is good cause to disregard one of Goodhue County's setback ordinances for wind energy projects. Because substantial evidence supports the MPUC's factual findings and those facts constitute good cause to disregard the setback, we affirm.

FACTS

In 2009, respondent AWA Goodhue Wind, LLC (AWA) filed a revised site permit application to construct a large wind energy conversion system (LWECS) in Goodhue County. Pursuant to a contract with Xcel Energy, AWA sought to generate 78 megawatts (MW) of power, using 50 wind turbines, each 397 feet tall with a 271-foot rotor diameter (RD). Respondent MPUC approved the contract under Minn. Stat. § 216B.1612 (2010).

An administrative-law judge (ALJ) presided over the permit hearings in July 2010 and submitted a summary of public testimony to the MPUC the following September. Less than one month later, the county adopted a stringent LWECS ordinance, which would prohibit the siting of all 50 turbines in AWA's proposed project. Among other things, the ordinance requires that turbines be set back at least the length of 10 RDs from each residence not participating in the project, absent a waiver from the owner of the residence.

The MPUC referred the matter of the ordinance's applicability to an ALJ for contested-case proceedings. The ALJ presided over a three-day public hearing that included oral testimony from 56 witnesses and thousands of pages of exhibits and expert reports. The ALJ issued findings, conclusions, and recommendations, including the determination that there is good cause to disregard the 10-RD setback ordinance and instead apply AWA's proposed 1,500-foot setback. The county and numerous intervenors, including relator Coalition for Sensible Siting (CSS) and amicus curiae Goodhue Wind Truth (GWT), filed exceptions to the ALJ's report.

In August 2011, the MPUC issued a site permit to AWA. In doing so, the MPUC concurred with the ALJ that there is good cause not to apply the 10-RD setback and instead imposed a 6-RD (1,626-foot) setback. Additionally, the MPUC required AWA to make a good-faith effort to comply with the 10-RD setback and accommodate the county's concerns about turbine noise and shadow flicker (alternating changes in light intensity caused by moving rotor blades). The county, CSS, and GWT filed petitions for reconsideration, which the MPUC denied. This certiorari appeal follows.

D E C I S I O N

The MPUC is the exclusive permitting authority for LWECSs that exceed a 25-MW capacity. Minn. Stat. §§ 216F.04, .07, .08 (2010). But the MPUC must apply a county's LWECS ordinance unless it finds good cause not to do so:

A county may adopt by ordinance standards for LWECS that are more stringent than standards in commission rules or in the commission's permit standards. The commission, in considering a permit application for LWECS in a county that has adopted more stringent standards, shall

consider and apply those more stringent standards, *unless the commission finds good cause not to apply the standards.*

Minn. Stat. § 216F.081 (2010) (emphasis added). Whether a permit applicant has shown good cause to disregard an ordinance is a mixed question of fact (what facts have been shown) and law (whether the facts constitute good cause). *See Averbek v. State*, 791 N.W.2d 559, 560-61 (Minn. App. 2010) (describing the good-cause standard); *In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d 341, 343 (Minn. App. 1985) (describing the burden of proof), *review denied* (Minn. May 31, 1985). We therefore review the MPUC's factual findings for substantial evidence but review its good-cause determination de novo. *See In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289-90 (Minn. App. 2010).

I. Substantial evidence supports the MPUC's factual findings.

The MPUC based its determination that there is good cause to disregard the 10-RD setback on the following facts: (1) the 10-RD setback is unnecessary to protect human health, safety, and quality of life, and the proposed project presents “no reasonable likelihood of adverse health impacts”; (2) the 10-RD setback is designed to eliminate all human exposure to noise and shadow flicker; (3) the 10-RD setback “may preclude the entire project”; and (4) the application of a 10-RD setback “could severely hinder the implementation of state renewable energy policies.”

CSS does not argue that any particular factual finding is unsupported by substantial evidence, and our review of the record reveals ample support for each finding. First, AWA presented modeling studies performed by an engineering consulting firm

demonstrating that the anticipated turbine noise and shadow flicker would be minimal: no more than 43 decibels of noise (below state noise standards) and 33 hours and 11 minutes of shadow flicker per year (less than 1% of daylight hours). Second, AWA submitted expert testimony and scientific reports from the Minnesota Commissioner of Public Health, the Wisconsin State Health Officer, the Ontario Chief Medical Officer of Health, the Wisconsin Public Service Commission, and the American Wind Energy Association, indicating that there is no reliable scientific research demonstrating that noise generated by wind turbines or shadow flicker cause adverse health conditions. Third, county officials testified that the county adopted the 10-RD setback to eliminate all noise and flicker exposure in order to avoid the costs of modeling and measuring actual noise and flicker effects. Fourth, AWA representatives testified that the 10-RD setback would preclude the placement of 43 out of the 50 proposed turbines, effectively prohibiting the project, and alternative project designs are not geographically or economically feasible. And fifth, modeling studies show that the 10-RD setback would essentially prevent all wind energy projects in Goodhue County—an ideal location for wind development—and, if applied throughout the state, would preclude wind development in the vast majority of Minnesota and thereby drive up the cost of wind power.

In the face of this substantial evidentiary support for the MPUC's findings of fact, CSS advances what is essentially a legal argument. It maintains that the MPUC erred in basing its findings of fact on the evidence presented in the contested-case proceeding because Minn. Stat. § 216F.081 requires the MPUC to accept and defer to the facts the county relied on in establishing the ordinance, namely, reports from the Minnesota

Department of Health and the World Health Organization that allegedly recommend a 10-RD setback. We disagree. Section 216F.081 creates a presumption in favor of applying the county's ordinance; it does not require the MPUC to adopt or defer to the factual allegations the county accepted in passing the ordinance. Indeed, an "agency decision-maker owes no deference to any party in an administrative proceeding" and must "weigh all of the evidence presented and come to an independent decision." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). Based on our independent review of the record, we conclude that the MPUC correctly relied on evidence developed in the contested-case proceeding and that substantial evidence supports the MPUC's fact-finding.

II. The MPUC correctly determined that there is good cause to disregard the 10-RD setback.

The permit applicant—in this case, AWA—has the burden of establishing that there is good cause to disregard the county's ordinance standards. *See In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d at 343. Good cause is a "reason for taking an action that . . . is justified in the context of surrounding circumstances." *See Averbek*, 791 N.W.2d at 561.

CSS and GWT argue that the MPUC shifted the burden of proof to the county to justify the 10-RD setback and show that it was necessary to protect human health and safety. We are not persuaded. The MPUC did not base its decision on the county's failure to produce evidence to justify the 10-RD setback. Instead, the MPUC based its decision on evidence produced by AWA not only that the 10-RD setback is unnecessary

to protect human health, but also that such an extensive setback requirement would likely prevent the proposed project and hinder the development of renewable energy in Minnesota. This analysis correctly placed the burden of proof on AWA.

Additionally, CSS asserts that the MPUC failed to give proper deference to the county's authority to set LWECS standards. Again, we disagree. Although the legislature gave counties the opportunity to establish siting standards through ordinances, it vested the MPUC with the ultimate authority to issue permits for LWECSs of the capacity involved here. Minn. Stat. §§ 216F.04, .07, .08, .081. In doing so, the legislature did not require the MPUC to defer to the county's process of setting standards but instead charged the MPUC with determining whether, as a substantive matter, there is good cause to disregard those standards. The MPUC's conclusion that the good-cause standard was met here does not undermine the county's authority to establish LWECS standards.

Finally, CSS argues that the state's policy of promoting renewable energy cannot be the only factor in the MPUC's good-cause determination. We agree. The good-cause determination involves a multi-factor analysis of all relevant considerations, including health, safety, and the legislative policy goals of encouraging county participation in LWECS siting, increasing the use of wind energy, and "sit[ing] LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources." Minn. Stat. §§ 216B.1691, 216F.03, .081 (2010). Application of this multi-factor analysis of the surrounding circumstances, as found by the MPUC, reveals good cause to disregard the 10-RD setback. As noted above,

substantial evidence demonstrates that AWA's proposed siting does not present adverse health or safety impacts due to turbine noise or shadow flicker.¹ Accordingly, the 10-RD setback—based on a zero-exposure standard—is unnecessary. And on the other hand, imposition of the county's 10-RD setback threatens AWA's private interest in wind development and the state's public interest in promoting wind development as a sustainable source of energy. On this record, there is good cause to disregard the 10-RD setback.

Affirmed.

¹ CSS argues that there was no “decisive” evidence that the proposed project would not pose stray voltage risks or diminish property values. But because CSS makes this point without any analysis or indication that the 10-RD setback addresses these concerns, CSS has waived the argument. *See In re Irwin*, 529 N.W.2d 366, 373 (Minn. App. 1995) (deeming issues waived because they were not adequately argued or briefed), *review denied* (Minn. May 16, 1995).