

Goodhue Wind Project Update
By Samuel Johnson

In the continuing saga of the Goodhue Wind Project, the Court of Appeals handed the developers a significant victory on June 25, when they upheld the decision of the Minnesota Public Utilities Commission (MEPC) to disregard Goodhue County's setback requirements. *In re AWA Goodhue Wind, LLC*, No. A11-2229, 2012 WL 2369004 (Minn. Ct. App. June 25, 2012). Goodhue County had passed an ordinance requiring a 10 rotor-diameter (RD) setback distance. The rotors in question have a diameter of 271 feet. This would mean a setback distance of 2,710 feet, or just over half-a-mile. This setback distance far exceeds the 6-RD setback distance traditionally required of developers.

The parties opposing the wind farm in Goodhue County presented four arguments to the Court of Appeals. First, they argued that the MPUC erred by not accepting and deferring to the facts that Goodhue County relied on in establishing its setback ordinance. This argument was rejected by the Court of Appeals because "agency decision makers owe no deference to any party in an administrative proceeding" and must "weight all of the evidence presented and come to an independent decision." *Id.* at *3.

Second, they argued that the MPUC improperly shifted the burden of proof to Goodhue County to justify its setback ordinance and show that it was necessary to protect human health and safety. The Court of Appeals disagreed, stating that "the MPUC based its decision on evidence produced by AWA not only that the 10-RD setback is unnecessary to protect human health" but that the unnecessary setback would essentially kill the project. *Id.* Third, the parties opposing the wind farm argued that the MPUC failed to give proper deference to the county's authority to set standards. This was also not persuasive because the MPUC has the ultimate authority under Minnesota statute to issue wind farm permits. *Id.*; Minn. Stat. §§ 216F.04-.08 & 216F.81 (2010).

Finally, the parties argued that Minnesota's policy of promoting renewable energy cannot be the only factor in the MPUC's good-cause determination. The Court of Appeals agreed with this argument, but found that the MPUC used the proper multi-factor analysis of the surrounding circumstances to find good cause to disregard the 10-RD setback ordinance. *Id.* at *4. The Court of Appeals concluded its opinion by stating, "the 10-RD setback—based on a zero-exposure standard—is unnecessary...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." *Id.*

AWA still has one significant hurdle to overcome to finally begin construction of the long-delayed wind farm. On February 23, 2012 the MPUC voted 2-1 to reject the Avian and Bat Protection Plan. The concern is that the wind farm could kill bats and birds, most notably any number of the bald eagle nesting pairs in the region. This roadblock is commonly raised by groups opposing the construction of wind farms, but the facts presented by both sides of the argument are conflicting. On one hand, conservationist groups claim that U.S. wind farms currently kill approximately 440,000 birds and bats a year. However, this is less than the millions of birds and bats that are estimated to be killed each year from window collisions, car strikes, and power lines.

AWA is in the process of applying for a permit that would allow them to accidentally "take" (legally kill) a limited number of eagles through rotor collisions each year. The

government has just started processing applications for these permits and it is unclear what effect they may have on eagle populations. Courtney Flatt, *Wind Farm Applies for First Golden Eagle 'Take Permit'*, Jan. 3, 2012, <http://earthfix.opb.org/energy/article/wind-farm-applies-for-first-golden-eagle-take-perm/>. The groups opposing wind farms have cried foul on the government's licensing of eagle "takes," but they tend to ignore the requirement that permit-holders must contribute to conservation efforts that result in no net-loss in breeding pairs of eagles. James Eng, *Feds Propose Allowing Wind-Farm Developer to Kill Golden Eagles*, Jan. 4, 2012, <http://usnews.msnbc.msn.com/news/2012/01/04/9952873-feds-propose-allowing-wind-farm-developer-to-kill-golden-eagles?lite>. No permits have been issued yet, but the controversy is likely to remain as AWA squares off against Goodhue residents over the fate of our nation's symbol.

Sam Johnson is a 3L at the University of St. Thomas School of Law. He is a Publications Editor for the St. Thomas Law Journal and a member of the St. Thomas Moot Court team. He currently works as a law clerk at the Hennepin County Attorney's Office. Sam earned a Bachelor of Arts in Biology from Macalester College in 2004.