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CHANGES IN ADMINISTRATIVE AGENCY AND LEGAL PRACTICE IN SOUTH CAROLINA FOLLOWING *STATE V. PEAKE*

I. INTRODUCTION

Defining the power of administrative agencies has engendered much discussion and debate, both in South Carolina and nationwide. Although the functions and scopes of these agencies vary greatly, “[m]ost agencies carry out—in other words, they ‘administer’ or ‘execute’—laws that, for the most part, are enacted by the legislature.”¹ This role explains “why most agencies are associated with the *executive* branch of government.”² South Carolina’s state constitutional rights recognize the importance of administrative agencies as tools for effective governance. Specifically, the primary purpose of administrative agencies is to ensure the protection of public interests. Article XII of the South Carolina Constitution provides the following:

The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern. The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies.³

However, in some instances a valid inquiry arises as to the exact scope of a granted agency power.

The South Carolina case of *State v. Peake* recently questioned the applicable power of a state administrative agency.⁴ In that case, the South Carolina Supreme Court determined that the power of the Department of Health and Environmental Control (DHEC) did not extend to initiating or settling criminal prosecutions.⁵ Although this result seems to contradict relevant statutory provisions, the court based its decision on the constitutional article that vests prosecutorial power in the Attorney General.⁶ However, this reading of the South Carolina Constitution is not the only permissible reading, and another interpretation is justifiable in light of the language the legislature expressed in its statutory grant of authority to DHEC. Instead of declaring the statute unconstitutional, the court simply chose to read the statute in a way that did not offend the constitution.⁷ The court has ruled that other

1. Richard H. Seamon, *Administrative Agencies – General Concepts and Principles*, in SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE 1, 7 (Randolph R. Lowell & Stephen P. Bates eds., 2004).

2. *Id.*

3. S.C. CONST. art. XII, § 1.

4. 353 S.C. 499, 579 S.E.2d 297 (2003) [hereinafter *Peake II*].

5. *Id.* at 504, 579 S.E.2d at 300.

6. *See* S.C. CONST. art. V, § 24.

7. *Peake II*, 353 S.C. at 505, 579 S.E.2d at 300. *See also* Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (explaining that courts should give statutes constitutional constructions whenever possible).

statutes conveying inappropriate powers to administrative agencies are unconstitutional according to the separation of powers doctrine expressed in article I, section 8 of the South Carolina Constitution.⁸ The court's approach in *Peake II* may significantly affect the mode of analysis of other controversial statutes granting powers to administrative agencies. Further, the current approach may open the door for deceptive and unethical activities by administrative agencies. Specifically, agencies may take advantage of parties by promising to settle issues of civil and criminal liability while still recommending criminal prosecution—potentially secretly—to the Attorney General's office.

This Note begins with an exploration of the powers and authorities of administrative agencies, specifically DHEC, and an observation that, while such agencies possess extensive regulatory powers, enabling legislation is not always precise in defining those powers. The resulting confusion and imbalance may create significant problems for those over whom the agencies exercise their power. DHEC's authority to protect South Carolina's environment is extensive: the legislature clearly stated this intent by granting significant powers to the agency and proscribing penalties for any violation. This Note presents and discusses these relevant statutes. Further, this Note sets forth those statutes defining the relationship between DHEC and the Attorney General's office and further, describes the differences between a facial reading and the judicial interpretation. This Note continues by exploring the recent South Carolina case of *State v. Peake*,⁹ which indicted a real estate developer for abandoning a wastewater treatment plant in violation of South Carolina law.¹⁰ Although DHEC represented to Peake during settlement negotiations that he could resolve the entire matter by deeding the plant to the state, DHEC surreptitiously referred the case to the Attorney General, who indicted Peake even after he complied with DHEC's request. A majority of the South Carolina Supreme Court affirmed the decision by the court of appeals to reinstate the indictment, but a three-justice concurrence lamented the absence of ethical behavior from DHEC and its employee.

The substance of this Note deals with the correctness, the sufficiency, and the effect of that decision, both on administrative agencies and on the legal community. Lack of continuity and oversight over this type of practice may discourage settlement and hinder lawyers' efforts to provide adequate service to their clients. Lawyers are subject to professional codes of conduct that require due diligence and informed decisionmaking with respect to their clients, but when an agency has no obligation to disclose whether such agency will refer a matter for criminal prosecution, a lawyer's ability to advise his client is in jeopardy. Without this duty agencies can explore any available opportunity to extract penalties from violators without regard to ethics; barring any illegality, the ends seemingly always justify the means. Although DHEC cannot initiate or settle matters of criminal prosecutions on its own authority after *Peake II*, the court's decision leaves open

8. Seamon, *supra* note 1, at 20. Specifically, the separation of powers provision of the South Carolina Constitution provides that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8.

9. 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001), *aff'd*, 353 S.C. 499, 579 S.E.2d 297 (2003) [hereinafter *Peake I*].

10. *Id.* at 75, 545 S.E.2d at 841.

the question of whether an administrative agency could validly contract away its right to refer matters to the Attorney General. This Note explores that question and discusses possible interpretations of statutory and constitutional authority. A reading of all the authority cited in *Peake II* which provides DHEC with prosecutorial authority may better fit the legislative intent and the plain meaning of that authority. Finally, this Note analyzes potential alternate decisions and their effects and concludes by encouraging the courts to seize future opportunities to clarify and reshape agency activities.

II. EXTENT OF ADMINISTRATIVE AGENCIES' POWER

One of the most important functions of an administrative agency is the regulation of private activity, and this power often extends to, and overlaps with, the executive ability to enforce appropriate laws and regulations.¹¹ The definitions of regulatory and enforcement powers are not always clear, and sometimes, the classification of a power "can be essential to analyzing its validity."¹² DHEC has extensive powers, both to regulate and to enforce various standards in this arena. Recognizing important state public policy objectives in maintaining air and water purity, the South Carolina legislature enacted the Pollution Control Act, which granted DHEC the "authority to abate, control and prevent pollution" in furtherance of these policies.¹³ Courts in this state have likewise recognized these objectives: "The State of South Carolina has a substantial interest in maintaining reasonable standards of purity of the air and water resources of the State."¹⁴ In addition, "[t]he Pollution Control Act is only one of the substantive statutes that DHEC is responsible for administering and that are separate from DHEC's organic statute. Another example of a substantive statute adding to DHEC's powers is the State Certification of Need and Health Facility Licensure Act."¹⁵ The legislature has entrusted to DHEC a broad responsibility to protect the interests of the South Carolina public.

The legislature has recognized that DHEC requires authority to enforce the provisions of the Pollution Control Act and has provided such authority by statute.¹⁶ As punishment for violating the Act, the South Carolina Code contemplates both civil monetary penalties and criminal sanctions, which can include a fine, imprisonment, or both.¹⁷ Exacting these penalties requires prosecution in the

11. See Seamon, *supra* note 1, at 8-9.

12. *Id.* at 9.

13. S.C. CODE ANN. § 48-1-20 (Law. Co-op. 1987).

14. S.C. Dep't of Health & Envtl. Control v. Armstrong, 293 S.C. 209, 214, 359 S.E.2d 302, 304-05 (Ct. App. 1987).

15. Seamon, *supra* note 1, at 12.

16. See S.C. CODE ANN. § 48-1-320 (West Supp. 2004).

17. See *id.*

A person who willfully or with gross negligence or recklessness violates a provision of this chapter or a regulation, permit, permit condition, or final determination or order of the department is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or more than twenty-five thousand dollars for each day's violation or be imprisoned for not more than two years, or both.

See also S.C. CODE ANN. § 48-1-330 (Law. Co-op. 1987) ("Any person violating any of the provisions of this chapter, or any rule or regulation, permit or permit condition, final determination or order of the

appropriate judicial forum. While agencies themselves can sometimes serve in this judicial role, the legislature has specifically provided that the courts are to conduct adjudications under the Pollution Control Act. The South Carolina Code provides, "The Department [of Health and Environmental Control] may . . . [i]nstitute or cause to be instituted, in a court of competent jurisdiction, legal proceedings, including an injunction, to compel compliance with the provisions of this chapter or the determinations, permits and permit conditions and orders of the Department."¹⁸ Furthermore, the legislature has stated in this regard, "Prosecutions for the violation of a final determination or order shall be instituted only by the Department or as otherwise provided for in this chapter."¹⁹

Recognizing the close ties between the Attorney General and actions on behalf of the State or a state agency, the legislature elaborated on the duties of the Attorney General as specifically relating to DHEC and the Pollution Control Act:

The Attorney General shall be the legal adviser of the Department and shall upon request of the Department institute injunction proceedings or any other court action to accomplish the purpose of this chapter. In the prosecution of any criminal action by the Attorney General and in any proceeding before a grand jury in connection therewith the Attorney General may exercise all the powers and perform all the duties which the solicitor would otherwise be authorized or required to exercise or perform and in such a proceeding the solicitor shall exercise such powers and perform such duties as are requested of him by the Attorney General.²⁰

The text of this statute appears to relegate the Attorney General to a clearly subservient role of advising DHEC and instituting court action upon its request. The Attorney General's role in this situation seems similar to an attorney advising a client and bringing suit at the client's request. If the decisionmaking power rests in the hands of the agency, the logical conclusion is that DHEC would have the final and ultimate power to decide when to bring legal proceedings against a party, and the Attorney General would merely effectuate that decision. However, the South Carolina Supreme Court construed this statute differently, delineating significantly from the decisions most other jurisdictions in the United States have reached.²¹

Department, shall be subject to a civil penalty not to exceed ten thousand dollars per day of such violation.").

18. S.C. CODE ANN. § 48-1-50(4) (Law. Co-op. 1987). Other relevant powers that this statute grants include the authority to "[s]ettle or compromise any action or cause of action for the recovery of a penalty or damages under this chapter as it may deem advantageous to the State" and to "[a]dminister penalties as otherwise provided herein for violations of this chapter, including any order, permit, regulation or standards." *Id.* at (7), (11).

19. S.C. CODE ANN. § 48-1-220 (Law. Co-op. 1987).

20. S.C. CODE ANN. § 48-1-210 (Law. Co-op. 1987).

21. *See Peake II*, 353 S.C. 499, 504, 579 S.E.2d 297, 299 (2003) (stating that "[t]he decision whether to pursue criminal charges for an alleged violation of the Act is vested solely in the Attorney General"). *But see, e.g., J.C. & Assocs. v. D.C. Bd. of Appeals & Review*, 778 A.2d 296, 309 (D.C. Cir. 2001) ("Thus, it is well established that 'an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.'")

III. *STATE V. PEAKE*

A. *Factual Background*

John Peake, a real estate developer, worked to develop “a tract of land located in Greenwood County, South Carolina, building townhouses and patio homes.”²² Through its authority to issue regulations to protect the environment, DHEC required Peake to install a wastewater treatment system costing approximately \$325,000.²³ The development project ultimately failed, and Peake allegedly abandoned the treatment plant in violation of section 48-1-90(a).²⁴ Shortly thereafter, DHEC contacted him regarding the operation of the facility, and in August 1996, Peake met with several DHEC representatives, including Anastasia Hunter-Shaw, in Columbia.²⁵ “Hunter-Shaw negotiated on behalf of DHEC and demanded that Peake acknowledge wrongdoing, convey ownership of the wastewater treatment facility to the municipality in which it was located, and pay a fine of \$100,000.”²⁶ Peake, acting on his attorney’s advice, rejected the demands since taking those actions would have resulted in the loss of his \$325,000 investment and could have provided inferences of guilt in a subsequent criminal prosecution.²⁷ During the course of these negotiations, Hunter-Shaw brought Peake’s alleged violations to the attention of the criminal investigative division of DHEC, which then decided to refer this matter to the Attorney General for prosecution in accordance with the authority under section 48-1-210.²⁸ Neither Peake nor his attorney ever learned, “[d]espite several subsequent personal and telephone conferences,” that Hunter-Shaw had recommended criminal prosecution.²⁹ During a later hearing on Peake’s motion to quash the indictment, Hunter-Shaw testified “that she never discussed the possibility of criminal charges with [Peake] or his attorney because, ‘[she] didn’t want to put that at jeopardy, and it wouldn’t—it simply wouldn’t have come up,’”³⁰ and that she “‘didn’t think it was

(quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985))).

22. *Peake I*, 345 S.C. 72, 75, 545 S.E.2d 840, 841 (Ct. App. 2001), *aff’d*, 353 S.C. 499, 579 S.E.2d 297 (2003).

23. *Id.*

24. *Id.* The relevant statutory provision states, “It shall be unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes and other wastes, except as in compliance with a permit issued by the Department.” S.C. CODE ANN. § 48-1-90(a) (Law. Co-op. 1987).

25. *Peake I*, 353 S.C. at 501, 579 S.E.2d at 298. As of February 3, 2005, DHEC still employs Ms. Hunter-Shaw, who serves as “Enforcement Officer for NPDES violations within the Catawba, Pee Dee, Trident, and Waccamaw EQC Districts.” See S.C. Dep’t of Health & Envtl. Control, *Water Pollution Enforcement*, at <http://www.scdhec.net/water/html/wpenf.html> (last modified Feb. 3, 2005).

26. *Peake I*, 345 S.C. at 75, 545 S.E.2d at 841.

27. *Peake II*, 353 S.C. 499, 506–07, 579 S.E.2d 297, 301 (2003) (Burnett, J., concurring). Interestingly, two other justices (Toal, C.J. and Waller, J.) joined the concurrence, providing a sufficient number of votes for a majority opinion.

28. *Peake I*, 345 S.C. 72, 75, 545 S.E.2d 840, 841 (Ct. App. 2001), *aff’d*, 353 S.C. 499, 579 S.E.2d 297 (2003). See *supra* note 20 and accompanying text and discussion.

29. *Peake II*, 353 S.C. at 507, 579 S.E.2d at 301 (Burnett, J., concurring).

30. *Id.* at 502, 579 S.E.2d at 298–99.

anything that he needed to know.”³¹ The negotiations between Peake and DHEC ultimately concluded with the execution of a deed conveying the water treatment system to the town of Ninety-Six on September 30, 1997; however, “Peake refused to acknowledge wrongdoing or pay a fine,” and he only transferred the facility as a means of ending the controversy.³² The basis for this decision was substantially, if not exclusively, a belief by Peake and his attorney that deeding the treatment plant to the municipality would eliminate the threat of criminal prosecution.³³ Shortly thereafter, on October 20, 1997, the Greenwood County Grand Jury indicted Peake “for abandoning the wastewater treatment facility in violation of sections 48-1-90(a) and 48-1-320 of the Pollution Control Act.”³⁴

B. Supreme Court Analysis and the Outcome of the Case

The South Carolina Supreme Court identified two issues present in *State v. Peake*: (1) whether DHEC had the authority to settle matters of criminal prosecution arising from violations of the Pollution Control Act and (2) whether allowing the prosecution of Peake under the particular fact pattern of the case would violate “fundamental fairness.”³⁵ The court summarily dealt with the second issue by concluding that Hunter-Shaw’s conduct did not rise “to a level that would cause [the court] to question the constitutionality of [Peake’s] criminal prosecution” and that DHEC’s conduct did not amount to a violation of Peake’s due process rights.³⁶

As to the first and more substantial issue, the court correctly identified section 48-1-210 as the most critical statute, but ruled that the provision did not vest prosecutorial authority in DHEC in criminal cases.³⁷ The court interpreted the first sentence of that statute as “envison[ing] that DHEC will be responsible for the administration and prosecution of civil matters and penalties, unless it requests the involvement of the Attorney General,”³⁸ and the second as “unequivocally” providing “that the Attorney General, or the solicitor acting pursuant to the Attorney General’s instructions, will bring any criminal charges.”³⁹ As a result, the supreme court overruled the interpretation of section 48-1-210 suggested by the

31. *Id.* at 507, 579 S.E.2d at 301 (Burnett, J. concurring) (internal quotation omitted).

32. *Peake I*, 345 S.C. at 75, 545 S.E.2d at 841.

33. Peake’s attorney testified that, during multiple phone conversations, Hunter-Shaw repeatedly assured him that, if Peake complied with DHEC’s demands, “the ‘entire matter’ would ‘all go away’ and ‘[t]here would be nothing further [to] come from the matter if he would do that.’” *Peake I*, 345 S.C. at 76, 545 S.E.2d at 842 (alteration in original). See also *Peake II*, 353 S.C. 499, 507, 579 S.E.2d 297, 301 (2003) (Burnett, J., concurring) (“Mr. Peake’s attorney . . . testified that he would not have advised his client to deed over the plant if the concern of criminal prosecution had not been resolved.”).

34. *Peake I*, 345 S.C. at 76, 545 S.E.2d at 841–42.

35. *Peake II*, 353 S.C. at 502, 579 S.E.2d at 299.

36. *Id.* at 505–06, 579 S.E.2d at 300–01. With regard to a claim of a due process violation, the South Carolina Constitution provides that “[t]he privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. CONST. art. I, § 3.

37. *Peake II*, 353 S.C. at 503, 579 S.E.2d at 299 (construing S.C. CODE ANN. § 48-1-210 (Law. Co-op. 1987)).

38. *Id.*

39. *Id.* at 503, 579 S.E.2d at 299.

circuit court and the court of appeals.⁴⁰ The supreme court further noted, as did the court of appeals, that one possible interpretation of section 48-1-220 would “affect this distribution of authority.”⁴¹ Peake argued in this circumstance for an interpretation that would grant DHEC “the authority to determine whether to pursue a criminal prosecution, while acknowledging the Attorney General’s sole authority to control the process once the decision to prosecute is made.”⁴² However, the court decided that reading the statute in this way would violate article V, section 24 of the South Carolina Constitution, which “vests sole discretion to prosecute criminal matters in the hands of the Attorney General.”⁴³ In support of this proposition, the court cited its earlier decision of *State v. Thrift*,⁴⁴ which held that “any requirement which places the authority to supervise the prosecution of a criminal case in the hands of the Ethics Commission is unconstitutional.”⁴⁵ Therefore, reading a similar statute to require a referral by an administrative agency before the Attorney General can initiate prosecution is impermissible. As a logical corollary, the court identified from this assertion the principle that “the authority to grant immunity from criminal prosecution also resides exclusively in the Attorney General.”⁴⁶

Peake argued that the DHEC attorney would be essentially acting as Attorney General, pursuant to the Attorney General’s authority under section 48-1-210 to effectively deputize an attorney employed by a state agency with the power to prosecute a criminal case.⁴⁷ The court rejected this argument and noted that Hunter-Shaw was not an attorney.⁴⁸ The court added that “the deputization here occurred after the civil settlement, and the DHEC attorney so deputized played no part in that settlement.”⁴⁹ Having determined that the South Carolina Constitution prevents

40. The court of appeals specifically noted that “[t]his language [of § 48-1-210] is consistent with the circuit court’s conclusion that the Legislature intended to place the decision to prosecute for criminal offenses under the [Pollution Control] Act in DHEC’s hands exclusively.” *Peake I*, 345 S.C. 72, 78, 545 S.E.2d 840, 843 (Ct. App. 2001), *aff’d*, 353 S.C. 499, 579 S.E.2d 297 (2003).

41. *Peake II*, 353 S.C. at 504, 579 S.E.2d at 299.

42. *Id.* at 504, 579 S.E.2d at 300.

43. *Id.* (citing the S.C. CONST. art. V, § 24). The South Carolina Constitution provides that:

The General Assembly also may provide by law for . . . the selection, duties, and compensation of other appropriate officials to enforce the criminal laws of the State, to prosecute persons under these laws, and to carry on the administrative functions of the courts of the State. The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.

S.C. CONST. art. V, § 24.

44. 312 S.C. 282, 440 S.E.2d 341 (1994).

45. *Id.* at 307, 440 S.E.2d at 355. See S.C. CODE ANN. § 8-13-320 (West Supp. 2004) (“The State Ethics Commission has [the duty and power] “to request the Attorney General, in the name of the commission, to initiate, prosecute, defend, or appear in a civil or criminal action for the purpose of enforcing the provisions of this chapter.”). *Thrift* also states, “Both the South Carolina Constitution and [the] South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor’s hands.” *Thrift*, 312 S.C. at 291–92, 440 S.E.2d at 346 (the bracketed word “the” appears in the South Carolina Reporter but not in the South Eastern Reporter). See also *McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976) (stating that the Attorney General has the “authority to supervise the prosecution of all criminal cases.”).

46. *Peake II*, 353 S.C. 499, 504, 579 S.E.2d 297, 300 (2003).

47. *Id.* at 503, 579 S.E.2d at 299.

48. *Id.* at 501 n.3, 579 S.E.2d at 298 n.3.

49. *Id.* at 505, 579 S.E.2d at 300.

anyone other than the Attorney General from instituting or settling criminal prosecutions, the court noted that construing the statute to read differently would violate its policy of finding a statute to be unconstitutional only where no valid, constitutional reading exists.⁵⁰ Next Peake contended that he held a reasonable belief that Hunter-Shaw could settle criminal liability issues, and that his belief thereby prevented the State from pursuing criminal charges.⁵¹ The court likewise rejected that argument and simply stated that Hunter-Shaw “lacked actual authority to grant criminal immunity, [and therefore] the State could not be estopped.”⁵²

Finally, Peake argued that criminal prosecution in these circumstances would violate his due process rights and be fundamentally unfair.⁵³ Specifically, he asserted three arguments advancing this proposition:

- 1) He was compelled to deed away his property with the false inducement that the whole matter would be resolved;
- 2) If and when he is tried, the fact that he deeded the plant makes him appear guilty; and
- 3) The same woman who falsely induced him to deed the property secretly reported him to the Attorney General for criminal prosecution.⁵⁴

While the court acknowledged that Hunter-Shaw may have acted unfairly by not revealing her referral of the matter for criminal consideration, the majority found that her conduct was not so unfair as to cause the court to question the constitutionality of Peake’s criminal prosecution.⁵⁵ Ultimately, the South Carolina Supreme Court affirmed the court of appeal’s decision to reinstate the indictment against Peake and thus reversed the decision of the circuit court.⁵⁶

IV. EFFECT OF THE *PEAKE II* DECISION ON AGENCY AND LEGAL PRACTICE

A. *Agency Incentives for Subterfuge and Unethical Behavior*

The behavior of Hunter-Shaw and DHEC in these circumstances presents serious concerns as to the role and presence of ethics—or lack thereof—in the agency. Justice Burnett wrote a concurrence in *Peake II* solely “to address the conduct of DHEC in this matter for fear that it is emblematic of the agency and the manner in which it manages our State’s citizens.”⁵⁷ DHEC manipulated its negotiations with Peake, refused to inform him of a potential criminal indictment

50. *Id.* See *Curtis v. State*, 345 S.C. 557, 569-70, 549 S.E.2d 591, 597 (2001) (“This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. A possible constitutional construction must prevail over an unconstitutional interpretation.”) (internal quotation omitted) (citations omitted).

51. *Peake II*, 353 S.C. at 505, 579 S.E.2d at 300.

52. *Peake II*, 353 S.C. 499, 505, 579 S.E.2d 297, 300 (2003).

53. *Id.*

54. *Id.* at 505-06, 579 S.E.2d at 300-01.

55. *Id.* at 506, 579 S.E.2d at 301.

56. *Id.*

57. *Id.* at 506, 579 S.E.2d at 301 (Burnett, J., concurring).

while still encouraging him to turn over a \$325,000 wastewater treatment facility to the state, and ultimately succeeded.⁵⁸ A majority of justices viewed the outcome as troublesome:

At best this case illustrates the problems which can occur when a governmental organization entrusts the enforcement of complicated statutes to those not trained to understand the import of telling a citizen "do this and all your trouble will go away."

At worst the facts here demonstrate a cultural environment at a State agency to abuse those the agency is entrusted to serve in order to obtain their idea of maximum results.⁵⁹

As an entity that owes a responsibility to the citizens of South Carolina, DHEC logically ought to be obligated to act professionally and ethically in its dealings with those citizens.⁶⁰ Regardless of whether Hunter-Shaw's conduct was a blatant misrepresentation to Peake or merely a dubious ethical decision, she undoubtedly could have been more forthcoming and informed Peake of her decision to recommend criminal prosecution. The court, while following what it believed to be the letter and spirit of the statutory law and constitution of this state, effectively condoned Hunter-Shaw and DHEC's actions. "The lifeblood of the administrative process is agency discretion."⁶¹ The broad powers the legislature granted through the Pollution Control Act contained an implicit assumption that DHEC would not abuse its discretion. DHEC does find refuge behind the letter of the law in this case, but as Justice Burnett advised, "perhaps State agency personnel will be constantly cognizant of the duty to, not only zealously fulfill their responsibility, but do so with equity and integrity."⁶²

Agencies will find themselves in murky ethical waters when dealing with violators like Peake, but the result of this case will harm DHEC and similar agencies in other ways. For example, external lawyers will be inherently distrustful of any negotiations with DHEC, since any settlement offer DHEC makes would cover only civil penalties, which are far less severe than criminal sanctions. Through settlements like those the agency reached with Peake, DHEC can acquire funding and other valuable resources to utilize in protecting and safeguarding the public's health and welfare. Without such accruals, the State may need to increase funding for enforcement of the Pollution Control Act, or potentially increase penalties for violations. Since the court has not determined whether an agency can contract with a party not to refer a case to the Attorney General's office, lawyers must be keenly aware of the potential for criminal prosecution and act accordingly. DHEC and other administrative agencies, as a result of *Peake II*, will face substantial opposition and difficulty conducting business and settlement negotiations with those who allegedly violate the laws that such agencies are responsible for enforcing.

58. *Peake II*, 353 S.C. 499, 507–08, 579 S.E.2d 297, 301–02 (2003) (Burnett, J., concurring).

59. *Id.* at 508, 579 S.E.2d at 302.

60. *See id.*

61. Seamon, *supra* note 1, at 19.

62. *Peake II*, 353 S.C. at 509, 579 S.E.2d at 302 (Burnett, J., concurring).

B. Ethical Concerns and the Obligations of Lawyers

Another concern arises with respect to the reasonableness of the beliefs and actions of lawyers representing clients who have allegedly violated the Pollution Control Act or other acts the different administrative agencies enforce. Specifically, a lawyer must now exercise far more diligence in dealings with administrative agencies in order to avoid making unintentional misrepresentations to the client or providing the basis for a malpractice claim. *Peake II* further implicates the duty of a lawyer to provide the client “with an informed understanding of the client’s legal rights and obligations” and to explain “their practical implications.”⁶³ Lawyers will be responsible not only for knowing the potential consequences from an alleged violation of an agency statute, but perhaps also for requesting frequent updates as to proceedings or decisions of referral for criminal matters. The administrative agencies, however, are under no obligation to disclose this information; neither the courts nor the legislature has developed such a requirement in this state.⁶⁴ Further, the court has not had the opportunity to establish the level of diligence the rules of professional conduct require of lawyers in these circumstances. *Peake II* implicates many of the duties that the courts of the state impose on lawyers; competency of representation is one requirement that a lawyer may find significant difficulty in fulfilling.⁶⁵ Reasonable thoroughness in the face of an agency that chooses to act surreptitiously may be unattainable. The decision also calls into question a lawyer’s ability to exercise due diligence, despite the opposition of DHEC or other agencies.⁶⁶ Finally, the result in the case drastically undermines lawyers’ communications with clients such as *Peake* and thus makes adequate and effective consultation far more difficult.⁶⁷

As a result, agencies may continue to give lawyers and their clients misleading and incomplete information in an attempt to achieve greater penalties against offenders, or to ensure the increased likelihood of exacting some penalty. Lack of judicial and legislative guidance in this arena also has the significantly discomforting effect of discouraging settlement between citizens and agencies. In

63. S.C. APP. CT. R. 407, pmbl.

64. One potential solution in this area would be the promulgation of an “Administrative Agency Code of Professional Responsibility” or similar document, but even general guidelines from the court or the legislature would be a positive step. Similar ethical codes and regulations are in use in numerous fields, and the importance of outlining legal or medical ethics so that individuals and companies can conform their practice applies with equal, if not greater, force to government practice. The substantial arguments for encouraging ethical practice by any governmental authority, including administrative agencies, would seem to warrant such a development.

65. S.C. APP. CT. R. 407 R.1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

66. *Id.* at R.1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

67. *See id.* at R.1.4(a) (“A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”); *Id.* at R.1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”). The comments to those rules make clear that a client must be able to engage in intelligent decisionmaking; inability by a lawyer to provide such service may subject that lawyer to sanctions by the court and malpractice suits. *Id.* at Scope (“Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”).

most circumstances, a lawyer would be ill-advised to recommend settlement to his client—especially if the settlement is substantial—where the threat of criminal indictment remains. Fewer settlements mean greater costs for clients and for the state, since the courts must handle the caseload and the administrative agencies must prepare their claims for adjudication. The after-effects of *Peake II*, while certainly not intentional, significantly hamper the ability of lawyers to provide adequate representation and will significantly discourage, if not eliminate altogether, any settlements by administrative agencies and alleged violators.

C. Questions *Peake II* Leaves Unanswered

Further complicating this matter is a looming question the court left unanswered in *Peake II*: whether an administrative agency can validly agree not to refer a case to the Attorney General for criminal prosecution. Of course, nothing prevents the Attorney General from seeking an indictment without an outside recommendation.⁶⁸ However, given the complexity and sheer number of agencies and the acts they are responsible for enforcing, as well as the practical separation between the activities of the Attorney General's office and these agencies, the probability of the Attorney General discovering a violation is extremely low, barring some form of politicizing or other publicizing of the matter.⁶⁹ The agency's general power to contract would facially allow a provision in a settlement agreement stating that the agency would not directly or indirectly refer the case to the Attorney General for criminal prosecution. Whether the court would uphold such an agreement depends on how strictly the court chooses to interpret article V, section 24 of the South Carolina Constitution.⁷⁰ A ruling based simply on the language of this provision would most likely allow the settlement; the agency is not actually settling the matter of criminal prosecution, and the Attorney General's rights under the constitution remain intact. As a counterargument, legally allowing an agency to agree not to inform the Attorney General of violations of an Act would effectively make that agency "the gatekeeper for criminal prosecutions,"⁷¹ a role for the agency that the court in *Peake II* definitively opposed. From this perspective, given that the Attorney General's lack of information would in most cases prevent issuance of a criminal indictment in the absence of a referral, the agency would be

68. See *McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976).

69. Cf. Seamon, *supra* note 1, at 7 ("Assuming that a problem is deemed to justify a governmental response, however, agencies are the only type of government entity that can do some types of work. Certainly, legislatures and courts cannot do all the work of governing."). Furthermore, the courts have not ruled that the Attorney General's supervisory power undermines the authority of state solicitors to prosecute criminal cases. See *McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976) ("[I]t is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits."). The supreme court's analysis in *Peake II* would appear to draw a distinction without a difference for administrative agencies; if the statutory authority that grants DHEC the power to institute or settle legal proceedings is invalid for criminal matters due to the Attorney General's supervisory power, so too should the court invalidate criminal prosecutions by solicitors.

70. See *supra* note 43 and accompanying text.

71. *Peake II*, 353 S.C. 499, 504, 579 S.E.2d 297, 300 (2003).

impermissibly deciding that prosecution of this nature should not occur.⁷² In situations dealing with DHEC and the Pollution Control Act, assuming completely ethical and truthful behavior, the former—allowing DHEC to enter into such contracts—is generally preferable. If a promise by DHEC not to refer matters to the Attorney General cannot be legally binding, parties who violate the Pollution Control Act are unlikely to settle, because criminal prosecution can still occur. Fewer settlements equates to more referrals to the Attorney General’s office, thereby increasing its caseload, as well as the burden on the courts. Further, since the charges filed would now be of a criminal nature, settlements of the type in *Peake II* would not be possible, as individuals would be unable to escape criminal liability by merely transferring a water treatment facility to the state. Agencies that choose to engage in activities whose underlying ethics are dubious at best, thwart the strong state and judicial interest in encouraging settlement, since parties such as *Peake* have no incentive to enter such an agreement. In any event, the uncertainty that remains following *Peake II* will have a substantial impact on the relationships between agencies and citizens of the state, between agencies and the legal community, and between those citizens and their lawyers.

V. VALIDITY OF THE *PEAKE II* DECISION

A. *The Attorney General and “Supervisory” Power*

Taking the analysis of this case one level deeper, the court’s quick decision regarding the constitutionality of certain provisions of the Pollution Control Act and subsequent interpretation of those statutes are subject to criticism. The only provision of the South Carolina Constitution that speaks to the powers of the Attorney General with regard to prosecution is article V, section 24, which consists of two phrases that grant powers.⁷³ The first phrase names the Attorney General as the “chief prosecuting officer of the State”; the second grants him the “authority to supervise the prosecution of all criminal cases in courts of record.”⁷⁴ The court’s interpretation that “[t]he decision whether to pursue criminal charges . . . is vested solely in the Attorney General,” and further “that the authority to grant immunity from criminal prosecution also resides exclusively in the Attorney General”⁷⁵ requires reading the terms “solely” and “exclusively” into the definition of “supervise.” Although that interpretation may serve important objectives in the court’s view, the common definitions of “supervise” do not clearly support such a

72. A useful sub-argument to consider is whether one side of the settlement issue more strongly fulfills the legislative purpose behind the relevant act. See S.C. CODE ANN. § 48-1-20 (Law. Co-op. 1987) (declaring public policy to be purity of air and water, consistent with factors such as employment, industrial development, and protection of property). The legislature’s clear choice of language throughout Chapter 48 shows an intention to grant broad authority to DHEC to protect public environmental concerns. See also Seamon, *supra* note 1, at 7 (“It falls primarily to the executive branch—through various government agencies—to administer the laws that are enacted by the legislature and interpreted by the courts.”).

73. S.C. CONST. art. V, § 24. Compare *supra* note 43 and accompanying text.

74. *Id.* (emphasis added).

75. *Peake II*, 353 S.C. at 504, 579 S.E.2d at 300.

construction.⁷⁶ While the constitution undeniably grants the Attorney General the powers to initiate and grant immunity, the plain meaning of that text does not appear to provide for exclusive powers.

Perhaps a more reasonable interpretation would allow the Attorney General to overrule any decision that DHEC or any other official or state agency makes concerning a criminal prosecution, subject to a dismissal of charges if the Attorney General so chooses. The *Peake II* court correctly recognized that DHEC could not definitively settle a criminal matter without the approval of the Attorney General; such action would clearly violate the article V, section 24 supervisory power. Completely prohibiting DHEC from exercising its authority to settle in criminal cases does not follow from that proposition; simply granting the Attorney General the right to review that decision is sufficient. Therefore, while the ultimate decision in *Peake II* would remain unchanged from this perspective, reconsideration by the court of the ability of officials and state agencies to initiate criminal prosecution should be in order in future cases.

B. Construction of Sections 48-1-210 and 48-1-220

Another important issue, assuming the court correctly interpreted the authority and powers of the Attorney General under the constitution, concerns the court's construction of sections 48-1-210 and 48-1-220. Obviously, if the court's decision that the Attorney General possesses the exclusive power to initiate and settle criminal matters was proper, then these statutes could not constitutionally provide otherwise. However, the court then decided to read the statute as consistent with the constitution rather than declaring it invalid, in order to avoid creating "a constitutional infirmity where none need exist."⁷⁷ A counterargument would suggest finding a South Carolina statute invalid if "(1) it violates the U.S. or South Carolina Constitution; (2) is preempted by federal law; or (3) has been expressly or impliedly repealed by a later South Carolina law."⁷⁸ The South Carolina Supreme Court has previously ruled statutes affecting administrative agencies invalid in a variety of settings, including the following: "statutes delegating legislative power to administrative agencies; statutes authorizing legislative involvement in the execution of laws; statutes authorizing legislative activity that does not follow constitutionally required procedures for exercise of legislative power; statutes authorizing judicial involvement in the execution of laws; and statutes authorizing adjudication by administrative agencies."⁷⁹ While the statutes at issue in *Peake II* do not fall directly within any of these categories, the language of those statutes appears to contrast significantly with the court's interpretation of the constitutional powers of the Attorney General.⁸⁰ The court read the first clause

76. See BLACK'S LAW DICTIONARY 1479 (8th ed. 2004) (defining "supervision" as "[t]he act of managing, directing, or overseeing persons or projects"); RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1342 (McGraw-Hill ed., 1991) (defining "supervise" as "to watch over and direct (a process, work, workers, etc.); oversee; superintend").

77. *Peake II*, 353 S.C. at 505, 579 S.E.2d at 300. See also *Curtis v. State*, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001) (providing that courts should give statutes constitutional constructions when possible).

78. Seamon, *supra* note 1, at 20.

79. *Id.*

80. See *supra* notes 19–20 and accompanying text and discussion.

of section 48-1-220 as only referring to civil cases, and the second as referring “to criminal prosecutions brought by the Attorney General,”⁸¹ despite the clear absence of those characterizing terms in the statute; the statute merely references prosecutions “as otherwise provided for in this chapter,”⁸² which can logically only refer to section 48-1-210. The court’s interpretation of that section also demonstrates a conclusion, despite a claimed unambiguity, that appears dubious at best.⁸³ The first sentence of section 48-1-210, like that of section 48-1-220, makes no mention of any distinction between civil or criminal matters, and defines the Attorney General only as DHEC’s “legal adviser,” acting “upon request” to institute “injunction proceedings or any other court action.”⁸⁴ The court correctly noted that the second part of this statute refers to the prosecution of criminal actions; however, nowhere does this language state or even imply any conclusion with respect to the initiation of criminal charges. This section merely serves, perhaps unnecessarily, to equate the powers of the solicitor and the Attorney General and to direct the solicitor to perform as the Attorney General requests during criminal prosecutions, not beforehand.⁸⁵ Finding a constitutional construction for these statutes, again assuming the correctness of the court’s conclusion on the constitutional claim, requires a decidedly equivocal reading of the language of the statutes in a way that may significantly alter their plain meaning.

C. Rewriting DHEC’s Legislatively-Defined Powers

The *Peake II* court noted seeming incongruities between reading the role of the Attorney General with regard to advising and initiating prosecution in sections 48-1-210 and 48-1-220 and the legislatively defined powers of DHEC.⁸⁶ However, the court merely glossed over this very important difference. The legislature, under its own authority granted by the state constitution,⁸⁷ defined a specific set of powers to DHEC and indeed to other such agencies. Section 48-1-50 creates twenty-five paragraphs of powers; some bear a significant similarity to the issues of the case. DHEC’s legislatively delineated powers under that code section include the ability to institute legal proceedings; the statute does not distinguish between criminal and

81. *Peake II*, 353 S.C. at 504, 579 S.E.2d at 300.

82. S.C. CODE ANN. § 48-1-220 (Law. Co-op. 1987).

83. As the court stated in *Peake II*:

The first sentence of § 48-1-210 envisions that DHEC will be responsible for the administration and prosecution of civil matters and penalties, unless it requests the involvement of the Attorney General. On the other hand, the second sentence of § 48-1-210 provides unequivocally that the Attorney General, or the solicitor acting pursuant to the Attorney General’s instructions, will bring any criminal charges.

Peake II, 353 S.C. 499, 503, 579 S.E.2d 297, 300 (2003) (citations omitted).

84. S.C. CODE ANN. § 48-1-210 (Law. Co-op. 1987) (emphasis added).

85. *Id.* The indicative language here is that the Attorney General “may exercise all the powers . . . which the solicitor would . . . perform and . . . the solicitor shall exercise such powers . . . as are requested of him by the Attorney General.” *Id.*

86. *Peake II*, 353 S.C. at 503, 579 S.E.2d at 299.

87. S.C. CONST. art. XII, § 1.

civil matters.⁸⁸ Further, the provision grants DHEC the right to administer penalties for violations of the environmental protection laws it enforces.⁸⁹ Section 48-1-320 specifically lists the criminal penalties that may result from such a violation and thus implies a right by DHEC to seek the imposition of those penalties unilaterally in a state court.⁹⁰ Additionally, section 48-1-50(7) vests DHEC with a power that *Peake II* partially removes: that of settling any action (with no reference limiting the authority to civil actions) or cause of action.⁹¹ The court gives no direct statement of any departure from its previous decisions or any statement construing these powers to refer solely to civil proceedings. However, these conclusions follow from the logic that the court employed in *Peake II*, and these points do to some extent stand in conflict with prior language. The court has stated that “[a]s creatures of statute, regulatory bodies such as DHEC possess only those powers which are specifically delineated,”⁹² which would seemingly dictate that DHEC possesses the powers expressed in section 48-1-50 without more. However, the court has gone even further and broadly construed legislative grants of power, while noting the necessity of doing so. “[A] regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged.”⁹³ The powers that the legislature granted to DHEC clearly cover criminally prosecuting an individual who violates the Pollution Control Act or settling with a violator, but the court in *Peake II* removed these powers it perceived as violating the constitutional powers of the Attorney General. A judicially imposed restriction on a legislatively defined power was apparently the best solution, in the court’s eyes at least, to the issues *Peake II* presented. However, allowing DHEC merely to engage in activity that has previously been under the Attorney General’s purview does not clearly violate the state constitution. Further, whether agencies would choose to exercise such power without the Attorney General’s knowledge or consent remains unclear. By effectively rewriting the statutory provisions, the court opened the door for significant confusion within administrative agencies, the legislature, and the legal community, since future decisions may further rewrite agency powers and move the court away from its broad constructions.

88. S.C. CODE ANN. § 48-1-50(4) (Law. Co-op. 1987) (“The Department may . . . [i]nstitute or cause to be instituted, in a court of competent jurisdiction, legal proceedings, including an injunction, to compel compliance with the provisions of this chapter or the determinations, permits and permit conditions and orders of the Department.”).

89. S.C. CODE ANN. § 48-1-50(11) (“The Department may . . . [a]dminister penalties as otherwise provided herein for violations of this chapter, including any order, permit, regulation or standards.”).

90. See S.C. CODE ANN. § 48-1-320 (West Supp. 2004).

91. S.C. CODE ANN. § 48-1-50(7) (Law. Co-op. 1987) (“The Department may . . . settle or compromise any action or cause of action for the recovery of a penalty or damages under this chapter as it may deem advantageous to the State.”).

92. *City of Rock Hill v. S.C. Dep’t of Health & Envtl. Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Bd. of Health & Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987)).

93. *Id.* (citing *City of Columbia v. Bd. of Health & Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987)). The state supreme court has further stated that “[t]he delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public.” *Bd. of Health & Envtl. Control*, 292 S.C. at 202, 355 S.E.2d at 538. Since DHEC is such an agency, the court has stated that it will construe its authority broadly and liberally. *S.C. Dep’t of Health & Envtl. Control*, 302 S.C. at 165, 394 S.E.2d at 330.

The court represents the Attorney General's supervisory power as extremely broad but fails to recognize that, even in the face of *Peake II*, DHEC has significant control over the issuance of a criminal indictment. Only in extreme circumstances will the Attorney General initiate or settle a criminal prosecution without a referral by an administrative agency. On a more fundamental level, the legislature and the state constitution define the role of DHEC and other agencies to protect the public interest and to decide whether a violation has occurred.⁹⁴ The United States Supreme Court has also noted the importance of agency decision and action.⁹⁵ From this perspective, the Attorney General is more an arm of the various agencies—one that carries out criminal prosecutions—than an independent actor who discovers and pursues violations of environmental laws without prompting. Declaring the Attorney General to exercise certain powers over the agencies, such as those the court expressed in *Peake II*, and expanding the definition of "supervisory" from the narrow language in the South Carolina Constitution implies a duty where none exists. The Attorney General does not seek out environmental violators and issue criminal indictments against them; the office waits for referrals from DHEC, acts at the agency's request, and relies on the agency's finding that a violation occurred. Allowing administrative agencies to institute criminal proceedings would not detract from the supervisory power the state constitution creates and would better fit the legislative model. Agency incentives to engage in subterfuge would decrease, settlement agreements would increase, relations with the legal community would improve, and lawyers would be far better equipped to serve their clients and meet their responsibilities.

VI. CONCLUSION

Peake II presents a variety of issues, including the interpretation of the South Carolina Constitution and certain statutory authority, the enforcement actions and conduct of state agencies, and the difficulties that lawyers who deal with agencies now face. With regard to the first, the court's chosen path required it to read new language and new definitions into both the text of the South Carolina Constitution as well as into two of the statutes the legislature developed for enforcement of the Pollution Control Act. Although strong public interest and efficiency arguments may support a centralized grant of authority to one Attorney General, who would then possess the final and exclusive power to initiate and settle criminal prosecutions, reaching to interpret those provisions in this regard has far more significant potential to introduce uncertainty and imbalance within the legal community, the agencies of this state, and the judicial system.

The second issue—conduct of state agencies—and the related discussion of the behavior of DHEC and its agents, specifically Hunter-Shaw, throughout the time leading up to *Peake*'s indictment, demonstrates a need for legislative or judicial

94. See S.C. CONST. art. XII, § 1; S.C. CODE ANN. § 48-1-20 (Law. Co-op. 1987).

95. As that Court has stated:

Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Heckler v. Chaney, 470 U.S. 821, 831 (1985).

guidance in these areas. The court's ruling in *Peake II* conceivably allows DHEC and other administrative agencies to effectively engage in unethical and dishonest conduct to receive a substantial civil settlement and, additionally, to bring about substantial criminal penalties for any individual or corporation who violates an act the agency is responsible for enforcing. As to the third issue, the *Peake II* decision discourages settlement and encourages criminal prosecution, as lawyers who have knowledge of the power of the agency in these circumstances will certainly advise a client against a substantial settlement while the threat of criminal prosecution still looms. Intertwined with this issue is the enhanced difficulty this case creates for lawyers seeking to provide adequate and useful representation to their clients and the corresponding potential for an increase in legal malpractice claims.

Remedying these problems is not beyond hope. Working backwards, the extensive powers that the legislature granted to agencies warrant a clear enumeration of the responsibilities those agencies hold regarding the citizens of South Carolina. Without such a declaration, the government through its administrative agencies can escape its obligation and duty to serve the people. Next, the court needs to settle the issue of whether an administrative agency can validly agree by contract not to refer a violation to the Attorney General's office, even though doing so would effectively end the threat of criminal prosecution in the particular case. Although either answer to that matter contains potential problems, allowing the uncertainty to remain would be far more problematic. Finally, the court ought to reconsider its interpretation of article V, section 24 of the South Carolina Constitution, as well as sections 48-1-210 and 48-1-220 of the South Carolina Code, and look more toward the plain meaning of the language. In the end, the *Peake II* decision may have the effect of allowing and even indirectly supporting potentially abusive agency practice. As Justice Burnett stated, DHEC as a state agency is "entrusted with the stewardship of the people's environment. This stewardship means they must not only zealously guard the environment, but must also be zealously on guard against a tendency to abuse its powers for what it considers to be the greater good."⁹⁶ In this context, the court is likewise responsible for the stewardship of the people's rights, and therefore, must guard those rights against abuse with an even greater zealousness.

Jared Quante Libet

96. *Peake II*, 353 S.C. 499, 508, 579 S.E.2d 397, 302 (2003) (Burnett, J., concurring).

