

## The consequences of *Loper Bright*: A sampler

This chart demonstrates how various selected statutes affect the work of agencies, before and after *Loper Bright*.

Statutory text	Before <i>Loper Bright</i>	After <i>Loper Bright</i>
<p>A fishery management plan shall contain conservation and management measures which are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.”</p> <p>16 U.S.C. § 1853.</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what is “necessary and appropriate”).†</p> <p><b>Express authority:</b> The agency has express authority to issue fishery management plans consistent with the statute’s meaning.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency still has the express authority to issue fishery management plans that are consistent with the statute’s meaning. However, in the event of a legal challenge to agency action, a court would determine the meaning of terms within the statutory text, such as “necessary and appropriate”; furthermore, that court could <i>probably</i> reject the agency rule if it found that the rule the agency issued was not consistent with that meaning.*</p>
<p>Minimum wage and maximum hour requirements shall not apply to “(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary... ).”</p> <p>29 U.S.C. § 213(a)(1).</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency has express authority to determine the meaning of ambiguous terms in the statute.†</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency has express authority to determine the meaning of ambiguous terms in the statute.†</p> <p>(Notably, <i>Loper Bright</i> has not changed the agency’s authority to apply and execute its rules.)</p>
<p>The Secretary “shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.”</p> <p>42 U.S.C. § 1302 (Medicare and Medicaid rules)</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what is “necessary” for “efficient administration”).†</p> <p><b>Express authority:</b> The agency has express authority to issue rules that establish the facts that are necessary to enforce the statute.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency has express authority to issue rules that establish the facts that are necessary to enforce the statute.</p>
<p>“The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available.”</p> <p>42 U.S.C. 300gg-14 (Extension of dependent coverage)</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what a “dependent” is).†</p> <p><b>Express authority:</b> The agency has express authority to issue rules that establish what scope of coverage for dependents is required.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency still has express authority to issue rules that establish what scope of coverage is required. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court has the authority to determine what a “dependent” is); furthermore, that court could <i>probably</i> reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.*</p>
<p>“The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”</p> <p>5 U.S.C. § 301 (Departmental regulations)</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency has express authority to issue rules that govern its employees and the use of its property.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency has express authority to issue rules that govern its employees and the use of its property.</p> <p>(Notably, <i>Loper Bright</i> has not changed the agency’s authority to apply and execute its rules.)</p>

† It is worth noting that, before *Loper Bright*, an agency’s authority to determine the meaning of ambiguous statutory terms was limited: the use of that interpretive authority was confined to reasonable or permissible interpretations.

\* A court could probably reject an agency rule in such circumstances because it would probably find that the circumstances at hand presented a mixed question of law and fact. In such cases, the court would probably find that the statute’s meaning (as determined by the judge) was inconsistent with the facts of the matter (as determined by the agency). However, if a court found that the circumstances at hand involved only questions of fact (and not questions of law), then presumably that court would not reject the agency rule—unless the agency lacked substantial evidence to support its claims of fact.

Statutory text	Before <i>Loper Bright</i>	After <i>Loper Bright</i>
<p>“The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, cybersecurity, and performance of aircraft, aircraft engines, and propellers”</p> <p>49 U.S.C. § 44701 (Safety Regulation).</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what a “minimum standard” is, what a “design” is, etc.).†</p> <p><b>Express authority:</b> The agency has express authority to issue rules establishing minimum safety standards—as well as rules that establish the facts that are necessary to enforce the statute.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency still has express authority to issue rules establishing minimum safety standards—as well as rules that establish the facts that are necessary to enforce the statute. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of a “minimum standard”); furthermore, that court could <i>probably</i> reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.*</p>
<p>“The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) as a result of emissions to the air.”</p> <p>42 U.S.C. § 7412 (Hazardous air pollutants).</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine the meaning of “adverse human health effects” or “adverse environmental effects”).†</p> <p><b>Express authority:</b> The agency has express authority to issue rules that designate what pollutants create a threat of adverse effects—and the facts that are necessary to determine whether such pollutants create that threat.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency still has express authority to issue rules that designate what pollutants create a threat of adverse effects—and the facts that are necessary to determine whether such pollutants create that threat. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of “adverse human health effects” and/or “adverse environmental effects”), furthermore, that court could <i>probably</i> reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.*</p>
<p>“The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States... which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States... present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.” 33 U.S.C. § 1321(b)(2) (Oil and hazardous substance liability).</p>	<p><b>Implied authority:</b> The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine the meaning of a “danger to public health or welfare”).†</p> <p><b>Express authority:</b> The agency has express authority to issue rules that designate what substances are hazardous, when or if they create a danger to public health or welfare, and what facts are needed to establish that such substances are hazardous and that they create such a danger.</p>	<p><b>Implied authority:</b> None.</p> <p><b>Express authority:</b> The agency still has express authority to issue rules that designate what substances are hazardous, when or if they create a danger to public health or welfare, and what facts are needed to establish that such substances are hazardous and that they create such a danger. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of a “danger to public health or welfare”); furthermore, that court could <i>probably</i> reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.*</p>