

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS LOBSTERMEN’S)
ASSOCIATION,)
)
 Plaintiff,)
)
 v.)
)
 NATIONAL MARINE FISHERIES SERVICE,)
 et al.,)
)
 Defendants.)

No. 1:24-cv-10332-WGY

**DEFENDANTS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT ON CLAIMS 1, 2, AND 3 IN PLAINTIFF’S
COMPLAINT**

At the Court’s March 7, 2024, hearing on Plaintiff Massachusetts Lobstermen’s Association’s Motion for Temporary Restraining Order, Preliminary Injunction, and Administrative Stay (Dkt. 35) (“Motion for a Preliminary Injunction”), the Court indicated that it would not enter an emergency injunction and, instead, would consolidate the Plaintiff’s Motion for a Preliminary Injunction with a trial on the merits as to the violations alleged in Claims 1 and 2 of Plaintiff’s Complaint (Dkt. 1 at 16-18); Dkt. 51 (setting hearing on claims “regarding the statute and regulations”).¹ The Court set the trial on the merits for March 14, 2024, from 1:45-2:45 p.m. Eastern, and indicated that it would not require briefing but would be amenable to receiving briefs before that time. Dkt. 51.

As a preliminary matter, Defendants urge the Court to clarify that the proceeding for which it has ordered the parties to prepare is an Administrative Procedure Act (“APA”) record review

¹ Plaintiff has asserted in correspondence with Defendants that it believes the Court also intends to hear argument on Claim 3 at the March 14, 2024, trial on the merits. For this reason, Defendants include Claim 3 in this motion and memorandum in support.

summary judgment proceeding, and not a “trial on the merits” as that phrase is traditionally employed under Federal Rule of Civil Procedure 65(a)(2). Plaintiff’s and Defendants’ counsel jointly expressed the position at the March 7, 2024, hearing that Plaintiff’s Claims 1 and 2 (and also Claim 3) are brought under the APA, seek review of an agency action and, as such, are appropriately decided on motions for summary judgment under the APA standard of review. *See Atieh v. Riordan*, 727 F.3d 73, 76 (1st Cir. 2013) (“APA review, however, involves neither discovery nor trial.”); *Associated Fisheries v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (explaining that the summary judgment rubric has a “special twist in the administrative law context. . . . Where the APA standard obtains, a court may set aside an administrative action only if that action is arbitrary, capricious, or otherwise contrary to law.”); *Boston Redevel. Auth. v. National Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016) (same). Also, motions for summary judgment in APA cases are usually staggered and allow for the parties to respond to each other’s arguments. *See, e.g., Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*, No. 1:21-cv-11390 (D. Mass.) (allowing four briefs in 2022 for Endangered Species Act matter under APA standard of review at Dkt. 88-89, 95-96, 105, 114).

Accordingly, and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, the Defendants hereby move for partial summary judgment on Claims 1, 2, and 3 set forth in Plaintiff’s Complaint. Plaintiff has failed to meet its burden to demonstrate standing, and thus the Court lacks jurisdiction for all of Plaintiff’s claims (including Claims 1, 2, and 3). Moreover, Defendants’ Motion for Partial Summary Judgment is supported by the agency’s administrative record (Dkt. 21), the Marine Mammal Protection Act (“MMPA”), and the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. JJ, Tit. I, 136 Stat. 4459, 6089-90. As these supporting documents make clear, there is no genuine issue of material fact as to Claims 1, 2, and 3 in Plaintiff’s Complaint, and

the Defendants are entitled to judgment as a matter of law. Accordingly, the Court should enter summary judgment for Defendants and dismiss Plaintiff's Claims 1, 2, and 3 with prejudice.²

Local Rule 56.1 requires the submission of a "concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried," but such a requirement is not applicable to this APA-based case. As the Supreme Court has consistently held, a Court's review of claims brought under the APA is to be based upon an administrative record compiled by the defendant agency, here the National Marine Fisheries Service. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The First Circuit has articulated and enforced this rule that the scope of judicial review of agency action is limited to the administrative record. *See, e.g., Cousins v. Sec'y of U.S. Dep't of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989). Judicial review of agency action is a unique procedure, different in both nature and scope from the procedures used to resolve civil actions within the original jurisdiction of the federal district courts. Consequently, there are no material facts for the Court to resolve in the first instance. Rather, the Court's role is limited to determining whether the challenged action or inaction of the Defendants is supported by the record or contrary to law. Accordingly, Defendants deny any purported material fact set forth by the Plaintiff that is inconsistent with the administrative record lodged by the Defendants on February 21, 2024 (Dkt. 21).

To the extent the Court is disinclined to proceed on a summary judgment footing at the upcoming March 14, 2024, hearing, Defendants submit the attached brief as a supplemental brief in

² Plaintiff alleged four more claims in its Complaint (Dkt. 1 at 17-21 (claims 4-7)) that the Court stated at its March 7, 2024, hearing that it will not be considering at this time. Defendants intend to move for summary judgment on the balance of Plaintiff's claims to the extent the Court establishes a schedule for briefing as to those claims.

opposition to Plaintiff's likelihood of success on the merits arguments as to Claims 1, 2, and 3, as raised in Plaintiff's Motion for a Preliminary Injunction.³

Date: March 12, 2024

Respectfully submitted,

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Counsel for Defendants

Of Counsel

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³ Whether styled as a preliminary or permanent injunction, to obtain the relief Plaintiff seeks, it must demonstrate four elements, including a likelihood of irreparable harm absent injunctive relief. *See* Dkt. 22 at 8-12; *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)); *Largess v. Mass. Supreme Judicial Court*, 373 F.3d 219, 224 (1st Cir. 2004) (standard for preliminary and permanent injunction is the same); *Doe v. Commissioner, N.H. Dept. of Health and Human Servs.*, 657 F. Supp. 3d 206, 218-19 (D.N.H. 2023) (plaintiff must meet all four prongs of injunctive relief standard to obtain permanent injunction). Irreparable harm is among the “most important” of the four factors. *Together Emps. v. Mass Gen. Brigham Inc.*, 32 F.4th 82, 85 (1st Cir. 2022) (citing *Nken*, 556 U.S. at 434). Yet after three tries, Plaintiff has never done so. *See* Dkt. 22 at 9-12. The Court should not, in proceeding under Federal Rule of Civil Procedure 65(a)(2), eliminate Plaintiff's requirement to show that it would be irreparably harmed by implementation of the limited lobster fishery closure at issue. *Mass. Lobstermen's Ass'n v. NMFS*, No. 1:23-cv-293 (D.D.C.) (02/16/23 Min. Order); *id.* at Dkt. 29 (Transc. of 02/16/24 Hearing at 30, 31); *see also id.* (Dkt. 40 at 4) (noting in granting Defendants' motion to dismiss, “The Court gave Plaintiff the option to move for a preliminary injunction with additional evidence supporting irreparable harm, which it did not do.” (citing Transc. of 02/16/23 Hearing at 31:18–24)).

NOAA Office of General Counsel
Silver Spring, Maryland

LOCAL RULE 7.1(A)(2) CERTIFICATION

I hereby certify that on March 11 and 12, 2024, Defendants' counsel conferred by email with Plaintiff's counsel, who indicated that Plaintiff opposes Defendants' motion for partial summary judgment.

/s/ Taylor A. Mayhall
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Taylor A. Mayhall
Attorney for Defendants