

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HOUSING AUTHORITY OF SNOHOMISH
COUNTY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT, et al.,

Defendants.

CASE NO. C13-1791RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the parties' cross-motions for summary judgment. Plaintiff, the Housing Authority of Snohomish County ("HASCO"), requested oral argument; Defendants, the United States Department of Housing and Urban Development and its Secretary (collectively "HUD"), did not. The court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS HASCO's motion (Dkt. # 11) to the extent stated in this order, and DENIES HUD's motion (Dkt. # 13). HUD must make a new decision as to HASCO's application to dispose of its public housing units. The parties must submit a joint statement no later than September 15, 2014 as to their preferences for the disposition of this civil action.

II. BACKGROUND

HASCO is a "public housing agency" ("PHA") within the meaning of the United States Housing Act of 1937 ("Housing Act"), which is codified along with amendments

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1 beginning at 42 U.S.C. § 1437. HASCO administers more than 5,000 housing units
2 through a variety of programs, including the Section 8 Housing Choice Program, in
3 which qualified persons receive vouchers that they use to subsidize market-rate rentals of
4 privately-owned housing. HASCO administers just 210 units of “public housing,” which
5 are units that HASCO owns and manages with subsidies from the federal government.
6 HUD administers those federal subsidies. HASCO’s 210 public housing units are in 14
7 geographically dispersed properties with as many as 30 and as few as 2 units.
8 Administrative Record (“AR,” Dkt. # 7) at 18, 206.

9 In July 2011, HASCO filed an application with HUD to “dispose” of its 210
10 public housing units. “Disposition” is a term of art in the Housing Act that describes the
11 sale or other transfer of public housing from the public housing program. 42 U.S.C.
12 § 1437p; 24 C.F.R. § 970.5 (defining “Disposition”). HASCO’s plan is to lease its 210
13 units to a nonprofit affiliate who would operate the units as low-income housing. The
14 residents of the units would receive Section 8 vouchers, allowing them to stay in their
15 home or seek other housing. HASCO planned to use proceeds of the disposition to
16 perform capital improvements and maintenance on the 210 units and to acquire an
17 additional 46-unit building to use for low-income housing. AR 18-20. HASCO offered a
18 host of reasons for disposition in its application to HUD. It explained that the disposition
19 would offer greater housing choice to its public housing residents, and that residents
20 supported the proposed disposition. AR 20, 69-70. It explained that the disposition
21 would help it deconcentrate poverty in its jurisdiction. AR 19. It emphasized that the
22 proceeds of the disposition would allow it to buy additional low-income housing. AR 20-
23 21. It also stated that under the financing structure applicable to public housing, it could
24 not meet its projected capital needs at the 210 units over the next 20 years. AR 18-20

25 HUD denied HASCO’s disposition application in February 2012, again in July
26 2012 after HASCO requested reconsideration, and a third time November 2012 after
27 HASCO requested reconsideration again. AR 202-203, 370-72, 470-71. Each time HUD

1 denied HASCO’s application, it focused on one issue: whether HASCO had sufficient
2 funds for capital improvements and maintenance at the 210 units with its existing income
3 and federal subsidies. AR 202 (“Specifically, the HASCO certified that it does not have
4 the resources necessary to address capital needs with its existing HUD subsidies.”), 372
5 (“Specifically, the size of the operating deficit combined with the lack of significant
6 capital needs does not justify disposition.”), 470 (“The Department . . . has determined
7 that all the information [HASCO provided] remain inadequate to justify the
8 disposition”). HUD did not address HASCO’s assertion that the disposition would
9 allow it to acquire more low-income housing. HUD did not address HASCO’s assertion
10 that the disposition would benefit the residents of the 210 units.

11 HASCO sued, invoking the judicial review provisions of the Administrative
12 Procedures Act (“APA,” 5 U.S.C. §§ 701-706). It contends that HUD erred at the
13 threshold by disregarding the duties that the Housing Act imposes on HUD in approving
14 disposition requests. In its view, HUD’s singular focus on HASCO’s capital needs and
15 resources at the 210 units is itself a violation of the Housing Act, regardless of whether
16 its substantive determination that HASCO had adequate resources to meet its capital
17 needs was correct. It also contends that the substantive determination was erroneous. It
18 asks the court to do what HUD would not – grant its disposition application. HUD, for
19 its part, contends that it both followed the Housing Act and that the court can set aside its
20 denial of HASCO’s disposition application only if it acted arbitrarily and capriciously,
21 which it did not. The parties’ cross-motions for summary judgment express their
22 disparate views, and the court now resolves them.

23 III. ANALYSIS

24 A. HUD “Shall Approve” a Disposition Application If a PHA Makes Certain 25 Certifications, and “Shall Disapprove” It If HUD Has Information That Is 26 “Clearly Inconsistent” With Those Certifications.

27 Section 1437p of the Housing Act establishes HUD’s duties in reviewing a
28 disposition application in two subsections. Subsection (a) mandates that HUD “shall

1 approve” a disposition application if a PHA makes a series of certifications described in
2 the statute. Eliminating the certifications that do not apply to the disposition of dwelling
3 units, the statutory certifications are as follows:

- 4 1) that keeping the property *is not* in the “best interests of the residents or the
5 public housing agency,” § 1473p(a)(2)(A), *or* that disposing of the property *is*
6 in the “bests interests of the residents and the public housing agency,
7 § 1437p(a)(2)(B);
- 8 2) that the PHA’s agency plan authorizes the disposition, § 1437p(a)(3);
- 9 3) that the PHA has given residents advance notice of the disposition and advised
10 the residents of its plan to provide them with comparable housing, relocation
11 expenses, and other resources, § 1437p(a)(4);
- 12 4) that the “net proceeds” of the disposition will be used first to retire debt
13 associated with construction or improvement of the public housing and then for
14 the benefit of the PHA’s residents, § 1437p(a)(5); and
- 15 5) that the PHA has, in “appropriate circumstances,” offered to sell the property
16 to resident organizations. § 1437p(a)(6).

17 But just as HUD “shall approve” a disposition application containing the required
18 certifications, it “shall disapprove” a disposition application if it makes one of the
19 following determinations:

- 20 1) that “any certification” made by the PHA as described above is “clearly
21 inconsistent with information and data available to [HUD] or information or
22 data requested by [HUD],” § 1437p(b)(1); or
- 23 2) that the application was not developed in appropriate consultation with
24 residents and “appropriate government officials,” § 1437p(b)(2).

25 This dispute focuses on whether HUD had information that was “clearly
26 inconsistent” with the first of the certifications described above. The parties raise no
27 dispute about the other certifications. HUD does not contest that HASCO took

1 appropriate steps to inform residents of the impact of the proposed disposition, that it
2 consulted appropriately with residents, that it consulted appropriately with local
3 governments, and so on. HUD Mot. at 5 (Dkt. # 13) (“The other required certifications
4 are not at issue.”).

5 The certification in dispute, codified at § 1437p(a)(2), can take two alternative
6 forms, both of which depend on the “best interests” of the residents and the public
7 housing agency. § 1437p(a)(2)(A)(ii) & (B)(i). The first best-interests certification
8 alternative permits a best-interests certification where the “disposition allows the
9 acquisition, development, or rehabilitation of other properties that will be more
10 efficiently or effectively operated as low-income housing.” § 1437p(a)(2)(A)(ii). The
11 second best-interests certification is more complex, allowing certification where the
12 disposition is in the best interests of residents and the PHA, is consistent with the goals of
13 the PHA and its plan, and is otherwise consistent with the Housing Act.
14 § 1437p(a)(2)(B)(i)-(iii).

15 Before considering the parties’ dispute over HASCO’s best-interests certification,
16 the court considers what role the APA gives the court in resolving that dispute.

17 **B. Standard of Review**

18 The APA does not permit plenary judicial review of an agency decision. A court
19 must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or
20 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The parties diverge
21 sharply about what that limited scope of review means in this case. HUD insists that the
22 court can take action only if it were to find that its conclusion that HASCO had adequate
23 resources to meet its capital needs at the 210 units was arbitrary or capricious. HASCO
24 invites the court to sidestep § 706(2)(A) entirely, and instead exercise its authority to
25 “compel agency action unlawfully withheld,” in accordance with § 706(1). In HASCO’s
26 view, it made the required statutory certifications, HUD did not conclude otherwise, and
27 thus HUD “unlawfully withheld” approval of the disposition application.

1 Neither party’s selective reading of the APA convinces the court. HASCO’s effort
2 to cast disposition approval as HUD’s mandatory duty ignores that HUD’s duty to
3 disapprove dispositions is no less mandatory. Here, the parties have a dispute about
4 whether HUD had a sufficient basis to carry out its duty to disapprove, a dispute that
5 requires the court to examine HUD’s decision. But HUD is mistaken as well to the
6 extent it suggests that the APA permits a court to set aside agency action only when the
7 agency acted arbitrarily or capriciously. The APA also permits a court to set aside
8 actions that are an “abuse of discretion” or are “otherwise not in accordance with the
9 law.” It is these latter aspects of § 706(2)(A) of the APA that are ultimately fatal to
10 HUD’s decision on HASCO’s disposition application.

11 The parties raise their APA disputes in summary judgment motions, which require
12 the court to draw all inferences from the admissible evidence in the light most favorable
13 to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.
14 2000). Summary judgment is appropriate where there is no genuine issue of material fact
15 and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a).
16 The moving party must initially show the absence of a genuine issue of material fact.
17 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show
18 a genuine issue of fact for trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475
19 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its
20 claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558
21 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See*
22 *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999). APA disputes are
23 often amenable to summary judgment, either because they turn on purely legal questions,
24 or because the court typically makes no finding of fact in determining if an agency’s
25 decision is arbitrary or capricious. *Rijal v. USCIS*, 772 F. Supp. 2d 1339, 1344 (W.D.
26 Wash. 2011), *aff’d & adopted by* 683 F.3d 1030 (9th Cir. 2012);

1 **C. HUD’s Denial of HASCO’s Disposition Application Violated § 1437p, HUD**
2 **Regulations, and the APA.**

3 HUD violated the Housing Act when it based its denial of HASCO’s disposition
4 application solely on its belief that it had data that was “clearly inconsistent” with
5 HASCO’s statements that its could not meet its capital needs while maintaining the 210
6 units as public housing. HUD treated HASCO’s opinion to the contrary as a
7 “certification” within the meaning of § 1437p, which is contrary to the plain language of
8 the statute and the regulations HUD adopted to implement it.¹

9 **1. HASCO’s Statement About Its Ability to Meet Its Capital Needs Was**
10 **Not a “Certification” Within the Meaning of § 1437p.**

11 In relevant part, § 1437p(b) permits disapproval “of an application submitted
12 under subsection (a) of this section” when HUD determines that “any certification made
13 by the public housing agency *under that subsection* is clearly inconsistent with
14 information and data available to” HUD. § 1437p(b)(1) (emphasis added). HUD prefers
15 to emphasize the statute’s reference to “any certification,” suggesting that this means that
16 literally “any certification” made as part of a disposition application is a potential ground
17 for HUD to disapprove of the application. Were that the case, Congress would have
18 permitted HUD to disapprove an application based on “any statement” within a
19 disposition application. Congress did not; it plainly required HUD to focus solely on the
20 certifications mandated in § 1437p(a). The court cannot accept HUD’s view, which
21 contradicts the unambiguous command of the statute. *See Mont. Consumer Counsel v.*
22 *FERC*, 659 F.3d 910, 915-16 (9th Cir. 2011) (noting that deference to agency’s
23 construction of the law it is charged with administering cannot countenance violation of
24 an “unambiguous command of Congress”). For the same reason, the court cannot accept
25 HUD’s view that HASCO’s capital needs assessment was a “certification” within the
26 meaning of § 1437p merely because it appeared in HASCO’s disposition application in a

27 ¹ HASCO invites the court to consider, in addition to the plain meaning of the statute, its view
28 that Congress amended § 1437p in 1989 with the intent of giving HUD only limited control over
disposition applications. The court need not consider congressional intent in this case, because
the command of § 1437p is apparent from the text of the statute.

1 section HASCO entitled “Section 18 Certification.” AR 18. Whether HASCO made a
2 “certification” in the ordinary sense of the word is irrelevant; “certification” is a term of
3 art in § 1437p. HUD could disapprove HASCO’s disposition application only if it had
4 information that was “clearly inconsistent” with one of the certifications enumerated in
5 § 1437p(a).

6 HUD’s regulations, like the statute that they supplement, make clear that it can
7 disapprove a disposition application only based on specific “certifications.” Congress
8 authorized HUD’s Secretary to issue “rules and regulations as may be necessary to carry
9 out his functions, powers, and duties.” 42 U.S.C. § 3535. The Secretary’s regulations
10 governing disposition are at 24 C.F.R. Part 970. There, the Secretary declared HUD’s
11 authority to disapprove a disposition application if “[a]ny certification made by the PHA
12 *under this part* is clearly inconsistent with,” among other things, “information and data
13 available to HUD related to the requirements of this part,” including “failure to meet the
14 requirements for the justification for . . . disposition” as found elsewhere in Part 970. 24
15 C.F.R. § 970.29(a) (emphasis added). The regulations require several “certifications,”
16 almost all of which are materially identical to the “certifications” listed in § 1437p(a).
17 They include, as applicable to the disposition of dwelling units, a certification “that the
18 retention of the property is not in the best interests of the residents or the PHA for at least
19 one of three reasons,” with three enumerated reasons that track the language of 42 U.S.C.
20 § 1437p(a)(2). They also include a few certifications that HUD describes as “[g]eneral
21 requirements” for a disposition application. 24 C.F.R. § 970.7(1) (requiring a
22 “certification that the PHA has described the demolition or disposition in the PHA
23 Annual Plan . . .”), § 970.7(16) (requiring a “certification that the . . . disposition
24 application does not violate any remedial civil rights order or agreement . . . or other
25 court order or agreement.”)

26 Absent from both § 1437p and the regulations that implement it is any requirement
27 that a PHA certify that it has inadequate resources to meet capital needs at public housing

1 units that it proposes to dispose of. HUD’s disapproval letters, however, leave the court
2 with no choice but to conclude that it denied HASCO’s disposition application solely
3 because it believed it had information that was clearly inconsistent with a HASCO’s
4 “certification” that it could not meet capital needs at the 210 units. That was error.

5 **2. HUD Erred By Failing to Show that It Had Data That Was “Clearly**
6 **Inconsistent” With HASCO’s Two Best-Interests Certifications.**

7 To distinguish between a “certification” that can support the approval or
8 disapproval of a disposition application and any other statement that appears in an
9 application is not an exercise in judicial nitpicking. Congress reduced the considerations
10 underlying approval or disapproval of a disposition application to just a few statutory
11 certifications. And, because no one argues that HUD’s regulations are in excess of its
12 statutory power, the court assumes that HUD permissibly used its regulatory power to
13 add a few certifications to the list. HUD’s approach in this case, so far as the
14 administrative record reflects, was to focus exclusively or nearly so on HASCO’s ability
15 to meet its capital needs. To the extent a comparison of capital needs to resources is
16 relevant, it is relevant to the second of the best-interests certification alternatives, the one
17 codified at § 1437p(a)(2)(B) and 24 C.F.R. § 970.17(c). But that version of the “best
18 interests” certification is not a certification that the disposition is necessary, or even
19 advisable, to help the PHA meet its capital needs. Instead, it is a holistic certification that
20 takes into account the broader interests of residents, the broader goals of the PHA, and
21 the broader aims of the Housing Act. § 1437p(a)(2)(B)(i)-(iii). HUD ignored these
22 broader considerations, and thus violated the law.

23 HUD also violated the law by failing to consider HASCO’s alternative best-
24 interests certification. HASCO certified that the disposition would be used to purchase
25 an additional 46 units of low-income housing. AR 20-21. That certification tracks the
26 best-interests certification alternative codified at § 1437p(a)(2)(A)(ii) and 24 C.F.R.
27 § 970.17(b), which applies to dispositions that allow “the acquisition, development, or

1 rehabilitation of other properties that will be more efficiently or effectively operated as
2 low-income housing.” HASCO did not place an “X” on its disposition application next
3 to the “Replacement Housing” heading that corresponds directly to this version of the
4 best-interests certification, AR 17, but that did not permit HUD to ignore it. This is
5 particularly so where HASCO’s first reconsideration request emphasized its intent to
6 acquire the 46 units with the proceeds of its disposition, and emphasized that “[e]ither of
7 these proposed initiatives” (the acquisition of the 46 units or the proposal to use
8 disposition proceeds to renovate the 210 public housing units) is a sufficient basis” for a
9 best-interests certification. AR 206 (emphasis in original). When HUD declined to
10 address the acquisition of the 46 units, it violated the law.

11 The effect of HUD’s tunnel vision, its singular focus on HASCO’s capital needs
12 and resources with respect to the 210 public housing units, was to leave the court with no
13 basis to conclude that HUD even considered these broader aims. Despite a year and a
14 half of wrangling between HASCO’s initial application and HUD’s final denial of its
15 reconsideration requests, neither HASCO nor the court can ascertain whether HUD has
16 any information that is “clearly inconsistent” with a statutorily-required certification.

17 HUD’s failure to follow its statutory and regulatory mandate has two
18 consequences. Neither HASCO nor the court has any idea if HUD has information that is
19 “clearly inconsistent” with the alternative certification of § 1437p(a)(2)(A)(ii) – that
20 disposition will allow the “acquisition, development, or rehabilitation of other properties
21 that will be more efficiently or effectively operated as low-income housing.” That
22 certification, by itself, is sufficient to satisfy § 1437p(a)(2), regardless of HASCO’s
23 capital needs or resources. HUD ignored it. Putting that aside, neither the court nor
24 HASCO can tell if HUD believed that it had information that was “clearly inconsistent”
25 with HASCO’s certification that disposition was in the best interests of HASCO and its
26 residents and was consistent with HASCO’s goals and the goals of the Fair Housing Act,
27 as described in § 1437p(a)(2)(B).

1 HUD's failure to follow its statutory and regulatory mandate means that it violated
2 the APA. When an agency makes a decision "based on an improper understanding of the
3 law," it commits an abuse of discretion in violation of 5 U.S.C. § 706(2)(A). *Kazarian v.*
4 *USCIS*, 596 F.3d 1115, 1118 (9th Cir. 2010); *see also Motor Vehicles Manufacturers*
5 *Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency
6 action is "[n]ormally" considered "arbitrary and capricious if the agency has relied on
7 factors which Congress has not intended it to consider, [or] entirely failed to consider an
8 important aspect of the problem").

9 **D. The Court Will Not Decide Whether to Set Aside HUD's Determination that**
10 **It Had Information That Was "Clearly Inconsistent" with HASCO's**
11 **Comparison of Its Capital Needs to Its Resources.**

12 The court declines to resolve the parties' dispute about whether the court can cast
13 aside HUD's determination that it has data clearly inconsistent with HASCO's
14 assessment of its capital needs and resources. First, it is not clear that the determination
15 will make any difference. As the court has noted, one of the paths to the best-interests
16 certification that § 1437p(a)(2) requires is to certify that disposition will permit the
17 "acquisition, development, or rehabilitation of other properties that will be more
18 efficiently or effectively operated as low-income housing." § 1437p(a)(2)(A). HASCO
19 can, so far as the court can ascertain, make that certification regardless of its ability to
20 meet capital needs at the 210 units. Putting that aside, it is not clear that HUD, were it to
21 properly consider the broader aims of the best-interests certification alternative at
22 § 1437p(a)(2)(B), would attempt to base a denial of HASCO's disposition application on
23 its statements about its capital needs. In short, the likelihood that HUD will, upon
24 considering HASCO's application in accordance with § 1437p, reach a decision that does
25 not implicate the parties' capital needs dispute, is sufficiently strong that the court
26 declines to address the minute details of that dispute.

27 In the interest of efficient resolution of this protracted dispute, however, the court
28 resolves the parties' dispute about the standard of review that would apply if the court

1 were to review a decision that HUD had information “clearly inconsistent” with one of
2 HASCO’s certifications. HASCO argues that the court itself would decide if the
3 information was “clearly inconsistent,” whereas HUD argues that the deferential review
4 inherent in the APA effectively obliterates the “clearly inconsistent” standard for
5 purposes of judicial review. The answer is somewhere in the middle. When a court
6 reviews the substance of an agency decision (as opposed to whether the agency complied
7 with the law, or abused its discretion), it can overturn that decision only if it is “arbitrary
8 and capricious.” 5 U.S.C. § 706(2)(A); *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d
9 835, 841 (9th Cir. 2003). The court reviews the agency’s decision to determine if it
10 “considered the relevant factors and articulated a rational connection between the facts
11 found and the choice made.” *Id.* The court does not “substitute [its] judgment for that of
12 the agency,” *id.*, it merely determines whether any rational adjudicator could have
13 reached the decision that the agency reached. *Rijal v. USCIS*, 772 F. Supp. 2d at 1345-
14 46. But in making that determination, the court must take guidance from a statute
15 circumscribing the agency’s power. In this case, HUD could deny a disposition
16 application only if it had information that was “clearly inconsistent” with a required
17 certification. A court determining whether a denial was arbitrary or capricious would
18 thus consider whether any rational adjudicator could have determined that HUD’s
19 information was “clearly inconsistent” with a required certification.²

20 **E. Remand Is the Proper Remedy for HUD’s Violation.**

21 HASCO urges the court to either grant HASCO’s disposition application itself or
22 order HUD to do so. It implicitly suggests that the court conclude that HUD’s silence as
23 to the certifications on which it could permissibly base a denial of the disposition

24 ² HUD cites *Aponte-Rosario v. Acevedo-Vila*, 617 F.3d 1 (1st Cir. 2013), which is, so far as the
25 court is aware, the sole appellate authority considering an APA challenge to a HUD decision on
26 a § 1437p application. There, however, the court considered a challenged to HUD’s *approval* of
27 a § 1437p application to demolish a public housing property. *Id.* at 10. The court’s discussion
28 of the APA challenge was brief. It affirmed HUD’s approval of the demolition, and it could not
have done otherwise unless it concluded that every rational adjudicator would have concluded
that HUD had evidence that was “clearly inconsistent” with a § 1437p(a) certification.

1 application are equivalent to an admission that it has no data that is clearly inconsistent
2 with those certifications. That idea is not outlandish; it is reasonable to hope that HUD
3 would address each of the statutory and regulatory certifications when it denies a
4 disposition application. Nothing in the statute or regulations, however, mandates that
5 approach. HUD can base its denial on information that is clearly inconsistent with even a
6 single certification, even if that approach is inefficient.

7 As a general rule, a district court should not make decisions that have been
8 delegated to an agency. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)
9 (“The reviewing court is not generally empowered to conduct a *de novo* inquiry into the
10 matter being reviewed [under the APA] and to reach its own conclusions based on such
11 inquiry.”). A court can grant relief where the record clearly mandates it, but this is not
12 such a case. It is possible, for example, that HUD has data that is “clearly inconsistent”
13 with HASCO’s projections as to its ability to use to proceeds of the disposition to expand
14 the number of units of low-income housing. *Cal. Energy Commission v. DOE*, 585 F.3d
15 1143, 1154 (9th Cir. 2009) (concluding that the court’s “role is not to engage in the
16 underlying analysis to determine whether the statutory criteria are met, even if the
17 [applying party] might have supplied the [agency] with sufficient information to do so”).
18 That seems unlikely to the court, but the administrative record is so focused on the
19 parties’ dispute over capital needs that the court cannot say with certainty. It is also
20 possible that HUD could explain how its disagreement about HASCO’s ability to meet its
21 capital needs so undermines HASCO’s best-interests certification that it warrants a denial
22 of the application. HUD (and HASCO for that matter) have institutional expertise with
23 respect to the issues underlying this disposition that the court cannot duplicate. *See Cal.*
24 *Energy Commission*, 585 F.3d at 1155 (remanding where issues remaining for resolution
25 “require factual findings in the [agency]’s area of expertise”). The proper course in this
26 case is to remand. *Lorion*, 470 U.S. at 744 (noting that remand for a new decision is
27

1 appropriate “if the reviewing court simply cannot evaluate the challenged agency action
2 on the basis of the record before it”).

3 Before remanding, however, the court requires the parties’ input on their preferred
4 disposition of this suit. There are at least two possibilities. First, the court could enter
5 judgment in favor of HASCO and remand to HUD with instructions to issue a decision
6 on HASCO’s disposition application in accordance with this order. Second, the court
7 could stay this action for the purpose of allowing HUD to make a new determination, and
8 could conduct additional proceedings depending on whether HASCO wishes to challenge
9 that new determination. The court suggests no preference between these alternatives (or
10 any others that the parties may propose), it merely prefers to implement whatever
11 disposition is consistent both with this order and efficiently resolving the parties’
12 underlying dispute. The parties shall submit a joint statement addressing this issue no
13 later than September 15, 2014.

14 IV. CONCLUSION

15 For the reasons previously stated, the court GRANTS HASCO’s summary
16 judgment motion (Dkt. # 11) to the extent stated in this order, and DENIES HUD’s cross-
17 motion (Dkt. # 13). HUD must make a new decision as to HASCO’s application to
18 dispose of its public housing units. The parties must submit a joint statement no later
19 than September 15, 2014 as to their preferences for the disposition of this civil action.

20 DATED this 2nd day of September, 2014.

21 

22 _____
23 The Honorable Richard A. Jones
24 United States District Court Judge