



Ministry of Housing,  
Communities &  
Local Government

Our ref: APP/E5330/V/18/3216423

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25 September 2019

Dear Madam

**THE PLANNING (HAZARDOUS SUBSTANCES) ACT 1990– SECTION 20 AND  
PLANNING (HAZARDOUS SUBSTANCES) REGULATIONS 2015  
APPLICATION MADE BY BRENNTAG UK LIMITED  
LAND AT 215 TUNNEL AVENUE, LONDON SE10  
APPLICATION REF: 18/1999/H**

1. I am directed by the Secretary of State to say that consideration has been given to the report of John Woolcock BNatRes(Hons) MURP DipLaw MRTPI, who held a public local inquiry on 24 and 25 April 2019 into your client's application for continuation of Hazardous Substance Consent, in accordance with application ref: 18/1999/H, dated 12 June 2018.
2. On 16 November 2018, the Secretary of State directed, in pursuance of section 20 of The Planning (Hazardous Substances) Act 1990, that your client's application be referred to him instead of being dealt with by the local planning authority.

**Inspector's recommendation and summary of the decision**

3. The Inspector recommended that the hazardous substances consent be continued with modifications.
4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, and agrees with his recommendation. He has decided to approve the application for the continuation of the hazardous substances consent subject to modifications. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

**Procedural matters**

5. The Secretary of State notes at IR5 that the required period for notification about the Inquiry was missed by two days. He agrees with the Inspector for the reasons given in IR5 that no party was likely to be prejudiced by this.

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6. For the reasons given in IR141 to 143, the Secretary of State agrees with the views of the Inspector and parties that he should exercise a wide discretion with regard to this application, having regard to the overarching public law requirement on decision-makers to take account of relevant considerations.

### **Policy and statutory considerations**

7. In reaching his decision, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.
8. In this case the development plan consists of the London Plan 2016 and Royal Borough of Greenwich's Core Strategy with Detailed Policies 2014. The Secretary of State considers that relevant development plan policies include those set out at IR14 to 15.
9. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework ('the Framework') and associated planning guidance ('the Guidance'), as well as the Greenwich Peninsula West Masterplan SPD of 2012, and the Greenwich Peninsula Site GP3 Planning Brief of October 2017. The revised National Planning Policy Framework was published on 24 July 2018 and further revised in February 2019. Unless otherwise specified, any references to the Framework in this letter are to the 2019 Framework.

### *Emerging plan*

10. The emerging plan comprises the draft New London Plan, which had its Examination in Public earlier this year. The report of the Examination Panel is expected to be submitted to the Mayor in September. The draft London Plan retains the current London Plan's objectives for the Greenwich Peninsula Opportunity Area and envisages the delivery of up to 17,000 homes and 15,000 jobs.
11. Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. As the Draft Replacement London Plan is still at a relatively early stage, any objections are not yet fully resolved and its policies may still be subject to change, the Secretary of State considers that the DRLP policies carry limited weight.

### **Main issues**

#### *The current or contemplated use of the application land*

12. For the reasons given in IR147 to 149, the Secretary of State agrees with the Inspector that there is nothing to indicate that the site would be used in any other way in the future provided that the Hazardous Substances Consent was continued.

#### *The way in which land in the vicinity is being used or is likely to be used*

13. For the reasons given in IR150 to 154, the Secretary of State agrees with the Inspector that the site and adjoining areas to the west of the A102 lie within the SIL designation, where Policy EA4 provides protection for continued employment use, and that proposals for redevelopment of the GP3 site would take into account relevant constraints, including

the proximity of industrial development and the A102 southern approach to the tunnel. He further agrees with the Inspector that there is no convincing evidence that the HSE's consultation zones from Brenntag's premises pose a constraint over and above other relevant constraints, that would materially limit the number of residential units that could be provided on the GP3 site, nor do they appear to constrain the current operation of Studio 338.

*Any planning permissions/consents granted for the development of land in the vicinity*

14. The Secretary of State agrees with the Inspector at IR155 that the most significant extant permission/consent here is that provided by the Silvertown Tunnel Order, and that achieving that proposal's implementation and resultant benefits should attract substantial weight.

*The advice given by the Health and Safety Executive (HSE)*

15. The Secretary of State agrees with the Inspectors summary of the HSE's position with regards to the application. In particular, he agrees with the Inspector at IR158 that with regard to Option 2, there is no health and safety reason to justify the HSE recommending that the HSC should cease for the yellow land following a change in control.

*The extent to which the continuation of the consent would be in accordance with the development plan for the area, and with relevant other local and national policy*

16. For the reasons given in IR160, the Secretary of State finds that the consent application would accord with RBG's Core Strategy Policy EA4, and that continuing the HSC would not materially affect the achievement of the aims for Greenwich Peninsula West as set out in Core Strategy Policy EA3, nor on achieving the adopted and emerging London Plan's objectives for the Greenwich Peninsula Opportunity area. In respect of other local and national policy, the continuation of the HSC would not be at odds with the GP3 Planning Brief 2017 or the Framework, for the reasons given by the Inspector in IR161.

**Planning conditions**

17. The Secretary of State has given consideration to the Inspector's analysis at IR162 to 166, the two alternative sets of conditions contained in Statement of Change 1 and Statement of Change 2 set out at the end of the IR and the reasons for them. The Secretary of State has borne in mind that the tests for planning conditions do not strictly apply here, but like the Inspector, he considers that they are based on sound principles, and provide a useful reference for the consideration of possible conditions for a continuation HSC. He agrees with the Inspector at IR169 that a "necessity" requirement would also sit comfortably with national guidance, which provides that in considering an application for the continuation of a HSC the HSA may modify it in any way considered appropriate, however, it should rarely be appropriate to impose more onerous conditions. He is satisfied for the reasons given by the Inspector at IR162 to 166, that should the HSC be continued, then the conditions set out in Statement of Change 1 should form part of the decision.

**Overall conclusion**

18. For the reasons given above, the Secretary of State considers that the application is in accordance with RBG's Core Strategy Policy EA4 and would not materially affect the achievement of other relevant development plan policies. He therefore concludes that the application is in accordance with the development plan overall. He has gone on to

consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

19. The Secretary of State has identified no material considerations which weigh against the proposal. While neighbouring landowners and businesses have expressed concerns, these have not been borne out by evidence and do not justify the imposition of restrictive conditions.
20. Continuing the HSC would ensure the continuation of an important chemical distribution centre serving south-eastern England and continued employment for its workers. While this maintains the status quo, in the absence of a continuation as sought here, the existing HSC would fall when a change in control of land took place, and these important attributes would be lost. Their preservation therefore weighs in favour of the proposal.
21. The Secretary of State finds that there are no material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
22. The Secretary of State therefore concludes that the application should be approved.

### **Formal decision**

23. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby approves the application and modifies the hazardous substance consent by attaching Statement of Change 1 to the Decision Notice – Continuation of Consent as set out in Annex A of this decision letter.
24. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than section 4 of the Planning (Hazardous Substances) Act 1990.

### **Right to challenge the decision**

25. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.
26. A copy of this letter has been sent to the Royal Borough of Greenwich Council and notification has been sent to others who asked to be informed of the decision.

Yours faithfully

*Andrew Lynch*

Authorised by the Secretary of State to sign in that behalf

## Annex A

### DECISION NOTICE – CONTINUATION OF CONSENT

Ref: APP/E5330/V/18/3216423

The Planning (Hazardous Substances) Act 1990  
The Planning (Hazardous Substances) Regulations 2015

The Secretary of State hereby determines pursuant to section 20 of the above Act that the application for the continuation of the hazardous substances consent at Brenntag UK Ltd, 215 Tunnel Avenue, London SE10, Reference number 18/1999/H, dated 12 June 2018, be approved and that consent be granted subject to the following statement of change.

### STATEMENT OF CHANGE

#### *A1 Approved Documents*

Subject to the requirements set out in Condition A2 and A3 the hazardous substances shall not be kept or used other than in accordance with the particulars provided on the application form.

#### *A2 Storage of hydrofluoric acid following change in the person in control of the land*

A2(1) Prior to the person in control of any part of the land shown coloured green on the attached drawing number JERI 592-COC-002 ("Change of Control Plan") changing to Transport for London (or any other person exercising Transport for London's powers under the Silvertown

Tunnel Order 2018 (SI 2018/574) as modified by the Silvertown Tunnel (Correction) Order 2019 (SI 2019/413) ("the Silvertown Tunnel Order")) for the purpose of undertaking the development authorised by the Silvertown Tunnel Order, the person in control of such land prior to such change ("Occupier") shall notify the Hazardous Substances Authority and the Health and Safety Executive in writing of the date on which the change in the person in control of such land is expected to occur.

A2(2) Upon the change in the person in control of any part of the land mentioned in Condition A2(1) occurring, the Occupier shall notify the Hazardous Substances Authority and the Health and Safety Executive in writing of the change and the date on which the change occurred ("Effective Date").

A2(3) From the Effective Date hydrofluoric acid shall not be stored on the land shown crosshatched black on the Change of Control Plan.

#### *A3 No entitlement to hazardous substances consent for land subject to change of control*

From the Effective Date no entitlement to hazardous substances consent shall remain with the land coloured green on the Change of Control Plan.

*Relevant Conditions of Schedule 3 of the Planning (Hazardous Substances) Regulations 1992 amended by the Planning (Control of Major-Accident Hazard) Regulations 1999*

*Condition B1*

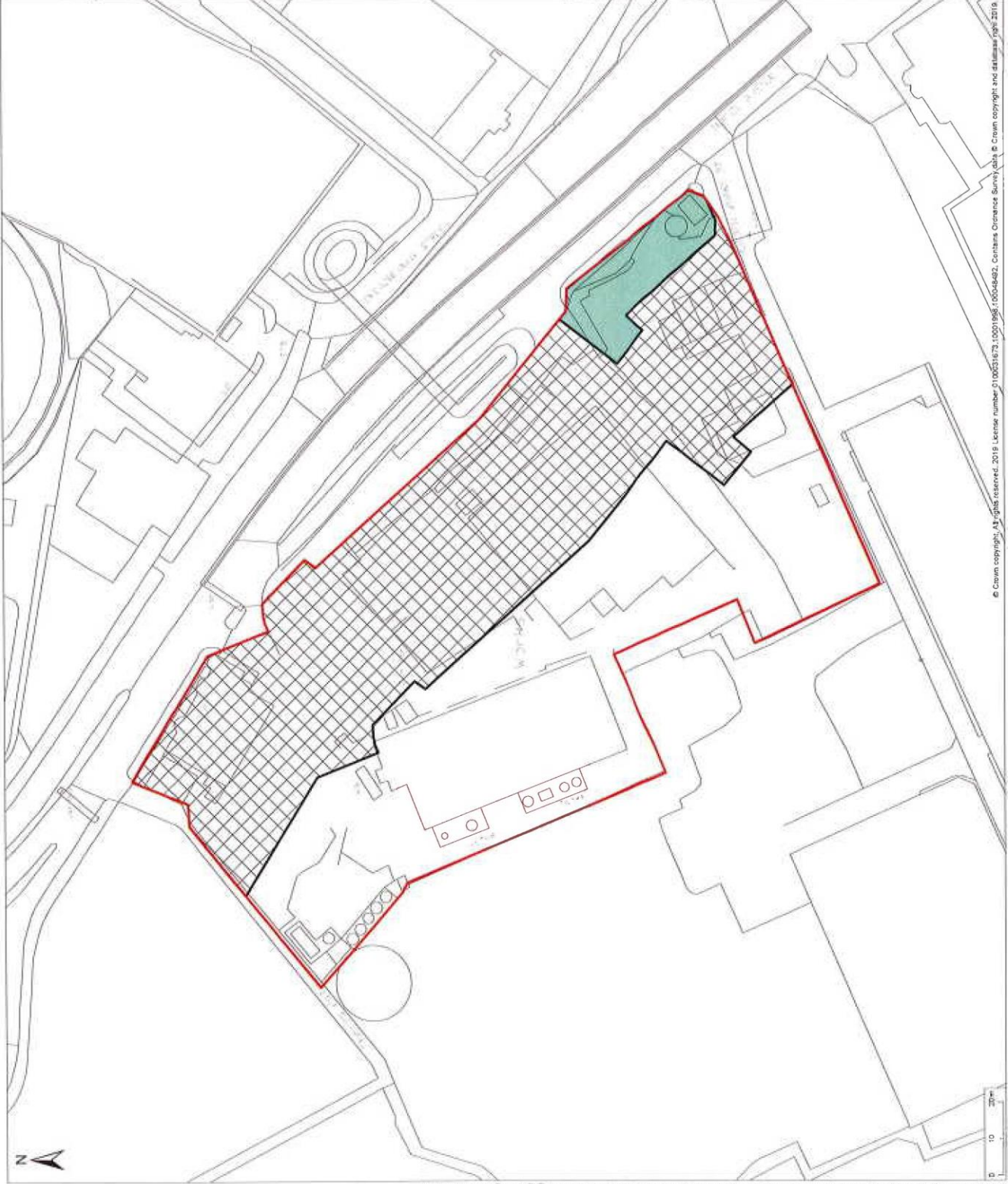
Only the following hazardous substances at up to the following maximum quantities may be present at the site:

Hydrofluoric Acid:	10,000 kg
Potassium Cyanide:	3,000 kg
Sodium Cyanide:	3,000 kg
Sodium Dichromate:	500 kg
Potassium Dichromate:	500 kg.

*Condition B2*

Each hazardous substance allowed by this consent may be present only in moveable containers at ambient temperature and pressure and of capacity no greater than 500 kg.

Moveable containers being containers designed or adapted to contain hazardous substances and that are not affixed to the land and do not form part of plant or machinery which is affixed to the land.



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- Legend**
- Hazardous Substance Consent
  - Boundary
  - 45m Zone
  - Land Subject to Permanent Acquisition by Transport for London

**Data Sources**  
 HSC: 12\_1247\_H-Block\_Plan-46128  
 Brennag Land: TIL/Mouchel Drawing  
 ST150035-MCC-ZZZ-ZZ-DRG-A9-0061  
 Rev P01.1 (20/02/2017)

Rev	Description	By	CB	Date



200 Park Avenue, Alpha West, Annandale, Bristol, BS32 4ST  
 T: +44(0)1454 803 000 E: rps@rpsgroup.com

**Client** Brennag UK Limited  
**Project** 215 Tunnel Avenue

**Title** Site Boundaries

**Status** DRAFT  
**Drawn By** R.J.  
**Project Number** JER1592  
**Scale @ A3** 1:1,000  
**Date Created** APR 2019  
**PM/Checked By** A.E.  
**Drawing Number** JER1592-COC-002  
**Rev** -



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# Report to the Secretary of State for Housing, Communities and Local Government

by **John Woolcock** BNatRes(Hons) MURP DipLaw MRTPI  
an Inspector appointed by the Secretary of State

Date: 12 July 2019

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Application for Continuation of Hazardous Substance Consent

by Brenntag UK Limited

to Royal Borough of Greenwich

The Planning (Hazardous Substances) Act 1990

Planning (Hazardous Substances) Regulations 2015

The Town and Country Planning (Inquiries Procedure) (England) Rules 2000

Inquiry Held on 24 and 25 April 2019

Brenntag UK Ltd, 215 Tunnel Avenue, London SE10

File Ref: APP/E5330/V/18/3216423



**File Ref: APP/E5330/V/18/3216423**  
**Brenntag UK Ltd, 215 Tunnel Avenue, London SE10.**

- The application is made by Brenntag UK Limited (abbreviated to Brenntag) to the Royal Borough of Greenwich Council (abbreviated to RBG).
- The application Reference number 18/1999/H is dated 12 June 2018.
- The application was called in for decision by the Secretary of State by a direction, made under section 20 of The Planning (Hazardous Substances) Act 1990 (hereinafter the 1990 Act), on 16 November 2018.
- The reason given for making the direction is that in the light of Paragraph: 050 reference ID: 39-050-20161209 of the *Planning Practice Guidance* the Secretary of State is of the opinion that the application is one which he ought to decide himself.
- On the information available at the time of making the direction, the following were the matters on which the Secretary of State particularly wished to be informed for the purpose of his consideration of the application:

The extent to which it is necessary to modify the consent in order for Transport for London to implement the development authorised by the Silvertown Tunnel Order 2018 (S.I. 2018/574).

**Summary of Recommendation: That the hazardous substances consent be continued with modifications set out in statement of change 1.**

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## ABBREVIATIONS

Birch/SGN	Birch Sites Limited and SGN Greenwich Limited
Brenntag	Brenntag UK Limited (the applicant)
DCO	Development Consent Order
<i>Framework</i>	<i>Revised National Planning Policy Framework 2018</i>
<i>Guidance</i>	<i>National Planning Practice Guidance</i>
HFA	Hydrofluoric acid
HSA	Hazardous Substances Authority
HSC	Hazardous Substances Consent
HSE	Health and Safety Executive
ID	Inquiry Document – document submitted at Inquiry
RBG	Royal Borough of Greenwich Council
Site	The application site outlined red on JER1592-COC-001
STO	The Silvertown Tunnel Order 2018 No.574
TfL	Transport for London
1990 Act	The Planning (Hazardous Substances) Act 1990
1992 Regulations	Revoked Planning (Hazardous Substances) Regulations 1992 amended by the Planning (Control of Major-Accident Hazard) Regulations 1999
2015 Regulations	Planning (Hazardous Substances) Regulations 2015

## Procedural Matters

1. A deemed Hazardous Substances Consent (HSC) was granted by RBG, as hazardous substances authority (HSA), to Hays Chemicals Limited on 12 November 1999 under reference 99/2274/HS. I requested a plan showing the site boundaries of the HSC, but neither Brenntag or RBG was able to provide a copy.<sup>1</sup> There have been changes in the ownership and occupation of the whole Site since 1999. However, the Inquiry was advised that no separate part of the Site has been the subject of a change in the person in control of the land.<sup>2</sup>
2. Part of the application Site is the subject of the Silvertown Tunnel Order 2018 (SI 2018/574) as modified by the Silvertown Tunnel (Correction) Order 2019 (SI 2019/413) (abbreviated to STO in this report). The STO provides for the acquisition and possession of part of the Site by Transport for London (TfL) for the construction of a new foot and cycle bridge.<sup>3</sup> Requirement 19 of the STO provides that the Silvertown Tunnel must not open for public use until the HSC for the Brenntag Inorganic Chemicals Ltd site has been revoked or modified, and in the case of modification those details have been considered by the Health and Safety Executive (HSE) and the HSE has advised TfL in writing that it does not advise against the development authorised by the STO.<sup>4</sup>
3. Section 17 of the 1990 Act provides that the HSC is revoked if there is a change in the person in control of part of the land to which it relates, unless an application for the continuation of the consent has previously been made to the HSA. Brenntag made such an application, dated 12 June 2018, to notify the HSA that there may be a change in the person in control of part of the land to which the existing HSC relates, thereby preventing the automatic revocation of that HSC under section 17 of the 1990 Act. For these purposes, it was clarified that a change in the person in control of the land could come about in two ways; (a) through the acquisition of Brenntag's interest either through exercise of the compulsory acquisition powers in the STO or by a voluntary transfer, or (b) in circumstances which did not amount to a change of ownership but which provided sufficient control to constitute a change for the purposes of the 1990 Act.<sup>5</sup>
4. The matters on which the Secretary of State particularly wished to be informed for the purpose of his consideration of the application are the extent to which it is necessary to modify the consent in order for Transport for London to implement the development authorised by the STO. For the purposes of section 21A of the 1990 Act the Secretary of State determined that the procedure by which proceedings are to be

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<sup>1</sup> The Decision Notice -Deemed Consent refers to Drawing Nos: Application Form 8, Allocated Drwg Nos 001,002 and 99.09.09, but no copies could be located.

<sup>2</sup> PD18.

<sup>3</sup> ID6 shows the Non-linear Work Limit of Deviation. ID7 refers to Work No.11 construction of a new Boord Street foot and cycle bridge.

<sup>4</sup> PD8 Appendix 1.

<sup>5</sup> PD16.

considered is by way of a local inquiry applying the spirit of The Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The HSE and TfL were subsequently granted Rule 6(6) status. Birch Sites Limited and SGN Greenwich Limited (Birch/SGN) have landholdings in the vicinity and were also granted Rule 6(6) status.<sup>6</sup> The Rule 6 parties submitted statements and participated in the Inquiry.

5. The Inquiry Rules provide for notification about the Inquiry at least two weeks before its opening. Notification was given on the 12 April, so this requirement was missed by two days. However, I do not consider that anyone would be likely to be prejudiced by this as the Inquiry was kept open after the 25 April to provide for closing submissions by the parties in writing. This also provided an opportunity to deal with any representations about the late notification, along with any resultant implications. The applicant concurred with this approach.<sup>7</sup> The Inquiry, which sat for two days, with an accompanied site visit on 13 May, was closed in writing on 20 May 2019.
6. I sought clarification from the parties at the Inquiry about the statutory provisions in this case for compensation in the event that the HSC was revoked or modified. The parties all agree that as the determination here would be made by the Secretary of State, not the HSA, there would be no entitlement to compensation under section 19 of the 1990 Act.<sup>8</sup> However, in this case TfL has agreed to compensate Brenntag for the imposition of more onerous conditions arising from the STO if they were to be imposed on the continuation of the HSC.<sup>9</sup> It has also entered into an agreement with Brenntag about accommodation works and advance notification of possession.<sup>10</sup>
7. I asked for submissions about whether a similar approach to that which applies to section 19 would apply to other sections of the 1990 Act, where reference is to the HSA, but not specifically to the Secretary of State, such as section 10 dealing with the imposition of conditions, and section 18 in determining applications for the continuation of an HSC. The parties' responses are included in the summary of their respective cases.
8. If the HSA had determined the application it would have been required by section 18(2) to have regard to any material consideration and, in particular, but without prejudice to the generality of the foregoing – (a) to the matters to which a HSA are required to have regard by section 9(2)(a) to (d); and (b) to any advice which the safety regulator has given following consultations in pursuance of the Regulations. Section 9(2)(a) refers to any current or contemplated use of the land to which the application relates; (b) to the way in which land in the vicinity is being used or is likely to be used; (c) to any planning permission, permission in

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<sup>6</sup> Figure 2.1 PD11.

<sup>7</sup> PD17.

<sup>8</sup> ID13. This position appears to be supported by the commentary to section 19 in the *Encyclopaedia of Planning Law and Practice* (paragraph H19.03).

<sup>9</sup> ID11 paragraph 26(e).

<sup>10</sup> ID19.

principle or development consent that has been granted for development of land in the vicinity; and (d) to the provisions of the development plan.

9. In the lead up to and during the Inquiry, the parties suggested the wording for various conditions should the HSC be modified.<sup>11</sup> This finally resulted in the submission of two different options.<sup>12</sup> Option 1 is preferred by Brenntag, RBG and TfL. This indicates the 'green land' subject to permanent acquisition by TfL, along with hatched land 45 m from the proposed STO foot and cycle bridge. Option 2, which is preferred by Birch/SGN, shows the same 45 m zone and green land, but includes 'yellow land' subject to temporary possession by TfL.<sup>13</sup>
10. Both Options 1 and 2 show the site boundary edged in red, and both would reimpose relevant conditions from Schedule 3 of the now revoked Planning (Hazardous Substances) Regulations 1992. I asked the parties for clarification about reference to the 1992 Regulations.<sup>14</sup> RBG, Brenntag, TfL and HSE consider that if the Secretary of State modified the HSC it would be appropriate to impose these conditions because the current application is for continuation of the original deemed consent. Birch/SGN agree that it would be lawful to impose these conditions, but do not consider that the consent, if granted, would be a deemed consent to which Regulation 31 of the 2015 Regulations would apply. However, it seems to me that if there is a legal distinction here it is not one that needs to be addressed in determining this application.

## **The Site and Surroundings**

11. The application land (the Site) is outlined in red on application drawing JER1592-COC-001. The location of the Site on the Greenwich Peninsula is shown at ID3A. This also indicates the gas holder site, along with HSE's outer, middle and inner consultation zones in relation to the extent of TfL's compulsory purchase. Studio 338, a nightclub premises, adjoins the gas holder site on the other side of the A102 Blackwall Tunnel southern approach to the application Site. Existing and proposed doors to the Studio 338 building are annotated 1 and 2 respectively on ID18. This also shows cross-hatched an outdoor area known as the 'beach', which is associated with the nightclub premises. A site on Boord Street is currently used by The London Evening Standard as a distribution centre. The freeholder of this site is Lidoka Estates Ltd. There is industrial land and wharves on the northern and western sides of the Site.
12. The Site is currently used by Brenntag as a general storage and distribution depot for inorganic and organic chemicals both in bulk and in packages. Dilution and mixing takes place on the Site, but there is otherwise no chemical processing. The Site has been in use for the storage of hazardous substances since 1974. The current HSC permits

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<sup>11</sup> ID16.1.

<sup>12</sup> ID16.2.

<sup>13</sup> Option 1 is the basis for Statement of Change 1 and Option 2 for Statement of Change 2.

<sup>14</sup> ID26.

storage of the following substances: Hydrofluoric acid (HFA) (10,000 kg), Potassium cyanide (3,000 kg), Sodium cyanide (3,000 kg), Sodium dichromate (500 kg) and Potassium dichromate (500 kg).

## Policy and Guidance

13. The development plan for the area includes the London Plan 2016 and RBG's Core Strategy with Detailed Policies 2014. The London Plan is currently being reviewed and a draft was the subject of consultation in 2017/18.
14. The Site lies within the Greenwich Peninsula Opportunity Area designated by the London Plan. Policy 2.13 seeks to optimise residential and non-residential output and densities within Opportunity Areas. Annex 1 of the London Plan sets out indicative employment capacity of 7,000 jobs and a minimum of 13,500 homes for the Greenwich Peninsula Opportunity Area. It states that the Peninsula plays two key strategic roles, as an internationally significant leisure attraction and as a major contributor to meeting London's need for additional housing. The draft London Plan retains these objectives for the Greenwich Peninsula Opportunity Area and envisages the delivery of up to 17,000 homes and 15,000 jobs.
15. Policy EA3 of the Core Strategy refers to the creation of a new urban quarter at Greenwich Peninsula West, which will require new development to provide sufficient buffering from the retained Strategic Industrial Location (SIL) land to minimise the potential for conflicts of use and interference to new residents. The Site lies within the SIL land. Policy EA4 states that SIL land is protected for continued employment use.
16. The *National Planning Policy Framework* (hereinafter the *Framework*) states that local planning authorities should consult the appropriate bodies when considering applications for the siting of, or changes to, major hazard sites or for development around them.<sup>15</sup> The *National Planning Practice Guidance* (hereinafter the *Guidance*) provides that the HSA can impose conditions, including how and where substances are kept and the times substances may be present, or requiring permanent removal within a certain time. Conditions on how a substance is to be kept or used may only be imposed if the HSE has advised that such conditions should be imposed. When an application to continue the consent is made, the HSA may (under section 18 of the Act) modify a consent in any way they consider appropriate; or they may revoke it. However, it should rarely be appropriate to impose more onerous conditions or revoke a consent.
17. In the section entitled 'How should cumulative development around major accident hazards be dealt with?' the *Guidance* states that local planning authorities should ensure that their land-use or other relevant policies take account of public consultation requirements in preventing major accidents and limiting the consequences of such accidents for human

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<sup>15</sup> Major hazard sites are defined in the *Framework* as sites around which HSE consultation distances to mitigate the consequences to public safety of major accidents may apply.



health and the environment. They also need to take account of the increase in the number of dwellings (or population at risk) in the consultation zones from the time the hazardous substance consent was granted.

18. The *Guidance* adds that local planning authorities are well placed to judge the extent of development around major hazard establishments so, when considering public safety in planning decisions and the formulation of development plan policies, they should take account of the total number of people that are present in the consultation zones around these sites, and the implications of any increase as a result of a planning decision or policy. In the case of encroachment (development getting closer to the major hazard) the risks can increase as well as the number of people.
19. The Greenwich Peninsula West Masterplan SPD was adopted in 2012, but the Core Strategy states that it will be updated. Greenwich Peninsula Site GP3 Planning Brief October 2017 was the subject of public consultation and approval by RBG members.<sup>16</sup> It sets a framework to guide the scale of development and mix of uses that will be supported on the site in accordance with the Royal Greenwich Core Strategy. An aerial view of the GP3 site in the context of the wider peninsula can be seen on Figure 1.1 of the planning brief. Figure 1.3 shows the 5.85 ha site, which includes Boord Street and Studio 338, as well as the SGN (gas holder) and Birch land. The HSE consultation zones shown in the Brief relate to a previous HSC application and so extended further into the GP3 site than do the current consultation zones arising from the Brenntag HSC.<sup>17</sup>

### **The Case for Royal Borough of Greenwich (RBG)**

The following summary of case broadly follows RBG's closing submissions to the Inquiry, with additional reference where necessary to the evidence adduced.<sup>18</sup>

#### *The relevant statutory provisions*

20. Section 38 of the 1990 Act makes financial provision in respect of compensation. It includes reference to compensation payable by a local authority. RBG's position is that it has no liability for compensation if the consent is modified by the Secretary of State. If there is any entitlement to compensation, then the liability would be that of the Secretary of State. Brenntag, Birch/SGN and TfL endorse the editorial commentary in the *Planning Encyclopaedia* which states that there is no entitlement to compensation under section 20.<sup>19</sup>
21. Section 20 does not deal expressly with decision making, unlike other similar referral provisions.<sup>20</sup> That may be because it is simply directed to

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<sup>16</sup> PD11 Appendix 5.

<sup>17</sup> PD11 paragraphs 3.65 to 3.68.

<sup>18</sup> ID24.

<sup>19</sup> ID13.

<sup>20</sup> A good example is section 77(4) of the Town and Country Planning Act 1990 which makes express reference to the other sections in that Act which apply to the decision.



providing a referral mechanism whereby there remains a determination under section 18 (and other associated provisions), or alternatively, because it operates independently. If the latter, it is not clear whether the other parts of the statutory framework which apply to decision making by HSAs (sections 9, 18 and 19) would necessarily apply to decisions under section 20. In the absence of a decided case on the point, a practical approach to decision making would be to take account of the matters set out in sections 18 and 9, irrespective of whether, strictly, they apply, on the basis that they span the relevant matters which would need to be taken into account in order to have regard to all material considerations (and thereby take a lawful decision).

### *Introduction*

22. There is important common ground between all parties to the Inquiry and a single contentious issue. The application should be granted, and the HSC continued subject to a condition which allowed Requirement 19 of the STO to be discharged. The single matter in dispute, relates to an alternative condition. The issue was raised originally by Birch/SGN and later supported at the Inquiry by Raduga Limited on behalf of Studio 338. They suggested that the condition which would allow the discharge of Requirement 19 of the STO should not come into effect on some trigger linked to the implementation of the Silvertown Tunnel scheme, but instead, should have immediate effect.
23. Option 1 would come into effect once there had been a change of the person in control of land coloured green on the plan at ID16.2, for the purpose of undertaking development authorised by the STO. The green land is required for permanent works. Once that change in control took place, Brenntag would be prevented from storing HFA within 45 m of the north-eastern boundary of the Site (shown cross-hatched on the plan at ID16.2). A linked condition would ensure that no HSC applied to the green land, i.e. the part of the Site that would then be under the control of TfL.
24. Option 2 would come into effect immediately, with no connection to the STO works. A linked condition would have the effect that there would be no HSC in place in relation not only to the green land, but also in relation to yellow land marked on the plan. That yellow land is only required for temporary works (changes to car parking and the like) and is not, in the view of RBG, TfL and Brenntag, likely to be the subject of a change of person in control of the land.
25. RBG does not support any more onerous condition on the HSC than is necessary; it is not convinced that there is proper justification for imposing a condition that has immediate effect. The Birch/SGN case for a condition with immediate effect is confused and confusing. On the one hand, those parties accept that it is "likely" that the Silvertown Tunnel project will go ahead, with the land take shown in ID3A and the condition suggested by the other parties coming into force, pulling back the inner,

middle and outer HSE consultation zones to the edge of the GP3 site.<sup>21</sup> On the other hand, they seek to argue that the self-same area covered by those consultation zones is "likely" to be redeveloped and therefore a condition which has the effect of pulling back the consultation zones immediately is necessary. The schemes cannot both be "likely" because they concern overlapping areas of land (with the exception of a hatched area shown on ID3A).

26. It seems unfair that compensation would be available in respect of a modification/revocation under section 18, but not section 20. The applicant has no control over whether it is a HSA or the Secretary of State who makes the decision. The issue of entitlement to compensation under the Act does not arise if the Option 1 conditions are applied, because TfL has entered into an agreement to compensate Brenntag if those conditions are imposed. If the Birch/SGN conditions were to be applied, it is unclear whether there is an entitlement to compensation under the Act. As RBG understands the position, TfL has not agreed to compensate Brenntag in those circumstances. If not, then Brenntag may well be worse off if Option 2 were applied, not only because conditions would be more onerous, but because Brenntag's security in respect of compensation would be foregone.

*The current/contemplated use of the application land (section 9(2)(a))*

27. There is no suggestion that Brenntag intends to do anything other than continue to operate their business on the remaining part of the Site; its application for continuation of the HSC is to allow it to do so. Birch/SGN appeared to suggest that the existing use of the land was not a material factor in deciding an application for continuation of the HSC. That is not correct. Section 9(2)(a) specifically directs the decision maker to consider the current use of the application land. In this case, the fact that there has been a longstanding use of the land for the storage of hazardous substances weighs in favour of the grant of continuation consent. The question here is what modification to that consent is justified.

*The use/likely use of land in the vicinity of the application land (section 9(2)(b))*

*Studio 338*

28. Land and buildings known as Studio 338 have been in use as a nightclub in recent years (there was previously a public house on the land). Following a fire in 2016, development was carried out, leading to enforcement action by RBG. Nightclub use resumed within the refurbished and extended building in December 2017.<sup>22</sup> Appeals in respect of the enforcement notices have resulted in the grant of planning permission for the retention of the refurbished and extended building. The Inspector took account of the use of the building as a nightclub and music venue in granting that permission.

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<sup>21</sup> PD5 Appendix 2 map D.

<sup>22</sup> ID2 paragraphs 4 and 11.

29. The HSE was asked for advice on the appeals. It did not advise against the development because it was an indoor use of less than 5,000 m<sup>2</sup>, and it did not require the imposition of any conditions. Although Studio 338 support Option 2 on the basis of removing a residual public safety risk, this is the same issue as was addressed in relation to its appeals. The Inspector found that conditions were unnecessary, having due regard for the need for "caution". Nothing has changed since that decision. The same conclusion should be reached in this case: the existing residual risk does not justify the imposition of a condition which has the immediate effect of restricting storage on the Brenntag site.

*Site GP3/STO land*

30. RBG's ambition for the GP3 site is for its comprehensive redevelopment, with an appropriate mix of residential and commercial uses. The planning brief acknowledges various constraints, including the chemical storage use at the Brenntag site, along with air quality and noise. These mostly affect the south-western part of the site. There are, in addition, two safeguarded wharves identified, which are among the numerous other constraints to development listed. RBG's vision and objectives are commercial-led development on its south-western side and residential-led development on its north-eastern side. It is possible that development might take a different form; it is possible that there could be residential development of the south-western edge, but at present, it is not likely. Although progress has been made towards readying the Birch/SGN site for redevelopment, there is no scheme which shows how the many constraints which affect the south-western edge in particular might be overcome, and no pre-application discussions.
31. Given that the Silvertown Tunnel project is likely to go ahead, the only land not the subject of that overlap is the hatched area marked on ID17. This is the only land which could, in theory, benefit from the removal of the consultation zone constraint now, and would not later be required for the Silvertown Tunnel. However, it is wholly unclear what use could be made of that land given the requirements arising from the Silvertown Tunnel project. But it is the so-called benefit which Birch/SGN relies upon as justification for imposing a condition which has immediate effect.
32. Arguments which would or might weigh in favour of the grant of planning permission for development for housing on the GP3 site are of peripheral relevance to the Secretary of State's decision on the HSC application. National and local policy supports the redevelopment of GP3. However, the balance of commercial and residential uses would have to be resolved through the planning process. RBG does not accept that there is a 5-year housing land supply shortfall as things stand.<sup>23</sup> Birch/SGN pointed out that the GP3 site is relied upon to deliver 800 homes in years 6-10, but these could be delivered in the north-eastern part of the site, as shown in the planning brief.

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<sup>23</sup> ID5.

*The consents in place over such land (planning permissions/permission in principle/development consent) (section 9(2)(c))*

*Studio 338*

33. The permission now in place in respect of Studio 338 does not offer justification for the imposition of a condition having immediate effect. There is no specific proposal available to be considered in respect of the introduction, or removal of fire doors, or any other works or development.

*GP3/STO*

34. There is no planning permission or extant application in relation to the GP3 land in the ownership of Birch/SGN. The Silvertown Tunnel project has been the subject of a Development Consent Order application, examination and Order. It was TfL's evidence that it has proceeded to the final stages of the procurement process. Two bidding consortia submitted their final tenders in February 2019. TfL expected to announce a preferred bidder in May 2019, with contract award expected in August 2019. Construction is due to commence in late 2019.<sup>24</sup> It is a nationally significant infrastructure project that has progressed beyond the consenting stage to procurement. It would bring significant benefits in that it would reduce congestion in a key growth area of London. Its maturity should be taken into account in determining the likelihood of the land it affects being used for the purpose specified in the STO. There is a need for a condition to be imposed to allow the discharge of Requirement 19. Without such a condition, the delivery of the Silvertown Tunnel project would be frustrated.

*The advice of the HSE (section 9(2)(e))*

35. The consistent position of the HSE has been that once a condition becomes effective that prohibits HFA from being kept within 45 m of the Site boundary nearest the A102 road, it will no longer advise against the opening of the Silvertown Tunnel. It has therefore been neutral, in that it has expressed no preference in terms of the principles underlying Options 1 and 2, whatever the specific wording. It does not offer support for the modification of the HSC in relation to the yellow land.

*The extent to which the continuation of the HSC would be in accordance with the development plan (section 9(2)(d)); local and national policy; and other material considerations*

36. RBG, Brenntag and TfL agree that provided a condition is imposed which allows for the discharge of Requirement 19, the continuation of the HSC would give rise to no conflict with the statutory development plan for the area. In terms of national policy, and "other material considerations", the matters in contention relate to the benefits arising from the removal of a constraint over a site earmarked for redevelopment versus the disadvantage to an existing business, which has had to make the application only as a result of the Silvertown Tunnel project.

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<sup>24</sup> PD8 paragraph 3.9.

*Whether any such continuation of the HSC should be subject to any conditions and, if so, the form they should take*

37. The Option 1 condition comes into effect only when the Silvertown Tunnel scheme is being implemented. The timing of that new restriction is not certain, but there will be a period of time within which Brenntag would continue to operate free of it. There is a possibility (but not a likelihood) that it would never take effect. In those circumstances Option 2 would take effect straight away, and so would be more onerous.
38. The justification for Option 2 by Birch/SGN is the removal of a constraint in respect of specific land on the south-western boundary of their holding. But this land is more likely to be used for the Silvertown Tunnel project than for redevelopment, and thus there is limited real benefit. Whilst TfL accepted that a condition with immediate effect was its preference, it also made clear that such a condition is not justified. It is also relevant to note the compensation position.
39. Studio 338 argued in favour of the condition having immediate effect because it reduced an existing residual public safety risk; and because it might allow them to alter their fire door arrangements more easily. The issue regarding the fire doors is difficult to understand, in that firstly, it is not clear what is actually proposed and secondly, Studio 338 has not pointed to any part of the HSE methodology which would suggest that the consultation zones as they stand in fact pose a constraint to those proposed arrangements.

*Drafting*

40. Option 1 conditions A2(1) and A2(2) would ensure that a change of the person in control of the land was properly anticipated and notified. A2(3) provides that from the effective date (i.e. the date of the change of control), there would be no storage of HFA within 45 m of the boundary of the Site. After that date, there would be no entitlement to HSC in respect of the green land. There would be no difficulty in enforcement. There is no reason to suppose that a change in control would not be notified, but in the event that did not happen, inspection of Land Registry documents would reveal a change in ownership, and inspection of the Site would reveal a change on the ground.
41. The Option 1 conditions do not withdraw HSC from the yellow land which is intended to be the subject of temporary works. There is no need for that as temporary works do not necessarily involve a change of the person in control of land, and it would create yet further disadvantage to Brenntag if more of their land was outside their HSC.

*Conclusion*

42. For these reasons, RBG supports the grant of HSC in accordance with the application, together with the imposition of the Option 1 conditions.

## **The Case for Transport for London (TfL)**

The following summary of case broadly follows TfL's closing submissions to the Inquiry, with additional reference where necessary to the evidence adduced.<sup>25</sup>

### *The scope of the Secretary of State's powers pursuant to section 20*

43. It appears that the Secretary of State's power to consider and determine an application for continuation of a HSC under section 20 is not constrained by the matters that control a HSA under sections 9 and 10 (and indeed other provisions in the 1990 Act). In other words, the Secretary of State's power is unconstrained; save by general administrative law constraints on decision-making by public bodies.
44. It is clear from the Secretary of State's section 20 referral letter, dated 16 November 2018, that he recognises he has the power to modify the continuation HSC, as he specifically asks to be informed about the extent to which it is necessary to modify the HSC in order to implement the development authorised by the STO. As a generality, however, it might be expected that the Secretary of State will wish to exercise his powers under section 20 in accordance with the spirit of sections 9 and 10, even though they do not strictly apply to him.

### *The applicability of the Framework on planning conditions*

45. Paragraph 55 of the *Framework* provides that "Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects." Whilst this guidance is not strictly applicable to HSC conditions, the principles seem fairly universal and may form a helpful framework within which to consider the drafting of HSC conditions.

### *Common and uncommon ground*

46. There is substantial common ground between many of the principal parties. This common ground includes: (a) there are no significant reasons, on safety grounds, for refusing continuation of the HSC, (b) the impact of the continuation HSC on the ability to implement the STO is a material consideration, (c) the HSE has made clear that if a restriction were placed on the storage of HFA in an area within 45 m from the boundary of the Site with the A102 then it would be able to withdraw its advice against the Silvertown Tunnel, (d) the parties have agreed a plan on which the 45 m area of land to be subject to the above restriction is 'cross-hatched', (e) the continuation HSC application should be granted subject to conditions, (f) there is no dispute that these conditions should allow HSE to withdraw its objection and allow TfL to discharge Requirement 19 of the STO, (g) TfL has reached agreement with Brenntag to pay it compensation.

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<sup>25</sup> ID22.



47. TfL has liaised with Brenntag to understand the potential operational impact of the modifications to the HSC and to agree appropriate mitigation and compensation. Notwithstanding that the 1990 Act does not contain any provisions for compensation in the circumstances that apply here, TfL has agreed to compensate Brenntag for losses suffered as a result of any modification attributable to the exercise by TfL of the powers of compulsory acquisition in the STO.<sup>26</sup> TfL has also entered into an agreement about accommodation works and advance notification of possession.<sup>27</sup>
48. The debate has evolved into one about whether the continuation HSC should be subject to a condition that imposes a restriction on the location within which HFA may be stored at the Site that takes effect immediately, or that takes effect contingent upon a change in the person in control of the green land.
49. Whilst an immediate restriction would be perfectly acceptable to TfL – indeed, it would actually have advantages over a contingent restriction in that it would deliver certainty on Requirement 19 earlier – TfL does not consider that its justification for a restriction extended to it taking effect immediately.

*The wording of any contingent restriction to be imposed by condition on a continuation HSC on the Brenntag Site*

50. Option 1 has four broad effects. Prior to any change in control of the green land to TfL (or persons acting for TfL) for the purposes of undertaking works authorised by the STO, there is a requirement for Brenntag to notify the RBG and the HSE of the date on which the change in person in control is expected to occur. Upon the change in person in control of the green land, Brenntag is required to notify RBG and the HSE of the date of actual change in control ('the effective date'). From the effective date, HFA would not be stored on the land shown cross-hatched black, and the HSC would not apply to the green land.
51. Birch/SGN criticise these provisions as not complying with the policy tests for planning conditions. The conditions are 'necessary' to allow TfL to discharge Requirement 19 of the STO and bring forward the substantial transport and economic benefits that will flow from the development of the Silvertown Tunnel project. The conditions are 'enforceable' in that RBG will be notified in advance and at the time of any change in the person in control of the green land that is to be acquired by TfL for the purposes of undertaking Work No.11 in Schedule 1 to the STO. This is reinforced by the legal agreement that TfL entered into with Brenntag, which provides that TfL is to provide Brenntag with 3 months' notice before occupation under the Order.<sup>28</sup>

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<sup>26</sup> PD8 paragraph 8.10.

<sup>27</sup> ID19.

<sup>28</sup> ID19.

52. RBG would have plenty of notice of any change in the person in control and would have time to act accordingly. The conditions are 'relevant' to the HSC as they seek to control the area within which one of the hazardous substances may be stored by reference to its distance from a HSE methodology 'Level 2' development (i.e. the Silvertown Tunnel approach road and its overbridge). They are 'precise' in that the trigger event (i.e. the change in control) would be notified to RBG, and the area of the restriction on the HFA is clearly identified in cross-hatching on a plan. The conditions are 'reasonable', in that they impose no greater restriction on Brenntag than is necessary to enable the Silvertown Tunnel to be implemented.
53. Birch/SGN's objection about the yellow land over which TfL has power to take temporary possession is not valid because this would not constitute a change in the person in control of that part of the Site for the purposes of the 1990 Act. Temporary possession under Article 29 of the STO – where this is not a precursor to compulsory acquisition – is not a change in control for the purposes of the 1990 Act where that temporary possession is simply to allow TfL to carry out certain accommodation works for the benefit of Brenntag (i.e. the re-laying out of the Brenntag car park). These works are no different than those that could be carried out by Brenntag's own contractors and do not indicate any loss of control.
54. Furthermore, the purpose of the section 17 revocation procedure is to ensure that a third party does not gain the benefit of a HSC. That could not, however, happen in these circumstances as TfL and its contractors only have power to take temporary possession for the purpose of undertaking the works authorised by the STO, and thus have no legal power to be on the land for the purpose of storing HFA.
55. Turning to Option 2, it is not necessary to include reference to the yellow land in the conditions. TfL's sole point about the Option 2 conditions is that by bringing in the restriction immediately, they would go beyond what is justified by the Silvertown Tunnel. It is for Birch/SGN to justify the imposition of conditions that go beyond what is properly required for the Silvertown Tunnel. The Secretary of State particularly wishes to be informed about the 'extent' to which it is 'necessary' to modify the HSC in order to implement the STO.

### *Conclusion*

56. TfL asks that the Brenntag continuation HSC application be granted subject to the Option 1 form of conditions. In the alternative, if justified, the Option 2 form of conditions (without reference to the yellow land). In the further alternative, such other form of words as the Secretary of State may see fit that will allow HSE to withdraw its objection to the Silvertown Tunnel project and thereby allow TfL to discharge Requirement 19 of the STO.
57. TfL anticipates that it will need to enter into contractual arrangements with a preferred bidder to design, build, finance and maintain the Silvertown Tunnel during August 2019. TfL respectfully requests, therefore, that the continuation HSC is granted subject to the above



conditions in a timescale that will allow it to meet those contractual deadlines.

### **The Case for the Health and Safety Executive (HSE)**

The following summary of case broadly follows the HSE's closing submissions to the Inquiry, with additional reference where necessary to the evidence adduced.<sup>29</sup>

58. The HSE require, upon the opening of the tunnel for public use, that there is a prohibition on HFA being stored at the Site within 45 m of the Site boundary nearest the A102 road. The HSE will no longer advise against the development once the prohibition is effective.

#### *The HSE's role and methodology*

59. The HSE provides advice as to what would be required for it to withdraw its 'advise against' advice in respect of the opening of the Silvertown Tunnel. HSE's methodology is indicative, and exceptional cases may not follow the methodology, however it guides HSE's advice when it is consulted.<sup>30</sup>

60. An issue arose as to the effect of the HSC on residential development at the western edge of the Birch/SGN former gas holder site. The methodology sets out the sensitivity levels for various types of development. The sensitivity level and the zone of the development are input into the decision matrix to provide indicative advice. In respect of housing, indicatively, "Larger developments for more than 30 dwelling units" and "Any developments (for more than 2 dwelling units) at a density of more than 40 dwelling units per hectare" are Level 3. The decision matrix shows that HSE would, indicatively, advise against these in the middle zone but, again indicatively, HSE would not advise against any other type of housing development in the middle zone. This would depend on the exact proposal and is also subject to other rules in the methodology, for example multiple-use developments or the 10% rule.

#### *HSE's view on the suggested conditions*

61. The HSE's position is that, once a condition becomes effective that prohibits HFA from being kept within 45 m of the Site boundary nearest the A102 road, it will no longer advise against the opening of the Silvertown Tunnel. The difference between Option 1 and Option 2 conditions is whether the 45 m zone would take effect immediately or upon TfL activating a trigger. It appears TfL are content with the suggested trigger because activating that trigger remains in their sole control, and therefore it can unilaterally cause the 45 m rule to become effective at any point. However, any risk that the trigger will fail and therefore the 45 m rule does not take effect, is on TfL. Assuming it takes effect, HSE will withdraw its advice.

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<sup>29</sup> ID23.

<sup>30</sup> PD4 Appendix 13.

62. In respect of Condition A3 it is agreed between the other parties that, for the green land no HSC will remain. Birch/SGN suggest that the HSC should also cease on the yellow land. HSE's position is that, at least on safety grounds, there is no further requirement that HSC should cease on the yellow land.

*Points raised by Studio 338*

63. Studio 338 has cited an ongoing risk to users by the continued storage of HFA anywhere on the Site. However, such a risk is a "residual risk" and is not such a risk that HSE, in accordance with its methodology, would cause it to advise against the continuation of the HSC.

64. There is also concern that an application to alter the placement of fire doors will lead to HSE being consulted who would advise against such development. However, HSE's indicative methodology places 'DT 2.4 – Indoor Use by Public' as sensitivity Level 2 – and the decision matrix indicates this would be 'Do not advise against' in the middle and outer zones. When considering its advice in the enforcement appeal, HSE considered Studio 338 as an 'Indoor Use by Public' (although there was some debate about the correct categorisation) and it currently lies in the middle and outer zone. However, HSE's position would of course only be able to be determined upon a specific application.

*HSE's Note on section 10(2) of the 1990 Act*<sup>31</sup>

65. Section 10(2) provides that a HSA may only grant consent subject to conditions as to how a hazardous substance is to be kept or used if the conditions are conditions to which the safety regulator, in this case HSE, has advised the HSA that any consent they might grant should be subject. HSE does not consider that the restriction in section 10(2) applies where the Secretary of State modifies a consent by adding a condition following a call-in pursuant to section 20.

66. The Secretary of State has the power to impose conditions by virtue of the power to determine the application, including by modifying the HSC. Modifying a consent includes adding a condition, consistent with section 18(6), which refers to the 'generality' of section 18(1).

67. It appears that on Birch/SGN's suggested condition that this would encompass consent for all hazardous substances, including HFA. HSE's position is that, on safety grounds, there is no further requirement that the HSC should cease on the yellow land. HSE is of the view that the Secretary of State should impose a condition which states that the HSC does not pass to the green land following a change in control; however, there is no health and safety reason to justify it recommending that the HSC should cease for the yellow land following a change in control.

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<sup>31</sup> ID20.

## The Case for Birch/SGN

The following summary of case broadly follows Birch/SGN's closing submissions to the Inquiry, with additional reference where necessary to the evidence adduced.<sup>32</sup>

### *Introduction*

68. The grant of the continuation HSC sought by Brenntag would impose a constraint on the future development of land immediately to the east of the Site, comprising a former gas holder site. Birch/SGN's case is simply that the constraint is unnecessary and can be removed through the imposition of an appropriately worded condition, and invite a straightforward exercise of a planning judgment as to the terms on which Brenntag's HSC should be granted.
69. Option 2 would make little or no difference to the reality of Brenntag's application and would not affect the day to day use of its Site. Brenntag accepts that its use of the Site should be constrained by a condition which would prevent the storage of HFA in a part of the Site on which its HFA store is not currently situated. The exclusion of part of the Site should happen now, rather than upon the occurrence of another future event. Doing so would remove the constraint on the delivery of welcome and much needed residential led development on the Birch/SGN site, in accordance with national, London and local planning policy.
70. A decision on this application engages a broad planning judgment: modification "in any way" which is considered appropriate, having regard to "any material consideration", and "in particular" the matters set out in section 18(2)(a) and (b) of the 1990 Act. The impact of the continuation consent on the Birch/SGN land is a material consideration. However, section 9(2) requires specific regard must be had to the current or contemplated use of the Site, the way in which land in the vicinity of the Site is being used or is likely to be used, any planning permission or development consent that has been granted for the development of land in the vicinity, along with the provisions of the development plan. Regard must also be had to the advice of the HSE (section 18(2)(b)). The impact of these provisions is that a continuation application is determined on the same basis as an application for a fresh HSC.
71. The following key points can be noted from the statutory provisions. The reasons for making the application, in contemplation of a change of control, are not treated as material considerations for the purposes of the Act. That is important context since much of the argument at the Inquiry focused on the change of control itself. That change is not relevant to the consideration of the application, save to the extent that it goes to the "current or contemplated" use of the Site. The general duty to have regard to all material considerations is added to by a specific requirement to consider the way in which land in the vicinity of the Site is being used or is likely to be used. This is because the existence and continuation of a

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<sup>32</sup> ID21.

HSC may affect the surrounding land uses. The Birch/SGN land is “in the vicinity of the site” and therefore its likely use is a matter to which regard must be had.

#### *The Current and Contemplated Use of the Brenntag Site*

72. There is no condition attached to the 1999 HSC that restricts the storage of HFA, and no plan is available showing the boundary of the 1999 HSC. The parties are operating on an assumption that this extends to the Site boundary. HFA is only stored in the 45 m zone pending it being loaded onto a vehicle (or whilst in the vehicle) for onward delivery. The imposition of the 45 m zone restriction would not affect the quantity of HFA that Brenntag could continue to store on the Site or the current location of that storage.

#### *The Birch/SGN land and the impact of the Brenntag HSC*

73. Option 1 would impose a constraint on the development of the gas holder site by placing parts of the site within the HSE’s consultation zones. The *Guidance* is clear that consideration should be given as to how any conflict between the proposed consent and the future development of surrounding land can be resolved.<sup>33</sup> This supports Option 2.

74. Brenntag, and to a lesser extent TfL, rely on Paragraph 065 of the *Guidance* which states that; “it should rarely be appropriate to impose more onerous conditions or revoke a consent”. Brenntag presented no evidence to demonstrate that the 45 m zone would be onerous. TfL’s evidence was that there would be limited impact that would require no works. Brenntag accept that there would be limited impact and that the Site would continue to operate in a similar vein with the current use. It is difficult to see how Option 2 is any more “onerous” than the condition which Brenntag volunteers, which would impose the same restriction at an unknown future date.

75. The *Guidance* does not state that it is never appropriate to impose conditions but rarely. This is a situation where it is entirely appropriate to impose Option 2, and Paragraph 065 does not fetter the approach of overcoming conflict advocated by Paragraph 067. Since the 1999 HSC was granted there has been a fundamental change in the land use and intended future land use in the vicinity. Birch/SGN’s land was at the time of the deemed consent in 1999 an operational gas holder, with no immediate prospect of an alternative use. The material change in the nature of the area warrants a fresh approach to the Brenntag HSC.

#### *The future development of the Birch/SGN land*

76. It is highly likely that the future use of the gas holder site will be a residential led mixed use development at high density. That is important because it is precisely that type of use which would be restricted by the HSC in the terms sought by Brenntag. In simple terms, that is as far as Birch/SGN need to go in their planning case. However, the position in

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<sup>33</sup> *Guidance* Paragraph: 067 Reference ID: 39-067-20161209.

respect of the likely use of the gas holder site and moreover the very significant planning benefits which would flow from such a use are supported by national, London and local planning policy. These are all important material considerations.

77. The gas holder site is previously-developed land that was subject until recently to a HSC, and remains contaminated. The gas holder infrastructure is itself redundant. This is precisely the sort of site where residential output should be maximised. The *Framework* makes clear that "Strategic policies should set out a clear strategy for accommodating objectively assessed needs, in a way that makes as much use as possible of previously-developed or 'brownfield' land" (paragraph 117) as part of a national strategy of significantly boosting the supply of housing.
78. In making "effective use of land", the *Framework* states that planning policies and decisions should; "give substantial weight to the value of using suitable brownfield land within settlements for homes and other identified needs, and support appropriate opportunities to remediate despoiled, degraded, derelict, contaminated or unstable land". National policy provides clear support for the remediation and development of the gas holder site in a way which maximises ("makes as much use as possible") its development potential. Conversely, planning measures which would limit the development potential of such a site (such as a HSC nearby) should be regarded as inconsistent with the *Framework*.
79. The London Plan also provides very clear support for the residential led mixed use development of the gas holder site because it supports very significant levels of new housing development and the gas holder site forms part of an Opportunity Area. In Policy 2.13 and Annex 1 the Greenwich Peninsula is identified for a minimum of 13,500 new homes in its role as "a major contributor to meeting London's need for additional housing". Policy 2.13 makes clear that planning decisions should "seek to optimise residential and non-residential output and densities" in Opportunity Areas and to meet or where appropriate exceed the minimum housing numbers identified. There could not be a clearer statement that sites such as the gas holder site need to deliver as much housing as is possible. It is self-evident that "optimising" residential densities involves seeking to overcome constraints which would otherwise limit those densities.
80. Policy 5.22 of the London Plan requires local authorities to ensure that in allocating land for hazardous installations, account is taken of the need to incentivise and fund decommissioning. This is a theme which is taken further in the emerging London Plan. There is particular emphasis on surplus utilities sites, such as gas holders, and a recognition that they may come forward for residential uses.
81. The RBG Core Strategy reflects the London Plan's identification of the Greenwich Peninsula as an Opportunity Area. Policy EA3 identifies land including the gas holder site as a "Strategic Development Location" comprising a "new urban quarter". Policy EA3 supersedes the previous planning framework for the area, including the 2012 SPD, reflecting the fact that this area is now expected to deliver housing at scale. The gas

holder site forms part of RBG's future housing land supply, having been identified as delivering 800 homes in the plan period.<sup>34</sup>

82. The GP3 development brief does not have development plan status, but it is a material consideration. It shows a concerted effort by RBG and the landowners to establish a "fresh approach to the site" and "guide the scale of development and mix of uses" which will be supported under the development plan. The Brenntag Site is a "key constraint to the development" of the GP3 site. The vision is to redevelop the site "to address existing environmental constraints and create a high quality residential-led mixed use neighbourhood". The objectives include delivering "a residential-led mixed use development" seeking a "pragmatic approach to redevelopment" which ensures an "appropriate balance between providing viable development and maximising community benefit", whilst managing constraints from the HSC. The development principles identify an output of between 600 and 1,200 residential units. Across the site that is a density of 100-200 dwellings per hectare.<sup>35</sup> The figure is notable because the HSE's "advise against" position relates to residential development above 40 dwelling per hectare.
83. The owners of the gas holder site have already surrendered their HSC, and obtained approval for the demolition of the gas holder structure. Works to clear the site have begun. Direct and costly steps towards redevelopment have been taken. The likely future use of the gas holder site is for residential-led mixed use development at high density. Such a use is clearly supported by all levels of planning policy. The site plays an important role in RBG's housing land supply, but the existing 1999 HSC imposes a constraint on the residential output of the site.

*Is there a reason not to remove the Brenntag constraint from the gas holder site?*

84. Brenntag and RBG cite three arguments against Option 2. (1) The western portion of the gas holder site is subject to other constraints, which are unrelated to the 1999 HSC, and would in any event limit development in that area. (2) That much of the land which is constrained by the 1999 HSC will in any event be the subject of compulsory acquisition by TfL for the Silvertown Tunnel. (3) That the imposition of a condition which removed the Brenntag constraint from the gas holder site would be onerous to Brenntag's operations.
85. The GP3 development brief indicates concentrating residential development to the east of the Site (see Figure 4.1), but that is a direct consequence of the Brenntag constraint. The other matters which are identified as environmental constraints (noise and air quality) are matters which can be addressed through the design of the scheme, including

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<sup>34</sup> ID5.

<sup>35</sup> GP3.



through building at greater heights.<sup>36</sup> These do not necessarily limit residential output.

86. Much of the constrained part of the site is also subject to the threat of compulsory acquisition, but the application has to be dealt with whether or not the Silvertown Tunnel scheme proceeds. It is for this reason that Brenntag proposes a condition which is contingent on TfL taking some steps towards the delivery of Silvertown Tunnel – because it is not a *fait accompli*. The HSC sought by Brenntag would endure whether or not Silvertown Tunnel goes ahead, and therefore it needs to be considered on its merits. TfL presented no evidence on the compulsory acquisition of the gas holder site. The fact that there are powers of compulsory acquisition does not mean that those powers (or all of those powers) will be exercised.
87. The approach advocated by Birch/SGN is entirely consistent with the *Guidance* on the imposition of conditions. The necessity for Option 2 comes from the clear constraint which would otherwise be imposed on the development of the gas holder site. The condition is required to remove that constraint and thus to maximise the output of the site. It is a reasonable condition because it reflects the current storage location for HFA. Consequently, Brenntag has clearly worked out how it can “live” with the 45 m exclusion zone in terms of its day to day operations, such as parking arrangements. TfL will compensate for any impact from a more onerous condition being imposed on the HSC than is currently the case. Brenntag presented no evidence to demonstrate that this condition would be onerous and no evidence on compensation.
88. No evidence was given of any actual adverse operational impact on Brenntag which would arise from the exclusion zone. The Site would have to be operated differently, however no physical works would be required to reflect the constraint. Brenntag suggested that extra staff would be required, but could not explain why and called no evidence to show that the proposed condition would unreasonably constrain or otherwise adversely affect its operations. A balance has to be struck between any adverse impact on Brenntag and the potential benefits in planning terms from removing the constraint over the gas holder site. There is very little, if anything, weighing against the imposition of Option 2.

#### *TfL's position*

89. TfL has a proper interest in ensuring that any grant of the continuation HSC does not inhibit the delivery of the nationally significant Silvertown Tunnel. Birch/SGN's approach would not inhibit the delivery of that scheme and would be better for TfL, since it would result in the immediate release of the Brenntag constraint on the opening of the Silvertown Tunnel. This would put the matter beyond doubt at this stage rather than in a way that would be contingent on further steps and later consideration by the HSE.

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<sup>36</sup> Paragraph 4.4.5 of the GP3 brief “minimum heights of four storeys” to mitigate against noise and air quality effects.

### *The conditions*

90. Option 2 would immediately prevent the storage of HFA within 45 m of the eastern boundary of the Site, and thereby remove any constraint imposed by Brenntag on the future development of the gas holder site. In terms of its drafting and effectiveness, it is not opposed by any party and it is accepted as being appropriate by the HSE. It addresses TfL's concern and would lead to the immediate satisfaction of Requirement 19 of the STO. Option 2 is justified on the planning balance and there is no legal doubt about its imposition.
91. Conditions A2(1) and A2(2) and A2(3) of Option 1 are neither workable nor enforceable. Condition A2(1) is superfluous and serves no purpose. The HSE only need to be notified of an actual change of control, and not an intended change of control. This links to an apparent misunderstanding by Brenntag and TfL as to when a change of control occurs, which is on the date of actual possession.
92. Condition A2(2) is imprecise as it no longer addresses the yellow land, over which TfL will take temporary possession. The previously agreed drafts of the condition that have been submitted to the Inquiry by Brenntag, RBG and TfL have related to the entire red line boundary (as is appropriate), including both the green land and the yellow land.<sup>37</sup> The HSC must cease to apply to all land over which there will be a change of control. Temporary possession under Article 29 amounts to a change of control and that the change of control occurs on the date on which temporary possession is taken.<sup>38</sup> TfL will take temporary possession of the yellow land.<sup>39</sup> There is no legal basis to distinguish between temporary possession of the yellow land or green land pursuant to Article 29 of the STO. TfL will not be acting as Brenntag's contractor in carrying out such works. Only TfL have the benefit of the STO under which the works will be carried out, and it would not be lawful for Brenntag to carry out works pursuant to the STO without first having taken a transfer of the benefit of the STO. The HSE's advice that there is no "safety grounds" for removing the yellow land from the consent is irrelevant. The yellow land is not removed for health and safety reasons: it is removed because there is a change of control.
93. Condition A2(3) is imprecise as it does not address the yellow land. The continuation of the consent in respect of the yellow land is not an issue of any direct interest for Birch/SGN. However, the inconsistent approach to the yellow land and its omission from the Conditions demonstrates that there remains uncertainty and imprecision on Brenntag, RBG and TfL's part as to; (i) the extent of the land in question, and (ii) the point at which there is a change of control, and the extent of that change of control. This lack of certainty and precision is a further reason to support

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<sup>37</sup> Section 7.4 of the Statement of Common Ground dated 6 March 2019; and section 2.2 of the Additional Statement of Common Ground dated 23 April 2019 at ID1.

<sup>38</sup> Section 24 of the Joint Written Statement dated 15 April 2019.

<sup>39</sup> Section 2.2 of the Summary of Notice Provisions contained in an Agreement dated 10 April 2017 submitted post-inquiry at ID19.



Option 2. A failure to address the yellow land would, if reflected in the final condition, carry a risk of automatic revocation pursuant to section 17 of the Act. Birch/SGN reserve their position on this.

94. There is serious doubt as to whether the approach in Option 1 is lawful and meets the policy tests for imposing conditions. The point at which the condition is "triggered" is a matter of debate, not least because there is no statutory definition, case law or guidance on the meaning of change of control or the application of section 17 of the Act. A continuation application can only be made when there is a change of control, and a continuation application must identify the land over which a change of control will occur.
95. The HSC must cease in respect of land over which it is identified that there will be a change of control. The purpose of the continuation application is to allow for the HSC to subsist in respect of the remainder of the land, but not in respect of the land identified on the change of control plan. Brenntag has chosen, presumably for commercial reasons, to make this before it knows whether there will ever be a change of control. Whilst it is entitled to do so, it is illogical and circular to make a continuation consent that is solely triggered by a change of control, itself conditional upon a change of control.
96. There is no planning justification or linkage between the change of control of the green land and the imposition of the 45 m exclusion zone. Put another way, the change of control has no relevance to the 45 m zone. The 45 m zone is a wider strip that is unrelated to the green land.
97. The HSC is a public document, and the continuation consent to be granted pursuant to the application would also be a public document. Its effect must be clear on its face to enable the general public, and those affected by it, to clearly understand it and its ongoing effects at all times. Option 2 would do so. It is clear at all times where HFA cannot be stored. It meets all of the six tests that apply to planning conditions.
98. Option 1 does not meet those tests. It is dependent on another process occurring, namely a change of control of part of the Site. The change of control is fundamentally a private, and not a public, act. Compulsory acquisition under the STO is not necessarily a matter of public record at the point of action, and there is not necessarily any public means by which Birch/SGN, the HSA, the HSE or the general public could become or be made aware of such compulsory acquisition unless and until land registration as a land charge or at HM Land Registry occurred (which may be months or even years after such acquisition). Temporary possession by TfL is not a public act. Under the STO, the only obligations that TfL has in the event that it takes such temporary possession is to give 14 days' notice to the relevant owners and occupiers of such land. There is no requirement for TfL to notify any other party, and such temporary possession is unlikely to be registered as a land charge or at HM Land Registry, and so is unlikely to be discoverable publicly.
99. This is particularly important given the potential for debate over the extent to which there might be a change of control at any particular time.

RBG, as the HSA, cannot be placed in a situation where it does not know, in the event that there is a breach, what it should be enforcing against, particularly in relation to matters as important as the storage of hazardous substances. In this circumstance, if Brenntag does not provide the requisite notification under Condition A2(2), then RBG as enforcing authority would not be in a position to adequately enforce this condition. Future development could continue to be prejudiced by this condition because of the difficulties in understanding whether the exclusion zone had been "triggered". The condition relates to an act by a third party over which Brenntag has no control. On conventional principles, such a condition should be regarded as unenforceable.

100. Option 2 suffers from none of these objections. In all those circumstances, not only is the Birch/SGN condition necessary on the planning merits, it is also the only proposed condition which definitely works and would ensure that there was no impediment either to the opening of the Silvertown Tunnel, or to the continued activity at the Brenntag Site. For those reasons, it is the only credible and lawful proposal before the Secretary of State and should be imposed in the form proposed.

#### *Section 14 of the Act*

101. Birch/SGN recognise that section 14 might be an option that could be relied on in other circumstances. However, it is not a process that is available to Birch/SGN on application, and whilst Birch/SGN could lobby RBG to exercise its powers under section 14, these are essentially discretionary powers. If RBG did not exercise these powers, Birch/SGN's only recourse would be to demonstrate that RBG had acted unlawfully (essentially irrationally) in a judicial review. RBG may be less inclined to exercise such powers due to the obligation to pay compensation. Furthermore, if Brenntag objected, which based on its current position would seem likely, an inquiry would need to be held in any event, and exactly the same considerations as now would be debated. An approach of deferring the matter to a future consideration disregards the clear planning case to remove the constraint on the gas holder site and to encourage its development in accordance with all levels of planning policy, and the lack of any evidence of prejudice to Brenntag from dealing with the matter now.

#### *Conclusion*

102. The consent sought by Brenntag should be granted subject to the conditions proposed by Birch/SGN. Such an approach is straightforward, it serves TfL's objective of removing the constraint to the opening of the Silvertown Tunnel, and imposes no greater burden on Brenntag than they already contemplate and accept. Moreover, it gives effect to the clear planning case to remove the outstanding constraints on the development of the gas holder site.

## The Case for Interested Persons

103. David Dadds on behalf of Raduga Limited of Studio 338 would prefer the imposition of a condition on the HSC as soon as possible to reduce public safety risk associated with use of the nightclub and music venue, and for the commercial benefit of the premises.<sup>40</sup> An area known as the 'beach' lies within the HSE consultation zones and is used for up to 28 days a year. Concern was also expressed about patrons obtaining permission to relocate access/fire exits in works required as a result of the Silvertown Tunnel.<sup>41</sup>

## The Case for Brenntag

The following summary of case broadly follows Brenntag's closing submissions to the Inquiry, with additional reference where necessary to the evidence adduced.<sup>42</sup>

104. The Brenntag Group has a network with more than 530 facilities in 74 countries and a workforce of more than 15,000 employees involved in chemical distribution. It provides a link between chemical manufacturers, suppliers and users. It operates from 21 strategic locations around the UK and Ireland, with an integrated network of production facilities, warehousing and storage depots, and distribution centres. Warehouse throughput (outbound) at the Greenwich Site is in the region of 30,000 tonnes per annum, with this volume of products being distributed throughout the south-eastern region of the UK. There has been no change in the person in control of the Site since 1999 which could have triggered the provisions of section 17 of the 1990 Act.

105. The Site has operated since the 1970s with no restriction on where HFA may be kept. Due to the hazardous nature of certain of the products stored and handled at the Site, its operation is governed by the COMAH (Control of Major Accident Hazards) regime, in particular the Control of Major Accident Hazards Regulations 1999. Operating as a 'Lower Tier' facility, the Site is heavily regulated by the joint competent authority under the COMAH regime, the Environment Agency and the HSE.

106. The continuation application was made to anticipate the risk of a "change in the person in control" from the STO, which has given TfL the power to permanently acquire a small parcel of land in the south-eastern corner of Brenntag's Site. In continuation applications like this "it should rarely be appropriate to impose more onerous conditions" other than those which apply to the existing consent. But this is one of those rare cases. Brenntag accepts that a condition is required to control the locations on the Site where HFA may be stored, for a particular purpose:

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<sup>40</sup> ID14. Planning permission was granted on appeal for works to the building following fire damage, with the Inspector commenting that if planning permission was granted the building could be used for its designed purposes (ID2 paragraph 41).

<sup>41</sup> The intention is to relocate access to the building from location marked '1' on ID18 to location '2'.

<sup>42</sup> ID25.

to enable the Silvertown Tunnel to open, a nationally significant piece of highways infrastructure.

107. Section 20 does not expressly put the Secretary of State “into the shoes” of the HSA or imbue him with the powers and obligations set out in sections 9 and 10. However, the proper approach is straightforward: The Secretary of State’s power is to “determine” this application pursuant to section 20(4). This includes the power to impose whatever conditions he considers to be appropriate. Brenntag agrees with TfL that the Secretary of State’s power to determine this application is not constrained by the matters that control the way HSAs must act under sections 9 and 10 of the 1990 Act. Nonetheless, the Secretary of State will normally wish to exercise his powers under section 20 in accordance with the spirit of sections 9 and 10, even though they do not strictly apply to him. Most of the matters listed e.g. at section 9(2) would be likely to be material to the Secretary of State’s determination in any event, i.e. under the overarching public law requirement on decision-makers to take account of relevant considerations.

#### *Common ground*

108. All of the main parties agree that the continuation application should be approved by the Secretary of State; and that it should be modified by imposing conditions, one of which should limit the storage of HFA to the area of Brenntag’s Site beyond 45 m from the A102. The 45 m limit should only be imposed from the date that control of part of the Site transfers to TfL pursuant to the STO. The justification for that trigger date is obvious: the 45 m buffer is required to protect the users of the Silvertown Tunnel. But is not required until the Silvertown Tunnel starts to operate. A condition requiring it any sooner (i.e. on the grant of this consent, well before required for the Silvertown Tunnel) would fail the test of necessity. Birch/SGN takes a different view.

#### *Trigger for the 45 m limit condition*

109. Although the *Framework* is not strictly applicable to HSC applications, the planning witnesses before the Inquiry accepted – correctly – that the Secretary of State should only impose conditions on this consent which meet the *Framework* tests. Birch/SGN’s position is that the 45 m limit should be imposed immediately on the grant of this consent. There are four steps in that argument. (1) For high-density housing schemes, the HSE will “advise against” development within either its inner or middle consultation zones. (2) In consequence, the HSE would advise against any high-density housing development which comes forward within the orange-shaded zone in ID17 (“the orange area”). (3) However, it is likely (within the meaning of section 9(2)(b) of the 1990 Act) that housing will come forward in the orange area. (4) So the Birch/SGN condition is necessary to enable that housing to come forward.
110. Points (1) and (2) are uncontroversial. The bulk of the evidence at the Inquiry turned on point (3). The answer to point (3) – i.e. whether the likely future use of the orange area is for residential development –

determines the answer to point (4) – i.e. whether an even more onerous condition is required to enable that residential development.

111. Birch/SGN's case focussed on the likely future use of the gas holder site as a whole. But that approach does not assist the Secretary of State with the controversial questions in this application. If housing comes forward outside the orange area, it would not generate an HSE objection. So any likelihood of housing which might exist outside the orange area is not constrained by the Brenntag consultation zones, and has nothing to do with whether or not this HSC should be modified. Brenntag accepts that the likely use of the gas holder site as a whole is for some kind of mixed-use development which includes residential. However, unless there is evidence that the likely future use of the orange area will be residential, there is no case for modifying the Brenntag consent to protect that future use. So, the real issue for the Secretary of State is whether the likely future use of the orange area includes high-density residential development.
112. Most of the orange area is subject to compulsory acquisition by TfL under the STO.<sup>43</sup> The STO is a material consideration for the Secretary of State when considering the likely future use of the orange land. The STO is more recent than any of the adopted planning documents on which Birch/SGN rely, and that increases the weight the STO should attract in the balance. The STO is site-specific – unlike all of the relevant adopted planning policy – and that too increases the weight it should attract. TfL has already invested substantial time, resources and money in furtherance of the STO, and that too increases the weight it should attract. The Secretary of State for Transport has confirmed the DCO, which also increases the weight it should be accorded.
113. The majority of that part of the gas holder site falling within the HSE consultation zones around the Site is subject to permanent acquisition by TfL as part of the Silvertown Tunnel scheme. The most significant limitation on the residential capacity of the gas holder site is not the continuation of the HSC, but the permanent acquisition by TfL of a much larger part of the site that extends well beyond the HSE consultation zones. The likely future use of that area is as part of the STO scheme.
114. That leaves only the "hatched area" on plan ID17. In relation to that area, Birch/SGN relies not on any particular proposal or planning application, but on planning policy. There is no adopted policy which prescribes that housing (and not e.g. commercial development) should come forward on that land. There is no adopted policy which precludes commercial uses from coming forward within the hatched area, and the adopted planning brief for the site does not prescribe housing-led development within the hatched area. There is no site-specific or objective evidence (i.e. evidence not produced by Birch/SGN itself) which offers any support for the case that the hatched area's likely future use is for residential development. The relevant policies in the RBG's local plan (EA3 and EA4) apply to the entire peninsula, not just the Birch/SGN land,

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<sup>43</sup> Purple shading at ID3A.

and allocate the peninsula for a range of residential and commercial uses. They do not control the distribution of those uses across the peninsula. But policies do protect the Brenntag site for continued industrial use.

115. Nothing in the policies deal specifically with the Birch/SGN land, still less the orange or hatched areas in ID17. The policies do not assess where housing uses should go (against, for example, commercial uses) and a buffer will be required on the Birch/SGN site to protect the ongoing Brenntag operations. If a buffer were required, the orange area is where it would need to be placed. There is nothing in either RBG's Core Strategy or the London Plan which prescribes that residential is the likely future use of the hatched area. There is nothing in the statutory development plan, taken as a whole, which prescribes residential as the likely future use of the hatched land.
116. RBG's 2016 "Issues and Options" consultation document for the Greenwich Site Allocations Local Plan can only be given minimal weight. In any event, it notes only that housing may be appropriate on site GP3 "only if noise and air quality issues can be resolved".<sup>44</sup> RBG's October 2017 GP3 Planning Brief: Notes a "number of environmental constraints" on the site, including land contamination, air quality and noise pollution, with a major source of emissions being the A102 on the site's western fringe.<sup>45</sup> Noise is said to be a "significant constraint" on future development which will "define land use and building massing in the worst affected areas", i.e. at the western fringe. So in respect of residential development on the western side of GP3 there is a wide range of environmental constraints, which extend well beyond the HSE consultation zones associated with the Brenntag site, and are yet to be overcome.
117. It is not known whether all of the constraints can be overcome to RBG's satisfaction. Birch/SGN have not yet even settled on a scheme, still less have they lodged a planning application or even an EIA screening request. So imposing Option 2 would not "provide the certainty" required for residential development on the site's western fringe to come forward. Whatever else residential development within the orange or hatched areas may be, it is obviously not certain – and that will remain the case with or without the impact of the Brenntag consultation zones. Birch/SGN's point that the spatial vision in the planning brief is "a direct consequence of the Brenntag constraint" conveniently dodges the long list of other constraints, all of which pull residential development back from GP3's western fringe with or without the Brenntag consultation zones in place.
118. The grant of the continuation HSC sought by Brenntag would not "impose a constraint" on the future development of Birch/SGN's land "by placing parts of the site in the within the HSE's consultation zones" [sic]. The constraint already exists and has done for many years. The grant of this continuation consent would simply continue the *status quo* as regards the extent of the HSE consultation zones over part of Birch/SGN's land, at

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<sup>44</sup> PD1 page 18.

<sup>45</sup> The constraints are mapped at figure 2.9 on page 15 PD11 Appendix 5.



least until the modification of those consultation zones following the compulsory acquisition of part of the site by TfL.

119. The spatial vision in the GP3 Planning Brief (figure 3.1) shows “commercial led” development in the western part of the site, with a “green buffer” along its western fringe, as well as proposed tree planting. At least some of the orange area would be taken up by that green buffer. The justification for that arrangement is at paragraph 4.1.3 of the brief: “Focus land uses sensitive to noise and air quality, Environment Agency Flood Zone 3 and Health and Safety Executive Safety Zones, such as residential development in the east of the site with no habitable rooms permitted on the ground floor, and less sensitive uses such as leisure/sports use, an archive centre or a data centre to the west, providing a buffer from the A102 and industrial uses to the west.” The brief says what RBG wants to see on the western fringe of GP3, and it is not high-density residential development. The Brief’s references to a “residential-led” development are to the site as a whole. When the Brief considers the site’s western areas, it is obvious that it envisages commercial-led uses in those areas. It offers no support to the contention that residential use on the site’s western fringe is the likely future use.
120. There is no analysis which demonstrates, with reference to a viability analysis or site masterplanning, that the hatched land is necessary to enable a deliverable residential scheme to come forward on the GP3 site. Until there is a scheme proposed which includes high-density residential development on the site’s western fringe, and until it is shown to RBG’s satisfaction how the constraints can be solved, the contention that the likely future use of the orange land is for residential is hopeless.
121. In effect, Birch/SGN ask the Secretary of State to accept that the likely future use of the orange and hatched areas of plan ID17 is not as part of the recently confirmed DCO, nor for the buffer / commercial development uses prescribed by the adopted GP3 Planning Brief, but for a high-density residential development which has not even been agreed on internally by Birch/SGN, let alone applied for, still less determined. The future use of the western fringe of the GP3 site is plainly not likely to be residential. RBG clearly envisage that, in the absence of the STO, the GP3 site would be deliverable as a whole, even with the Brenntag consultation zones in place as they are now. The Birch/SGN case that the HSC must now be amended in order to deliver a policy-compliant GP3 scheme – when all of the policies which cover the GP3 site were drafted in the knowledge of and taking account of the deemed HSC – is not supported by the evidence.
122. If the likely use of the orange and hatched areas of ID17 is not for a high-density residential scheme, then it is not necessary to require an imposition of the 45 m limit in advance of the operation of the Silvertown Tunnel. The 45 m limitation imposes a new constraint on Brenntag’s operations, which are not currently constrained. The cage store for HFA is currently outside the 45 m zone, but orders are made up in advance and can be stored on vehicles over night/weekends as there is currently no restriction of where it can be stored on the Site. Option 2 would impose that new constraint immediately on the grant of consent, rather than in

the future as and when the change of control is required to facilitate the STO. Imposing a new constraint immediately, rather than at some time in the future, is a more onerous approach.

123. Any restriction on where HFA may be stored is therefore more onerous. The fact that no physical works are required to deal with the 45 m limit does not mean that Brenntag will not be prejudiced by the imposition of the 45 m limit. Changes to operating practices requiring the hiring of additional staff will have a prejudicial impact on Brenntag's operations at the Site. Birch/SGN's submissions that Brenntag has "worked out how it can "live" with the 45 m exclusion zone in terms of its day to day operations such as parking arrangements" and is entitled to compensation are not justification for imposing Option 2 and do not mean that Brenntag would not suffer prejudice.
124. Brenntag has undertaken contingency planning, as any prudent business would, but the very need for that planning is to address the way its operations will be prejudiced by imposing the 45 m limit. The fact that TfL agreed to compensate Brenntag for the prejudice it has suffered proves the point. Any compensation would be returned to TfL in the event that the STO scheme does not proceed. If that happened, then under Option 2 Brenntag would suffer the prejudice of dealing with the 45 m limit condition without any compensation. In any event, the test for imposing conditions is not to weigh the prejudice which will be suffered by Brenntag against that of Birch/SGN. The Birch/SGN version of the 45 m limit condition is more onerous than Option 1. The issue is whether the conditions are necessary.
125. The onus is on Birch/SGN to justify the more onerous wording, and to do so with reference to the test of necessity. Birch/SGN suggested that the correct approach to this question is to balance the prejudice which either condition would cause Brenntag on one hand, against the prejudice which would be caused to Birch/SGN on the other. Brenntag would suffer prejudice as a result of Option 2. But the necessity test does not require a balancing of relative prejudice. If a condition is not necessary to enable the consent to be granted, then the test is failed, and the condition should not be imposed.
126. Option 2 may well be generally desirable to mitigate or remove constraints on gas holder sites wherever possible so that they can be brought forward as a source of brownfield housing land. But the issue is whether Option 2 is necessary to enable the consent to be granted. If the likely use of the orange area is not for residential, then the test cannot be passed, and the condition should not be imposed. Evidence in relation to other gas holder sites shows that the schemes they tend to generate are mixed-use, i.e. a mix of commercial and residential uses, which is consistent with the GP3 Planning Brief, and RBG's aspiration to focus residential uses toward the east of the site.
127. Condition A2(1) alerts the HSA of an expected change in control. Early notification means that the HSA, and the public, are not taken by surprise when the change of control takes place. It enables the HSA to conduct and coordinate its enforcement effectively. Birch/SGN considers that



“there is not necessarily any public means” of ascertaining when a change of control takes place “unless and until” confirmed by the Land Registry. That is why early notification to the HSA of an intended change of control is an important step.

128. On Condition A2(2), the main point taken by Birch/SGN is that it is imprecise because it excludes the yellow land. But temporary possession under Article 29 of the Silvertown Tunnel Order – where this is not a precursor to compulsory acquisition – is not a change in control for the purposes of the 1990 Act where that temporary possession is simply to allow TfL to carry out certain accommodation works for the benefit of Brenntag, such as re-laying out of the Brenntag car park. A failure to address the yellow land does not give rise to a risk of automatic revocation pursuant to section 17 of the 1990 Act because there will be no change of control in respect of the yellow land.
129. The fact of the change of control does not determine the terms of the continued HSC. Birch/SGN rely upon section 24 of the Joint Written Statement, but that should be read in full: “For the purposes of the 1990 Act, a change in the person in control of the land would occur on the date on which TfL enters on and takes possession of the land in exercise of the power in article 29 as a precursor to the compulsory acquisition of the land for the purposes of Work No.11”.<sup>46</sup> The only land within the Site in respect of which TfL possess a power of temporary possession as a precursor to compulsory acquisition is the green land.
130. Birch/SGN argue that Option 1 is contingent on a future third party act over which Brenntag has no control. However, section 10(1) of the 1990 Act expressly anticipates making consents “conditional on the commencement or partial or complete execution of development on the land which is authorised by a specified planning permission or development consent”, and that is precisely what is proposed here.

#### *Studio 338*

131. On the use of the Studio 338 building as a nightclub, the issue was considered recently at an enforcement appeal. The decision noted that the HSE did not object to the nightclub use on the basis of the Brenntag operations, and that no further condition was required to limit the number of people who may gather outside the nightclub.<sup>47</sup> In relation to the use of an outdoor area known as the ‘beach’, that use is unlawful.<sup>48</sup> There was some reference to a need to move fire exits in Mr Dadds’ oral evidence, but there is no detail on that, and Mr Dadds accepted that it had not been the subject of any planning application.

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<sup>46</sup> PD16.

<sup>47</sup> ID2 DL:50-52.

<sup>48</sup> ID12.

### *Conclusion*

132. The continuation application should be approved, and the consent should be granted subject to the conditions agreed between Brenntag, RBG and TfL, as set out in Option 1.

### **Written Representations**

133. RBG's report summarises written representations submitted at the application stage.<sup>49</sup> At the Inquiry stage five written submissions were received.<sup>50</sup> Quod on behalf of SGN raised issues that were discussed at the Inquiry.
134. Martin Crane Director of Lidoka Estates Ltd, the freeholder of a site on Boord Street currently used by The London Evening Standard as a distribution centre, considered that there was a strong case for reducing the area covered by the HSC, if not removing it completely. The Greenwich Peninsula is gradually being developed from an industrial area to a commercial and residential area, and hazardous substances are now increasingly out of place and could have significant risks for users and residents of the Peninsula. The HSC affects part of the GP3 site identified in the adopted Planning Brief and its continuation would compromise the envisaged development. It would also appear highly desirable not to have any hazardous substances so close to a very busy thoroughfare. Lidoka Estates are strongly in favour of removing the consent completely. If not, the area covered by the consent should be no bigger than Brenntag need to be able to meet their requirements for storing hazardous substances, taking into account the Silvertown Tunnel and the proposed developments under the GP3 Brief.
135. Dadds LLP finds it objectionable that hazardous substances are being stored at the Brenntag premises, which restricts his client's operation and business, which has been operating as a late-night venue with activities akin to a nightclub since 1994. These submissions were elaborated by Mr Dadds at the Inquiry, as summarised above.
136. Written submissions were also made by CMS acting for SGN and Birch Sites Limited, which were elaborated upon and updated at the Inquiry by the Rule 6 party.

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<sup>49</sup> Section 6 of Planning Board Report 19 December 2018 at PD8 Tab28.

<sup>50</sup> Red folder in file.

## Conditions

137. The parties submitted a consolidated list of conditions dated 3 May 2019. Option 1 includes Conditions A1, A2, A3, B1 and B2. Suggested condition A1 concerning approved documents is agreed between the parties. So too is Condition A3, in respect of the 'green land', where no HSC would remain, although there is a disagreement about when this would apply. Conditions B1 setting out substances and quantities, and B2 concerning moveable containers of capacity no greater than 500 kg, are not disputed, and the HSE advises that these should be imposed on any continuation of consent. Birch/SGN object to Conditions A2(1), A2(2) and A2(3) of Option 1, and advocate the imposition of Option 2. This dispute is considered in more detail in my Conclusions.

## Conclusions

### Preliminary matters

138. The following conclusions are based on the written submissions, the evidence given by those who appeared at the Inquiry, and my inspection of the site and its surroundings. In these conclusions the figures in parenthesis [ ] at the end of sections indicate source paragraphs from this report.
139. The section 17 application is for the continuation of the hazardous substance consent (HSC) deemed granted to Hays Chemicals Limited in 1999 for the facility located at 215 Tunnel Avenue, which is now operated by Brenntag. The parties were unable to provide any plans indicating the site to which the HSC applies. The application was made because part of the Brenntag site is required for works associated with the Silvertown Tunnel, for which Transport for London (TfL) have been granted powers of acquisition by the Silvertown Tunnel Order 2018 (STO), and if there is a change in control of part of the HSC it would be revoked unless a section 17 application had been made. There have been changes in the ownership and occupation of the whole site since 1999, but no evidence, and nothing to suggest, that any separate part of the site has been the subject of a change in the person in control of the land.
140. The Secretary of State's direction states that the matters on which he particularly wished to be informed for the purpose of his consideration of the application are the extent to which it is necessary to modify the HSC in order for TfL to implement the development authorised by the STO. Requirement 19 of the STO provides that the Silvertown Tunnel must not open for public use until Brenntag's HSC has been revoked or modified, and in the case of modification the Health and Safety Executive (HSE) has advised that it does not advise against the development authorised by the STO.
141. For the purposes of the 1990 Act the Secretary of State is not the hazardous substances authority (HSA). Therefore, the Act is silent about specific statutory provision regarding considerations to be taken into account by the Secretary of State in determining the application and the imposition of conditions. Section 20 of the Act provides that the Secretary

of State has powers to call-in and to determine an application made under section 17. Therefore section 20 appears to provide the Secretary of State with a wide discretion in determining such applications.

142. If this discretion was limited solely to the matters about which the Secretary of State wished to be informed for the purpose of his consideration of the application, as set out in the referral letter, then that would exclude consideration of other options that involved either revoking the HSC or modifying it by imposing conditions unrelated to the implementation of the Silvertown Tunnel Order (STO). There was tacit agreement at the Inquiry by the parties that the Secretary of State should exercise a wider discretion, having regard to the overarching public law requirement on decision-makers to take account of relevant considerations.
143. To be consistent with the provisions that would have applied had the application not been referred to the Secretary of State, consideration would need to be given to any material consideration and, in particular, to the matters required to be considered by sections 18 and 9(2)(a)-(d) of the 1990 Act, and to any advice from the HSE.
144. In the event that the HSC were to be modified or revoked it would appear that this would not give rise to any obligation under the 1990 Act for either the Secretary of State or the Royal Borough of Greenwich (RBG) to compensate Brenntag in respect of any resultant loss or damage. However, TfL has agreed to compensate Brenntag for losses suffered as a result of any modification attributable to the exercise by TfL of the powers of compulsory acquisition in the STO. TfL has also entered into an agreement with Brenntag about accommodation works and advance notification of possession.
145. If the HSC was modified in accordance with the application the site boundary would be defined as edged in red on the application drawing.

[1,2,3,4,6,7,8,20,21,43-45,68-71,107]

Main considerations

146. The evidence indicates that the main considerations here are as follows.

- (1) Any current or contemplated use of the land to which the application relates.
- (2) The way in which land in the vicinity is being used or is likely to be used.
- (3) Any planning permission, permission in principle or development consent that has been granted for development of land in the vicinity.
- (4) Any advice which the HSE has given following consultations in pursuance of the Regulations.
- (5) Any other material considerations.
- (6) The extent to which the continuation of the consent would be in accordance with the development plan for the area.
- (7) The extent to which the continuation of the consent would be in accordance with relevant other local and national policy.
- (8) Whether any continuation of the consent should be subject to any conditions and, if so, the form that these should take.

*The current or contemplated use of the application land*

147. The Site has been in use for the storage of hazardous substances since 1974. It is currently used as a general storage and distribution depot for inorganic and organic chemicals both in bulk and in packages. The extant HSC permits storage of hazardous substances, including hydrofluoric acid (HFA).

148. The business provides a link between chemical manufacturers, suppliers and users. The Site is one of Brenntag's 21 strategic locations around the UK and Ireland. These provide an integrated network of production facilities, warehousing and storage depots, and distribution centres. Warehouse throughput (outbound) at the Greenwich Site is in the region of 30,000 tonnes per annum, with this volume of products being distributed throughout the south-eastern region of the UK.

149. Brenntag has made the section 17 application so that it can continue this operation after control of part of its land has passed to TfL for works associated with the Silvertown Tunnel. There is nothing to indicate that the Site would be used in any other way in the future provided that the HSC was continued.

[12,63,64,72,104-106]

*The way in which land in the vicinity is being used or is likely to be used*

150. The Site is located on the Greenwich Peninsula. There is industrial land and wharves on the northern and western sides of the Site. A gas holder site, which is in the process of being cleared for decontamination and redevelopment, and Studio 338, a nightclub premises with an outdoor area known as the 'beach', are located to the east of the Brenntag site. These lie on the other side of the A102 Blackwall Tunnel southern approach,

which adjoins the application Site. Further to the south-east is a site on Boord Street, owned by Lidoka Estates Ltd, which is currently used as a distribution centre.

151. In terms of likely future uses, the Greenwich Peninsula is designated an Opportunity Area in the London Plan, where Policy 2.13 seeks to optimise residential and non-residential output and densities. The Peninsula plays a key strategic role as a major contributor to meeting London's need for additional housing. The draft London Plan has similar aims for the area. Policy EA3 of RBG's Core Strategy refers to the creation of a new urban quarter at Greenwich Peninsula West, which will require new development to provide sufficient buffering from the retained Strategic Industrial Location (SIL) land to minimise the potential for conflicts of use and interference to new residents. The Site and adjoining areas to the west of the A102 lie within the SIL designation, where Policy EA4 provides protection for continued employment use.
152. The GP3 site is likely to be redeveloped for a mixed commercial and residential scheme in accordance with local and national policy. Subject to detailed design this is likely to include high density residential development. An acceptable design would need to take into account relevant constraints, including the proximity of industrial development and the A102 southern approach to the tunnel. The A102 here is a significant constraint, both in terms of noise and air quality.
153. It will be important that sites such as GP3 maximise the contribution that they make to meeting London's housing land requirement. However, there is no convincing evidence that the HSE's consultation zones from Brenntag's premises (the orange land) pose a constraint, over and above other relevant constraints, that would materially limit the number of residential units that could be provided on the site. Ultimately this would be a matter for the planning authority in considering a detailed design. At this early stage in the redevelopment of the GP3 site available evidence does not point to the existing HSE consultation zones being the determinative factor insofar as residential output is concerned. Furthermore, if the Silvertown Tunnel scheme was implemented only a small part of the orange area (shown hatched on ID17) would remain within the HSE consultation zones.
154. The existing HSE consultation zones do not appear to constrain the current operation of Studio 338. There is no clear evidence about the likely future for this business, and so it is not possible to say whether, or to what extent, the HSC and associated consultation zones might be a constraint, particularly having regard to the advice from the HSE.

[13,14,28,30,32-34,73-83,103,109-120,135]

*Any planning permissions/consents granted for the development of land in the vicinity*

155. The most significant extant permission/consent here is that provided by the STO. The Silvertown Tunnel is an important national infrastructure project. Achieving its implementation and resultant benefits should attract substantial weight. [34,57]

*The advice given by the Health and Safety Executive (HSE)*

156. The HSE require, upon the opening of the Silvertown Tunnel for public use, that there is a prohibition on HFA being stored at the Site within 45 m of the Site boundary nearest the A102. Once this prohibition is effective HSE will no longer advise against the development of the Silvertown Tunnel. No restriction on the siting of the other chemicals stored on the Site is considered necessary by the HSE.
157. Studio 338 is concerned about an ongoing risk to users by the continued storage of HFA anywhere on the Site. However, such a risk is a "residual risk" and is not such a risk that the HSE, in accordance with its methodology, would cause it to advise against the continuation of the HSC. If the HSE was consulted about the alteration of fire doors, and the nightclub use was categorised as 'Indoor Use by Public', it currently lies in the middle and outer zones, where the HSE's indicative methodology and the decision matrix indicates that the advice would be 'Do not advise against'.
158. Option 2 would encompass consent for all hazardous substances, including HFA. A condition should be imposed which states that the HSC does not pass to the green land following a change in control. However, there is no health and safety reason to justify the HSE recommending that the HSC should cease for the yellow land following a change in control.

[28,29,35,58-60,65-67]

*Any other material considerations*

159. There are no other material considerations which need to be reported.

*The extent to which the continuation of the consent would be in accordance with the development plan for the area*

160. The continuation of Brenntag's HSC would enable the business to continue its operation from the Site, which would accord with RBG's Core Strategy Policy EA4. The evidence does not indicate that continuation of the HSC would be likely to materially affect the achievement of the aims for Greenwich Peninsula West as set out in Core Strategy Policy EA3. For similar reasons, it would not be likely to have any material effect on achieving the adopted and emerging London Plan's objectives for the Greenwich Peninsula Opportunity area. [13-15]

*The extent to which the continuation of the consent would be in accordance with relevant other local and national policy*

161. The Greenwich Peninsula West Masterplan SPD 2012 is outdated and so should not be influential. The GP3 Planning Brief 2017 is a material consideration. The continuation of the HSC would not be at odds with the Brief because it includes reference to the HSE's consultation zones. Consultation about the application to continue the HSC has taken place as required by the *Framework*. In terms of compliance with the *Guidance* it would be necessary here to impose a more onerous condition to realise the benefits that would result from Silvertown Tunnel. [16-19,36]



*Whether any continuation of the consent should be subject to any conditions and, if so, the form that these should take*

162. Birch/SGN argue that Option 1 conditions A2(1), A2(2) and A2(3) are neither workable or enforceable. However, A2(1) would be necessary to ensure that RBG was notified in advance of impending changes and the effective date so that it could responsibly enforce the HSC at all times.
163. Temporary possession to undertake accommodation works need not be a precursor to compulsory acquisition and so would not necessarily result in a change of person in control for the purposes of the 1990 Act. Brenntag would be likely to be vigilant about this to ensure that any such actions did not result in the revocation of the HSC. Therefore, conditions A2(2) and A2(3) are not imprecise because they do not refer to the yellow land.
164. Birch/SGN also consider that Option 1 would be unenforceable because it would relate to an act by a third party over which Brenntag has no control. However, the 1990 Act specifically makes provision for a HSC to be granted conditional on the commencement of development on the land which has the benefit of a development consent.
165. Imposing a 45 m restriction on where HFA could be stored on the Site would require administrative rearrangements for Brenntag that would be likely to result in some additional costs. This is acknowledged by TfL in making provision for compensation. Option 2 would not be contingent upon TfL taking control of the land, and so under this option there would be no provision for compensation for an undefined period. This would not be fair or reasonable.
166. It would be necessary to carry forward relevant conditions set out in Schedule 3 of the 1992 Regulations. There is agreement that it would be lawful to do so, but some dispute about whether the HSC would continue as a deemed consent for the purposes of the 2015 Regulations.

[9,10,22-25,37-41,48-55,61,62,90-100,108,121-130,137]

### Overall conclusions

167. A landowner in the area is strongly in favour of removing the consent completely. The revocation of Brenntag's HSC would potentially result in the loss of an important chemicals distribution centre that currently serves south-eastern England. Given that no right to compensation would apply, revocation would be unfair and create considerable hardship for the business and its employees. The HSE does not advocate revocation and there are no convincing grounds to justify the Secretary of State determining the application by revoking the consent.
168. RBG, TfL, HSE, Birch/SGN and Brenntag all agree that the application should be approved subject to conditions which would restrict the part of the Site in which HFA could be stored, and which excluded the green land from the HSC. However, there is an issue about when these restrictions should apply, and whether the yellow land should be included. Birch/SGN are concerned about the HSC adversely affecting the prospect of achieving

high density housing redevelopment for part of the gas holder site. Studio 338 is concerned about the HSE raising safety issues about the nightclub premises' future operation and development.

169. The tests for planning conditions do not strictly apply here, but they are based on sound principles, and provide a useful reference for the consideration of possible conditions for a continuation HSC. A "necessity" requirement would also sit comfortably with national guidance, which provides that in considering an application for the continuation of a HSC the HSA may modify it in any way considered appropriate, however, it should rarely be appropriate to impose more onerous conditions.
170. Evidence from the HSE does not indicate that it would be necessary to restrict the continuation HSC because of an unacceptable adverse residual risk to the Studio 338 premises and its users. Studio 338's concerns about future constraints on the business are not borne out by the evidence and fall far short of meeting the necessity test for imposing restrictive conditions.
171. Birch/SGN's concerns about the future development of the GP3 site centre on the likelihood of the HSC restricting high-density residential development in the south-western part of the site. But the evidence pointing to the likely prospect of such a constraint resulting in a material impact is far from convincing at this early stage in the proposed redevelopment of the gas holder site. A condition requiring the restriction on the storage of HFA to take immediate effect would fail the necessity test. As a matter of planning judgement, I find no sound grounds to impose a restriction on where HFA is stored on the Brenntag Site prior to the land being required by TfL for the STO works.
172. There is no planning reason why there should be no entitlement to HSC for the yellow land, which is required temporarily for accommodation works. There is a dispute about whether such works would result in a change in the person in control of the yellow land for the purposes of the 1990 Act. However, I am satisfied that these works could be undertaken without such a change in the person in control of the land.
173. Option 2 conditions would fail the necessity 'test'. So too, would the variation of Option 2 with the omission of the yellow land, which was suggested by TfL, if necessary, to progress procurement of the Silvertown Tunnel. Option 1 conditions would be necessary, relevant, enforceable, precise and reasonable in all other respects. They would also keep to a minimum onerous requirement on the holder of the HSC. For these reasons, Option 1 should be preferred in applying conditions to the continuation of Brenntag's HSC.

[46,47,56,57,84-89,101,102,131,134]

## **Recommendation**

174. It is recommended that in determining the section 17 application by Brenntag UK Ltd at 215 Tunnel Avenue, London SE10, pursuant to section 20 of the Planning (Hazardous Substances) Act 1990 the Secretary of State approves the application and modifies the hazardous substance consent by attaching Statement of Change 1 to the Decision Notice – Continuation of Consent.
175. However, if the Secretary of State disagrees with my recommendation, and endorses the conditions advocated by Birch/SGN, then he should approve the application and modify the hazardous substance consent by attaching Statement of Change 2 to the Decision Notice – Continuation of Consent.

*John Woolcock*  
Inspector

## APPEARANCES

### FOR ROYAL BOROUGH OF GREENWICH (RBG):

Melissa Murphy of counsel	Instructed by Eleanor Penn Assistant Head of Legal Services RBG
She called Jillian Holford BA(Hons) MTP MRTPI	Principal Planning Officer

### FOR THE APPLICANT:

Zack Simons of counsel	Instructed by Angus Evers Shoosmiths LLP
He called Asher Ross MRTPI	Planning Director GL Hearn

### FOR RULE 6(6) PARTY: HEALTH AND SAFETY EXECUTIVE (HSE)

Leon Glenister of counsel	Instructed by HSE
He called John Birch BEng (Hons) CEng MIChemE	HM Principal Specialist Inspector

### FOR RULE 6(6) PARTY: TRANSPORT FOR LONDON (TfL)

Michael Humphries QC of counsel	Instructed by TfL
He called Neil Chester MA DipTP MRTPI	Major Consents Team TfL

### FOR RULE 6(6) PARTY: BIRCH AND SGN SITES (BIRCH/SGN)

Richard Turney of counsel	Instructed by Robert Garden CMS Cameron McKenna LLP
He called Ben Ford BSc DipS MRTPI	Director Quod

### INTERESTED PERSONS:

David Dadds	Dadds LLP on behalf of Raduga Limited re Studio 338
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## PROOFS OF EVIDENCE and OTHER DOCUMENTS

### Applicant (Brenntag)

- PD1 Proof of evidence summary and appendices A-D by Asher Ross
- PD2 Rebuttal proof of evidence and appendices A-E by Asher Ross
- PD3 Statement of Case and appendices 1-6 dated 16 January 2019
- PD4 Documents relating to original application 1-23

### Royal Borough of Greenwich

- PD5 Proof of evidence summary and appendices 1-8 by Jillian Holford
- PD6 Statement of Case and appendices A-C dated 16 January 2019

### Transport for London Rule 6 Party

- PD7 Proof of evidence and summary by Neil Chester
- PD8 Statement of Case and documents 1-30

### Health and Safety Executive Rule 6 Party

- PD9 Proof of evidence summary and appendices 1-19 by John Birch
- PD10 Statement of Case and documents 1-15

### Birch/SGN Rule 6 Party

- PD11 Proof of evidence summary and appendices 1-30 by Ben Ford
- PD12 Position statement re SoCG
- PD13 Statement of Case and appendices A-F dated 25 February 2019

### Other documents

- PD14 Statement of Common Ground (SoCG) with Appendices 1-10 undated by Brenntag RBG TfL
- PD15 Technical Statement of Common Ground with Appendices 1-3 dated 6 March 2019 by Brenntag RBG TfL and HSE
- PD16 Joint Written Statement concerning acquisition/possession by TfL dated 15 April 2019 [requested by Inspector]
- PD17 Email dated 15 April 2019 from Brenntag concerning notification for Inquiry
- PD18 Joint Written Statement concerning history of site ownership and control dated 18 April 2019 [requested by Inspector]

## DOCUMENTS SUBMITTED AT THE INQUIRY (ID)

ID1	Additional statement of common ground between Brenntag RBG and TfL
ID2	Appeal Refs:3185346, 3189526/7/8 and 3187732 concerning Studio 338
ID3/3A	Consultation Zone Overlay Plan Drawing No.JER1978-CZ-005
ID4	Erratum & Update RBG
ID5	Annual Monitoring Report 2016/17 RBG
ID6	TfL Silvertown Tunnel Works Plan Drawing No.ST150030-ATK-ZZZ-ZZ-DR-CE-3081 rev P03 Work No.11
ID7	Work No.11
ID8	Brenntag's Opening Statement
ID9	Opening Submissions on behalf of RBG
ID10	Opening Statement of the HSE
ID11	Opening Submissions by TfL
ID12	Temporary Stop Notice concerning open air entertainment venue in respect of land located to the north west side of Riverway Blackwall Lane Greenwich London
ID13	Joint Note on Compensation
ID14	Observations made by Raduga Limited concerning land at Studio 338 including Premises Licences
ID15	Opening submissions on behalf of Birch Sites Limited & SGN Greenwich Limited
ID16.1	Consolidated list of conditions for session 25.04.2019
ID16.2	Consolidated list of conditions 3 May 2019
ID17	Consultation Zone Overlay Plan with area in Birch/SGN land and inner and middle consultation zones shaded orange and area outside TfL permanent acquisition shown hatched
ID18	Consultation Zone Overlay Plan showing existing (1) and proposed (2) fire exit locations for Studio 338 along with the area known as the 'beach' shown hatched
ID19	Summary of notice provisions contained in an agreement dated 10 April 2017 between TfL and Brenntag
ID20	HSE's Note on Section 10(2) of the 1990 Act [requested by Inspector]
ID21	Closing submissions on behalf of Birch Sites Limited & SGN Greenwich Limited
ID22	Closing submissions by Transport for London
ID23	Closing submissions of the Health and Safety Executive
ID24	Closing submissions on behalf of the Royal Borough of Greenwich
ID25	Brenntag's closing submissions
ID26	Joint note about 1992 Regulations and email from Birch/SGN dated 17 June 2019

DRAFT DECISION NOTICE – CONTINUATION OF CONSENT  
File Ref: APP/E5330/V/18/3216423

The Planning (Hazardous Substances) Act 1990  
The Planning (Hazardous Substances) Regulations 2015

The Secretary of State hereby determines pursuant to section 20 of the above Act that the application for the continuation of the hazardous substances consent at Brenntag UK Ltd, 215 Tunnel Avenue, London SE10, Reference number 18/1999/H, dated 12 June 2018, be approved and that consent be granted subject to the following statement of change.

STATEMENT OF CHANGE 1

*A1 Approved Documents*

Subject to the requirements set out in Condition A2 and A3 the hazardous substances shall not be kept or used other than in accordance with the particulars provided on the application form.

*A2 Storage of hydrofluoric acid following change in the person in control of the land*

A2(1) Prior to the person in control of any part of the land shown coloured green on the attached drawing number JERI 592-COC-002 ("Change of Control Plan") changing to Transport for London (or any other person exercising Transport for London's powers under the Silvertown Tunnel Order 2018 (SI 2018/574) as modified by the Silvertown Tunnel (Correction) Order 2019 (SI 2019/413) ("the Silvertown Tunnel Order")) for the purpose of undertaking the development authorised by the Silvertown Tunnel Order, the person in control of such land prior to such change ("Occupier") shall notify the Hazardous Substances Authority and the Health and Safety Executive in writing of the date on which the change in the person in control of such land is expected to occur.

A2(2) Upon the change in the person in control of any part of the land mentioned in Condition A2(1) occurring, the Occupier shall notify the Hazardous Substances Authority and the Health and Safety Executive in writing of the change and the date on which the change occurred ("Effective Date").

A2(3) From the Effective Date hydrofluoric acid shall not be stored on the land shown crosshatched black on the Change of Control Plan.

*A3 No entitlement to hazardous substances consent for land subject to change of control*



From the Effective Date no entitlement to hazardous substances consent shall remain with the land coloured green on the Change of Control Plan.

*Relevant Conditions of Schedule 3 of the Planning (Hazardous Substances) Regulations 1992 amended by the Planning (Control of Major-Accident Hazard) Regulations 1999*

*Condition B1*

Only the following hazardous substances at up to the following maximum quantities may be present at the site:

Hydrofluoric Acid:	10,000 kg
Potassium Cyanide:	3,000 kg
Sodium Cyanide:	3,000 kg
Sodium Dichromate:	500 kg
Potassium Dichromate:	500 kg.

*Condition B2*

Each hazardous substance allowed by this consent may be present only in moveable containers at ambient temperature and pressure and of capacity no greater than 500 kg.

Moveable containers being containers designed or adapted to contain hazardous substances and that are not affixed to the land and do not form part of plant or machinery which is affixed to the land.

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**Legend**  
 Hazardous Substance Consent  
 Boundary  
 45m Zone  
 Land Subject to Permanent Acquisition by Transport for London

**Data Sources**  
 HSC: 12\_1247\_H-Block\_Plan-46128  
 Brenntag Land: TIL/Mouchel Drawing ST150035-MCC-ZZ-ZZ-DRG-X8-0061  
 Rev P01.1 (20/02/2017)

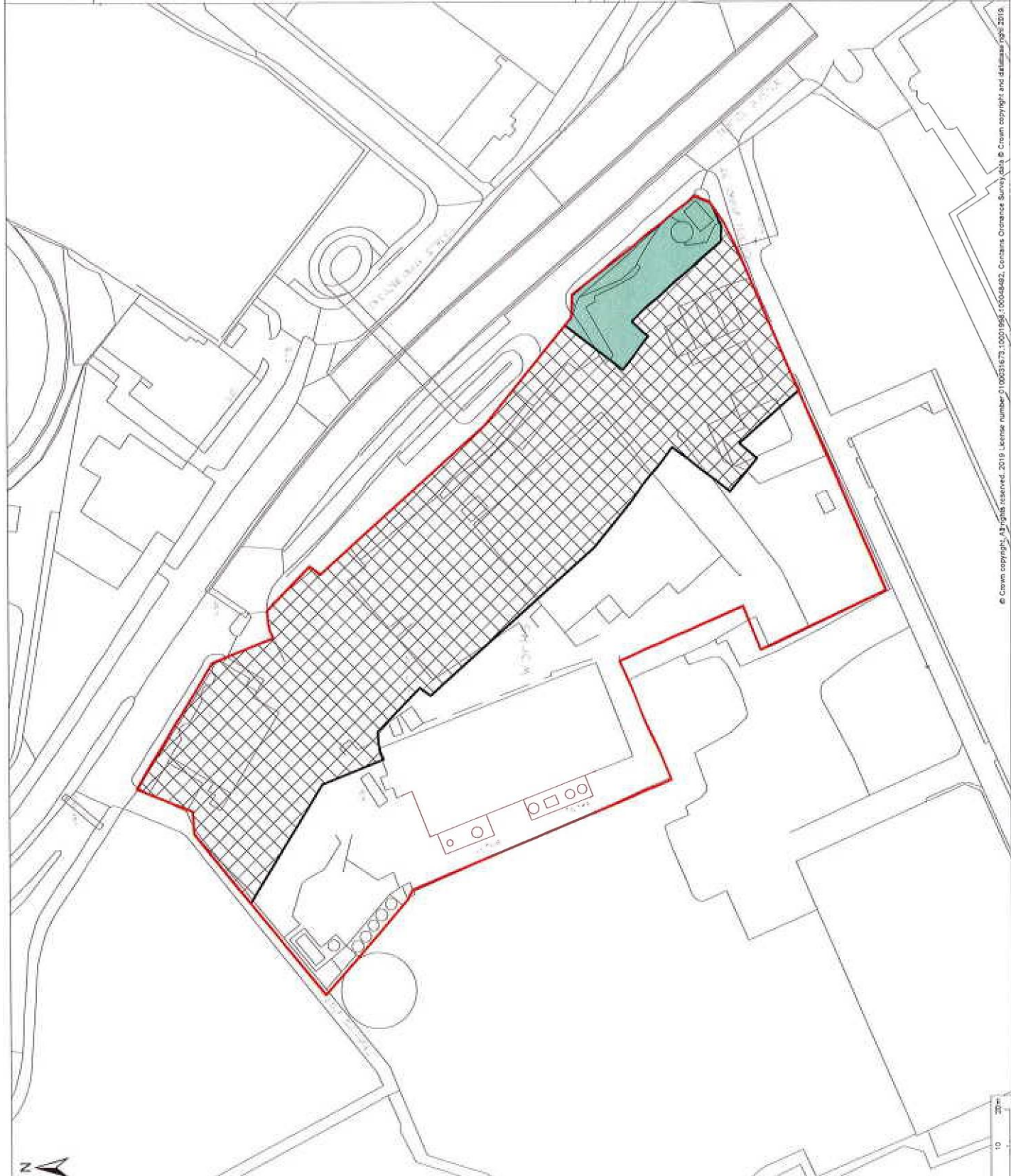
Rev	Description	By	CB	Date

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**Client** Brenntag UK Limited  
**Project** 215 Tunnel Avenue  
**Title** Site Boundaries

**Status** DRAFT  
**Project Number** JER1592  
**Drawing Number** JER1592-COC-002

**Drawn By** RJ  
**Scale @ A3** 1:1,000  
**Date Created** APR 2019  
**PM/Checked By** AE  
**Date Created** APR 2019  
**Rev** -



## STATEMENT OF CHANGE 2

### *A1 Approved Documents*

Subject to the requirements set out in Conditions A2 and A3 the hazardous substances shall not be kept or used other than in accordance with the particulars provided on the application form.

### *A2 Storage of hydrofluoric acid*

Hydrofluoric acid shall not be stored on the land shown cross-hatched black on the attached drawing number JERI 592-COC-002 Rev A ("Change of Control Plan").

### *A3 No entitlement to hazardous substances consent for land subject to change of control*

No entitlement to hazardous substances consent shall remain with the land coloured green or coloured yellow on the Change of Control Plan.

*Relevant Conditions of Schedule 3 of the Planning (Hazardous Substances) Regulations 1992 amended by the Planning (Control of Major-Accident Hazard) Regulations 1999*

### *Condition B1*

Only the following hazardous substances at up to the following maximum quantities may be present at the site:

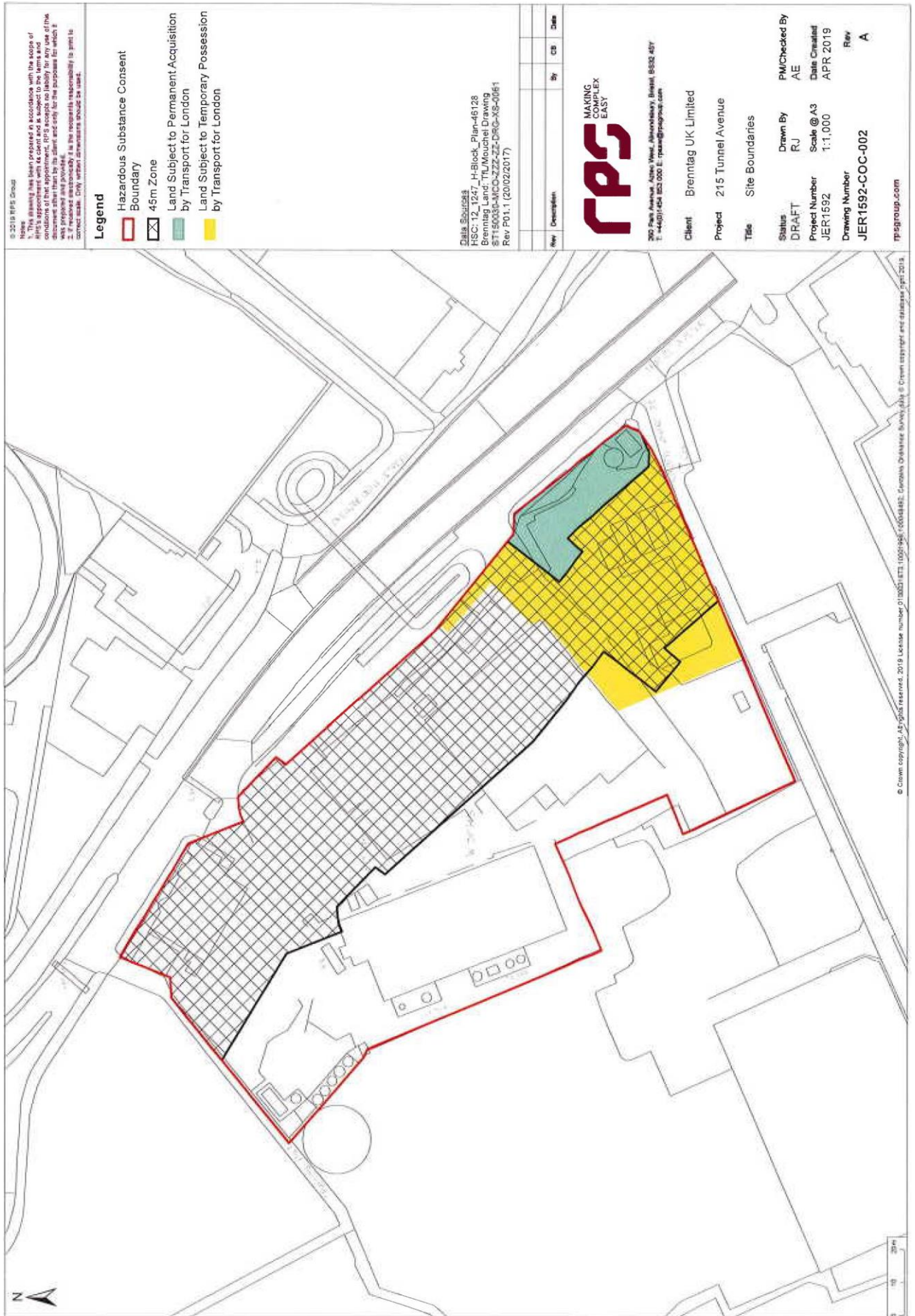
Hydrofluoric Acid:	10,000 kg
Potassium Cyanide:	3,000 kg
Sodium Cyanide:	3,000 kg
Sodium Dichromate:	500 kg
Potassium Dichromate:	500 kg.

### *Condition B2*

Each hazardous substance allowed by this consent may be present only in moveable containers at ambient temperature and pressure and of capacity no greater than 500 kg.

Moveable containers being containers designed or adapted to contain hazardous substances and that are not affixed to the land and do not form part of plant or machinery which is affixed to the land.





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Note:  
 1. This drawing has been prepared in accordance with the scope of RPS's appointment with its client and is subject to the terms and conditions of the appointment. It is not to be used for any other purpose without the written consent of RPS. RPS shall not be responsible for any errors or omissions in this document other than by its client and only for the purposes for which it was prepared and provided. It is the client's responsibility to provide correct and complete information to RPS. RPS shall not be responsible for any errors or omissions in this document other than by its client and only for the purposes for which it was prepared and provided.

**Legend**

- Hazardous Substance Consent
- Boundary
- 45m Zone
- Land Subject to Permanent Acquisition by Transport for London
- Land Subject to Temporary Possession by Transport for London

Data Sources:  
 HSC 12, 1247, H-Block, Plan-46128  
 Brentnag Land, TU/Mouchel Drawing  
 ST150036-MCO-ZZZ-ZZ-DRG-XS-0061  
 Rev P01.1 (20/02/2017)

Rev	Description	By	CB	Date



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# Ministry of Housing, Communities & Local Government

[www.gov.uk/mhclg](http://www.gov.uk/mhclg)

## RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

### SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

#### Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

### SECTION 2: ENFORCEMENT APPEALS

#### Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

### SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

### SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.