

PLANNING ACT 2008
INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)
RULES 2010

PROPOSED PORT TERMINAL AT
FORMER TILBURY POWER STATION

TILBURY2

TR030003

EXPLANATION OF CHANGES TO DRAFT
DEVELOPMENT CONSENT ORDER

TILBURY2 DOCUMENT REF: PoTLL/T2/EX/111



THE PORT OF TILBURY EXPANSION ORDER

EXPLANATION OF AMENDMENTS MADE TO THE DRAFT DCO AT DEADLINE 4.5 (18 JUNE 2018) (REV 3)

1. INTRODUCTION

- 1.1 This document provides a commentary on changes made to the draft Development Consent Order ("**dDCO**") in the version submitted at Deadline 4.5 (18 June 2018) (DCO Revision 3), compared with the Revision 2 of the dDCO submitted at Deadline 3 on 30 April 2018 (Examination Library document reference [REP3-002]).
- 1.2 The Applicant's revised dDCO (Revision 3) is document 3.1 (Revision 3) [PoTLL/T2/EX/109], and an electronic .pdf comparison with Revision 2 has also been submitted [PoTLL/T2/EX/110].
- 1.3 In broad terms the changes made in the latest dDCO have been made for the following reasons:
- 1.3.1 changes arising from and agreed in the Applicant's Response to the Examining Authority's ("**ExA's**") Second Written Questions [REP4-020];
 - 1.3.2 changes agreed with Interested Parties including the Port of London Authority (the "**PLA**") and the Marine Management Organisation (the "**MMO**"); and
 - 1.3.3 other points which the Applicant has identified as requiring amendment since Revision 2 of the draft DCO was submitted at Deadline 3.

2. TABLE OF CHANGES TO THE DRAFT DCO REVISION 3

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| General | References in the dDCO to the River Thames have been made consistent with the way it is described in the Port of London Act 1968 i.e. as " <i>the river Thames</i> ". This was agreed at paragraph 2.8.17ii of the Applicant's Response to the ExA's Second Written Questions. |
| Article 2 | The following changes have been made to this article: <ul style="list-style-type: none"> (a) the definition of "<i>the extended port limits</i>" and "<i>the harbour limits plan</i>" have been amended in order to reflect a change in the name of the plan which is now referred to as "<i>the extended port limits plan</i>". The plan has been amended and submitted at Deadline 4.5 under document reference [PoTLL/T2/EX/111]. This amendment was made in response to a query from the ExA in respect of the definition of "<i>the extended port limits</i>" where the Applicant agreed to consider the drafting at paragraph 2.8.1ii of the Applicant's Response to the ExA's Second Written Questions. This change also feeds through to section 2 of Schedule 7 where the terms are defined again in |

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| | <p>respect of the Port Premises Byelaws;</p> <p>(b) a definition of “<i>National Grid</i>” has been added as it is now mentioned in article 51 as set out in more detail below; and</p> <p>(c) paragraphs (2) and (3) of this article have been amended in order to reflect agreement between the Applicant and the PLA regarding measurements of distances, directions and lengths and measurements in metres. These are now to be construed as if the words “<i>or thereabouts</i>” were inserted after each distance.</p> |
| Article 3 | This article has been amended as part of ongoing discussions between the Applicant and the PLA and RWE. |
| Article 4 | <p>The following changes have been made to this article:</p> <p>(a) amendments have been made to paragraph (2) and a new paragraph (6) has been added as part of ongoing discussions between the Applicant and the PLA;</p> <p>(b) paragraph (3)(c) has been updated as agreed in paragraph 2.8.3iii of the Applicant's Response to the ExA's Second Written Questions to add “<i>Port of</i>” before “<i>Tilbury</i>”; and</p> <p>(c) as agreed in paragraph 2.8.3iv of the Applicant's Response to the ExA's Second Written Questions, a website link to the General Trading Regulations of the Port of Tilbury (referred to in paragraph (5)) has been added to the footnotes.</p> |
| Article 7 | <p>The following changes have been made to this article:</p> <p>(a) a new paragraph (2) has been added in order to clarify what is meant by a reference to a linear or non-linear work. This change was agreed in paragraph 2.8.6i of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(b) paragraph (1)(d)(ii) has been amended to remove the words: “<i>as may be found to be necessary or convenient</i>” as agreed in paragraph 2.8.6ii of the Applicant's Response to the ExA's Second Written Questions; and</p> <p>(c) paragraph (1)(e) has been amended to remove the word “<i>up</i>” as agreed in</p> |

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| | paragraph 2.8.6iii of the Applicant's Response to the ExA's Second Written Questions. |
| Article 11 | Paragraph (5) of this article has been amended as agreed in paragraph 2.8.9ii of the Applicant's Response to the ExA's Second Written Questions to insert the words " <i>the Thurrock Gazette or any other local newspaper circulating in the area</i> " in order to safeguard against any future demise of this newspaper. |
| Article 12 | The article has been amended in order to remove the abbreviation "PMA". The Applicant originally considered that this article should use the abbreviation throughout and indicated in paragraph 2.8.10ii of the Applicant's Response to the ExA's Second Written Questions that the change would be made accordingly. The Applicant has, however, given this further thought and considers that the use of the abbreviation is both unconventional and unhelpful so it has been removed and a full reference to "private means of access" has been used. Accordingly, Schedule 4 has also been amended to reflect this change. |
| Article 19 | Paragraphs (4) and (5) of this article have been amended in order to bring the drafting in line with the position in the recently-made Silvertown Tunnel Order 2018. The revised drafting makes it clear that if it is reasonably required, the Company may enter and take possession, or exclusive possession, of the building and land or part thereof for the purpose of carrying out protective works. |
| Article 22 | <p>This article has been amended following discussions with the PLA:</p> <ul style="list-style-type: none"> (a) paragraph (6) has been amended to change the time in which the PLA must issue a notice to mariners from "<i>within 10 business days</i>" to "<i>within 12 business days</i>"; and (b) paragraphs (7) and (8) have been amended in order to clarify that there will be a deemed refusal if an application is neither given nor refused within 28 business days of the PLA receiving the application under paragraph as opposed to a deemed approval. |
| Article 23, Article 25, Article 26, Article 27, Article 30, Article 31, Schedule 5 | These articles and schedules have been updated in order to bring the powers of acquisition and possession of land drafting in line with the position in the recently-made Silvertown Tunnel Order 2018 and the M20 Junction 10a Development Consent Order 2017. A number of drafting changes have also been made and the Applicant's general approach has been to follow the more recently made Order. There are a few minor differences in the drafting; for example, in article 25 (compulsory acquisition of rights) the reference to section 8 (other provisions as to divided land) of the Compulsory Purchase Act 1965 in connection with the objection to severance procedure has been kept. Section 8 applies Schedule 2A to the Compulsory Purchase Act 1965 (which is necessary), but it also includes additional provisions |

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| | <p>relating to the severance of land which “is not situated in a town or built upon”, such that it has wider application than Schedule 2A does on its own.</p> <p>The Applicant agreed to reconsider the drafting at paragraph 2.8.19 of the Applicant's Response to the ExA’s Second Written Questions.</p> |
| Article 24 | The heading of this article has been amended as agreed in paragraph 2.8.18 of the Applicant's Response to the ExA’s Second Written Questions. |
| Article 33 | This article has been amended at paragraphs (4) and (9) in order to insert the word “ <i>temporary</i> ” before possession as agreed in paragraph 2.8.22 of the Applicant's Response to the ExA’s Second Written Questions. |
| Article 35 | The heading of this article has been updated to refer to “ <i>statutory utilities</i> ” as opposed to “ <i>statutory undertakers</i> ” as agreed in paragraph 2.8.24ii of the Applicant's Response to the ExA’s Second Written Questions. |
| Article 41 | Paragraphs (1) and (2) of this article have been amended in order to clarify the purpose and operation of this article. The Applicant originally agreed at paragraph 2.8.28iii of the Applicant's Response to the ExA’s Second Written Questions to amend paragraph (2) only; however, having considered the article in full, the drafting has been further amended. |
| Article 42 | A minor amendment has been made to this article in line 1 of paragraph (2) so that it reads “ <i>of any part</i> ” instead of “ <i>or any part</i> ” as agreed in paragraph 2.8.29 of the Applicant's Response to the ExA’s Second Written Questions. |
| Article 43 | <p>The following amendments have been made to this article following agreement between the Applicant and the PLA:</p> <ul style="list-style-type: none"> (a) paragraph (3) has been amended in order to confirm that approval is required from the PLA; and (b) paragraph (4) has been amended in order to confirm that the exercise of the powers of the article is subject to the requirements of Schedule 10 as to the PLA's approval of dredging proposals and the payment of compensation for dredged material. <p>As to this article more widely, see section 3 of this note below.</p> |
| Article 45 | <p>This article has been amended:</p> <ul style="list-style-type: none"> (a) the Applicant has considered the drafting in this article and has removed the words “<i>by the confirming authority</i>” as they are superfluous. The Applicant confirmed in paragraph 2.8.30 of the Applicant's Response to the ExA’s Second Written Questions that the confirming authority is the Secretary of State; and (b) by the addition of new paragraphs (5) and |

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| | (6) as agreed with the PLA. These new paragraphs clarify that the Company must not make a byelaw so as to conflict with the PLA byelaws and that in the case of conflict with either a PLA byelaw or a direction given by the PLA or the PLA's Harbour Master, the byelaw or direction of the PLA or of the PLA Harbour Master will prevail. |
| Article 51 | <p>The following amendments have been made to this article:</p> <p>(a) paragraph (6) of this article has been amended in order to add National Grid Gas as a party who the Secretary of State must consult before giving consent under the article. This was agreed between the Applicant and National Grid Gas; and</p> <p>(b) paragraph (7) of this article has been amended in order to add a requirement to notify the Environment Agency and the PLA as suggested by the ExA and agreed in paragraph 2.8.32ii of the Applicant's Response to the ExA's Second Written Questions (in its response the Applicant deferred to the PLA's response and the PLA has confirmed that it would like to be notified).</p> |
| Article 52 | <p>The following amendments have been made to this article:</p> <p>(a) paragraph (1)(b) has been amended to read "<i>other</i>" rather than "<i>others</i>" as agreed in paragraph 2.8.33ii of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(b) paragraph (6)(b) has been amended to remove the words "<i>as the case may be</i>" as they are superfluous in this part of the paragraph. The words "<i>as the case may be</i>" have, however, been reinstated at paragraph (6)(a) (previously removed by the Applicant in Revision 1 of the dDCO) as the words are appropriate given that there is more than one possible consequence of this part of the paragraph.</p> |
| Article 57 | Paragraph (4) of this article has been amended to read " <i>if it had been taken after this Order came in to force</i> " in order to correct an error as agreed in paragraph 2.8.33ii of the Applicant's Response to the ExA's Second Written Questions. |
| Schedule 1 | <p>The following minor amendments have been made to Schedule 1:</p> <p>(a) to Work No.5 in order to ensure that the</p> |

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| | <p>CMAT abbreviation is used as agreed in paragraph 2.8.35iii of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(b) to Work No.9(a)(ii) in order to refer to the correct sheet of the rights of way and access plans as agreed in paragraph 2.8.35v of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(c) to Work No.9(c)(i) and (ii) in order to state "<i>carries</i>" as opposed to "<i>carried</i>" as agreed in paragraph 2.8.35vi of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(d) to Work 10(a) so that it reads "<i>the construction of a new bridge over new highway and new railway (Work No. 9A and Work No. 12) tying into the existing bridge over the London to Tilbury railway line</i>" as agreed at paragraph 2.8.35vii of the Applicant's Response to the ExA's Second Written Questions; and</p> <p>(e) to the description of Ancillary Works to add the words "<i>being development</i>" before "<i>consisting of</i>" as agreed between the Applicant and the PLA.</p> |
| Schedule 2, Part 1, requirement 1 – interpretation | <p>The following amendments have been made to this requirement:</p> <p>(a) the Applicant has updated the definition of AOD in Schedule 2 Part 1 to "<i>means above ordnance datum (Newlyn)</i>". The reference to Newlyn ensures that there is a single reference datum which allows levels to be checked against a national horizontal plane. This accords with the chart datum used by the PLA and was agreed at paragraph 2.8.36 of the Applicant's Response to the ExA's Second Written Questions;</p> <p>(b) the definition of the "<i>ecological mitigation and compensation plan (EMCP)</i>" has been removed in order to avoid confusion. As the Applicant explained in its Deadline 4 submissions, until the EMCP is finalised, Requirement 5 (relating to the off-site compensation) cannot refer to it as it won't be a certifiable document; and</p> <p>(c) the definitions of various documents have been update in order to reflect the most up-</p> |

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| | to-date versions. |
| Schedule 2, Part 1, requirement 3 | A minor amendment has been made to sub-paragraph (1) to read <i>"works have"</i> as opposed to <i>"works has"</i> as agreed at paragraph 2.8.37ii of the Applicant's Response to the ExA's Second Written Questions. |
| Schedule 2, Part 1, requirement 5 | An amendment has been made sub-paragraph (3) in order state <i>"provided, managed and maintained"</i> as agreed in paragraph 2.8.38ii of the Applicant's Response to the ExA's Second Written Questions. |
| Schedule 2, Part 1, requirement 10 | <p>This requirement has been updated by the Applicant, reflecting on ongoing discussions with Gravesham Borough Council.</p> <p>A minor amendment has been made to sub-paragraphs (1) and (3) to add the word <i>"inclusive"</i> after <i>"Work Nos 1 to 8"</i> as agreed in paragraph 2.8.40ii of the Applicant's Response to the ExA's Second Written Questions.</p> |
| Schedule 3 | The subheadings in this Schedule have been amended to lowercase as agreed at paragraph 2.8.43ii of the Applicant's Response to the ExA's Second Written Questions. |
| Schedule 4 | <p>The words <i>"In relating this Schedule 4 to its corresponding rights of way and access plans"</i> have been removed from this Schedule as they are superfluous. This change was agreed at paragraph 2.8.44iii of the Applicant's Response to the ExA's Second Written Questions.</p> <p>This Schedule has also been updated in order to remove the abbreviation PMA as per the changes made to article 12 set out above.</p> |
| Schedule 7 | <p>The following changes have been made to the Port Premises Byelaws:</p> <ul style="list-style-type: none"> (a) a heading has been added to the Byelaws; (b) as per the change made to article 45 (set out above) the words <i>"by the confirming authority"</i> have been removed; (c) information notes have been added to the Byelaws as agreed with the PLA in order to clarify the area to which they relate and in order to state that the "PLA's General Directions for Navigation in the Port of London 2016" apply throughout the River, including within the Port Premises. Such notes have been added to Part 5 – Berthing, Mooring and Anchoring, Byelaw 31, Byelaw 35, Byelaw 37, Byelaw 49 and Byelaw 51; and (d) a new paragraph (2) has been added to Byelaw 50 as agreed with the PLA in order to state that in the case of dredging, the Company must not grant permission unless the master will be acting in accordance with plans approved under Part 3 of Schedule |

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| | 10 to the Order or a licence granted by the PLA under section 73 of the 1968 Act. |
| Schedule 9 | <p>The Deemed Marine Licence (“DML”) has been updated following discussions with the MMO. A number of changes have been agreed:</p> <ul style="list-style-type: none"> (a) condition 3 has been updated to include specific licensable activities due to the practical requirements of the MMO in enforcing the terms of the DML. The grid coordinates for the area of the river Thames within which the licence holder may carry out licensed activities have therefore been updated accordingly. The exclusion zone coordinates have also been updated and wording has been added to clarify that this zone only applies to water injection dredging; (b) the old condition 9 in respect of “Access” has been removed as the MMO has a general right of access under the Marine and Coastal Access Act 2009 (“MACAA 2009”) which it does not usually limit under a DML; and (c) some minor tweaks to the wording and formatting have been made as agreed in paragraph 2.8.47 of the Applicant's Response to the ExA's Second Written Questions. <p>The Applicant and the MMO have continued discussions in respect of the exemption for maintenance dredging activities from the requirement to have a marine licence where the dredging is carried out by a harbour authority under section 75 of MACAA 2009. Further information in respect of such discussions is set out in more detail in section 3 below.</p> <p>There are also ongoing discussions in respect of a number of minor points in the DML. For example condition 13, hence the months stated within the condition have been left in square brackets. The Applicant will keep the ExA updated regarding the position between the parties on these points.</p> |
| Schedule 10, Part 3 | The provisions for the protection of the PLA have been updated following discussions between the Applicant and the PLA. These protective provisions now reflect the agreed position between the parties. |
| Schedule 10, Part 6 | The provisions for the protection of railway interests have been updated following discussions between the Applicant and Network Rail. |
| Schedule 10, Part 9 | The previous set of separate protective provisions for the protection of Highways England has been moved to this new place pending the outcome of continuing discussions between the Applicant and Highways England. |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| Schedule 10, Part 10 | Provisions for the protection of RWE have been added to the dDCO. These provisions are currently in discussion between the parties. |
| Schedule 10, Part 11 | Provisions for the protection of Cadent Gas Limited as gas undertaker have been added. These provisions are agreed between the Applicant and Cadent Gas Limited save for the arbitration provision which is currently under further discussion. |
| Schedule 10, Part 12 | Provisions for the protection of National Grid as electricity undertaker have been added. These provisions are agreed between the Applicant and National Grid save for the arbitration provision which is currently under further discussion. |
| Schedule 11 | This schedule has been updated to reflect updates to the documents and plans to be certified in accordance with article 58 of the Order. |

3. ARTICLE 43 - MAINTENANCE DREDGING

3.1 In discussions between the MMO and the Applicant, the Applicant has provided the following explanation of the need for and the legal basis for the inclusion of article 43(5) of the draft DCO. This is reproduced here for the assistance of the Examining Authority.

3.2 Section 75 of MACAA 2009 provides: *“(1) A marine licence is not needed for a dredging or spoil disposal activity if (a) the conditions in subsection (2) are met”*.

3.3 Those conditions are:

(a) that the activity is undertaken by or on behalf of a harbour authority, and

(b) that the activity is authorised by, and carried out in accordance with, any legislation falling within subsection (3).

3.4 The legislation within subsection (3) is:

(a) any local Act,

(b) any order under section 14 or 16 of the Harbours Act 1964 (c. 40),

(c) any order under section 1 of the Harbours Act (Northern Ireland) 1970 (c.1 (N.I.)), or

(d) section 10(3) of that Act.

3.5 If the DCO is made, Port of Tilbury London Limited (“**PoTLL**”) will be a harbour authority in respect of Tilbury2, by virtue of the provisions of the DCO. However, it would not fall within the legislation listed in subsection (3) of s.75 MACAA 2009 set out above. As such, it would not have the benefit of the exemption from the requirement to have a marine licence for dredging.

3.6 There is no reason in logic or policy why PoTLL as a harbour authority pursuant to a DCO should be in a different position from other harbour authorities or should be in a different position from that which it would be in had Tilbury2 been a smaller scheme, authorised by a harbour order under the Harbours Act 1964.

Planning Act regime and framework

- 3.7 The dDCO provides at article 43 (Power to dredge) that: *“(5) This Order is deemed to be ‘legislation’ falling within section 75(3) of the 2009 Act.”*
- 3.8 The provision in article 43(5) can be included in the DCO by virtue of the powers set out in s.120 of the PA 2008 for the following reasons.
- 3.9 First, under subsections (3) and (4) of s.120, a DCO may make provision relating to, or to matters ancillary to, the development for which consent is granted. That provision includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5 to the PA 2008. Matters listed in Part 1 of Schedule 5 include: the creation of a harbour authority (para 31); changing the powers and duties of a harbour authority (para 32); and carrying out civil engineering or other works (para 15).
- 3.10 Secondly, insofar as relevant, s.120(5) of the 2008 Act provides that a DCO may:
- “(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order”.*
- 3.11 The effect of the proposed provision in article 43(5) is to apply the statutory provision set out in s.75 MACAA 2009 to the power of PoTLL to carry out dredging, which is a matter for which provision may be made in the order – i.e. *‘powers and duties of a harbour authority’* to carry out *‘civil engineering or other works’*. Section 75 is a statutory provision which relates to those matters.
- 3.12 An alternative analysis is that the effect of the proposed provision in article 43(5) is to modify the statutory provision set out in s.75 MACAA 2009 as regards the power of PoTLL to carry out dredging (which as above, is a matter for which provision may be made in the order – i.e. *‘powers and duties of a harbour authority’* to carry out *‘civil engineering or other works’*). Section 75 is a statutory provision which relates to those matters.
- 3.13 In this context, the term ‘modify’ in s.120(5)(a) should be interpreted in the context of statutory drafting conventions. The Office of The Parliamentary Counsel Drafting Guidance (Dec 2017) (‘the Drafting Guidance’) states that:
- “A ‘non-textual modification’ is a modification of an enactment that is not intended to result in a change to the text of the modified enactment when the enactment is next printed (in contrast to a textual amendment, which is).” (para 6.9.1)*
- “Use of the word ‘modification’ does not of itself exclude the possibility that what is intended is a textual amendment. The word is sometimes used (rightly) to describe a textual amendment — see for example section 517(6) of the Education Act 1996 and section 26(2) of the Criminal Justice and Court Services Act 2000.” (para 6.9.4).*
- 3.14 Thus the meaning of the words ‘modify’ or ‘modification’ are wide and encompass both ‘textual amendments’ and ‘non-textual modifications’. A ‘non-textual modification’ leaves the primary ‘statutory provision’ unchanged, but changes its effect in a particular circumstance. The non-textual approach is the one adopted in respect of s.75(3) MACAA 2009. In effect, its effect in respect of the DCO will be modified, but it is not otherwise modified.
- 3.15 Generally, as a matter of law it is commonly recognised that it is possible for a DCO to include provision that changes, or changes the effect of, certain other legislation on the development authorised. It is done routinely in many DCOs. See for example art. 26 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 or art. 7 of the Silvertown Tunnel Order 2018.

Harbours Act 1964

3.16 The power to apply statutory provisions or to modify their application to particular schemes is not new – a similar power has always been included in the Harbours Act 1964 in respect of harbour orders made under section 14 or 16 of that Act.

3.17 For example, a power of modification is provided under section 14 (Ministers' powers, on application of harbour authorities, or others, to make orders for securing harbour efficiency, etc) of the Harbours Act 1964. At subsection (3) it states that:

“A harbour revision order may include all such provisions as appear to the appropriate Minister to be requisite or expedient for rendering of full effect any other provision of the order and any supplementary, consequential or incidental provisions appearing to him to be requisite or expedient for the purposes of, or in connection with, the order, including, but without prejudice to the generality of the foregoing words, penal provisions and provisions incorporating, with or without modifications, any provision of the Lands Clauses Acts or any other enactment and provisions for excluding or modifying any provision of any Act or of any instrument made under any Act (including this Act) and for repealing any statutory provision of local application affecting the harbour to which the order relates; but no penal provision of a harbour revision order....”

3.18 The words underlined outline that it is possible under the Harbours Act 1964 to exclude or modify the provisions of an act or instrument.

3.19 So see, for example, arts. 5, 6, 29 and 30 of the London Gateway Port Harbour Empowerment Order 2008.

Conclusion

3.20 The proposed art. 43(5) of the Order is within the *vires* of a DCO made under the Planning Act 2008.

3.21 The information set out above has been sent to the MMO in order to give it comfort on this matter.