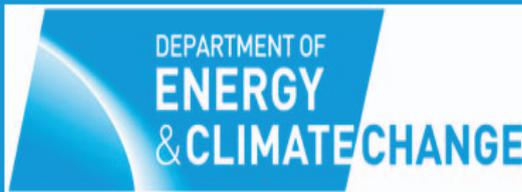


Appeals guidance – Aviation : EU Emissions Trading System (EU ETS)



Introduction

1. This document outlines the appeals process under the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (SI 2010/1996) ('the Regulations'). The grounds of appeal set out at paragraph 4 apply throughout the UK, however the appeals procedure set out under the heading "How to make an appeal" and following applies only to England, Scotland and Wales. Appeals in Northern Ireland are determined by the Planning Appeals Commission (PAC) for which a separate procedure is in place. Contact details for the appeal bodies, including the PAC, are provided at the end of the document.
2. The framework of the appeal procedure is set out in the Regulations, in the form of binding rules. Under the current Regulations the appeal body is the Secretary of State, the Welsh Ministers, the Scottish Ministers or the PAC (but see above on the scope of this Guidance). The appeal body depends on which regulator has taken the relevant decision: see paragraph 7. Where the appeal body has a discretion to exercise in conducting the appeal – either because the discretion is expressly allowed by those rules, or concerns a matter that is not expressly covered by them – this guidance will sometimes give an indication how that discretion is likely to be exercised. The appeal body will also be able to depart from such rules of practice, either generally or in a specific case, although in such cases it will endeavour to consult the affected parties in advance and explain its reasoning. Procedures that are set out in the Regulations cannot of course be waived or modified.
3. **For the purposes of this document all references to days include non-working days such as Saturday, Sunday, and Bank Holidays.**

When an appeal may be made

4. **Under the Regulations appeals may be made in the following circumstances:**
 - Where a regulator refuses, or is deemed to refuse, an application for a benchmarking plan.
 - Where a regulator refuses, or is deemed to refuse, to submit a tonne-kilometre (TKM) report to the Secretary of State.
 - Where a regulator serves an information notice or a civil penalty notice for failure to comply with an information notice.
 - Where a regulator refuses, or is deemed to refuse, to submit an application for an allocation from the special reserve to the Secretary of State.
 - Where a regulator refuses, or is deemed to refuse, an application for an emissions plan.

- Where a regulator serves a notice determining emissions.
 - Where a regulator serves a notice amending an emissions plan.
 - Where a regulator serves a civil penalty notice for failure to submit, or resubmit, an application for an emissions plan.
 - Where a regulator serves a civil penalty notice for failure to monitor aviation emissions.
 - Where a regulator serves a civil penalty notice for failure to report aviation emissions.
 - Where a regulator serves a civil penalty notice for making false or misleading statements in a TKM report, in an application to the special reserve or in a verified emissions report.
 - Where a regulator serves a civil penalty notice for failure to comply with emissions plan conditions.
 - Where a regulator serves a civil penalty notice for failure to surrender sufficient allowances.
 - Where a regulator serves a civil penalty notice on an aerodrome operator for failure to provide reasonable assistance and advice.
 - Where a regulator serves a civil penalty notice for failure to comply with a direction relating to an operating ban.
5. The ability to make an appeal is restricted to those aircraft operators, persons or aerodrome operators subject to the relevant notice or deemed refusal. Third parties without such direct interest are not eligible to appeal under the Regulations. However, once an appeal is brought other persons will have the right to participate in the proceedings if their interests are sufficiently affected (see paragraph 22).

Before making an appeal

6. Prospective appellants are advised to try to resolve any difficulties or disagreements with their regulator before commencing the appeals process. However, an appeal must be received by the appeal body within the requisite time period, as detailed in paragraph 16.

Who decides your appeal?

7. The appeal body will depend on which regulator was responsible for the notice or deemed refusal being appealed. Where the appeal is made against:
 - The Environment Agency, the appeal body is the Secretary of State (save for operators with their registered office in Wales).
 - The Environment Agency in relation to operators who are companies with their registered office in Wales, the appeal body is the Welsh Ministers.
 - The Scottish Environment Protection Agency, the appeal body is the Scottish Ministers.
8. The appeal body may delegate the function of determining the appeal to an Appointed Person. The Appointed Person will then have the same powers and duties as the appeal body, and references in this Guidance to the “appeal body” will generally also apply to such an Appointed Person. The appeal body may also appoint a person to deal with specific matters or questions in the appeal.
9. Where the appeal body does not delegate its function of determining an appeal, it may appoint a person to hold a hearing for the purposes of the appeal and make a report (“the Hearing Report”) to the appeal body.

How to make an appeal

10. The appellant must submit written notice of its appeal (‘Notification’) together with the following documents, within the time limit set out in paragraph 16 below, to the relevant appeal body:
 - Statement of the grounds of appeal (‘Statement’).
 - Copy of any relevant application for a benchmarking or emissions plan.
 - Copy of any relevant benchmarking or emissions plan.
 - Copy of any relevant correspondence between the appellant and the regulator.
 - Copy of any decision or notice which is the subject matter of the appeal.
 - Indication of whether the appellant wishes there to be a hearing (but see paragraph 25).

11. We would request that the appellant provides electronic versions of these documents, so that they can be transmitted more effectively to regulators and any interested parties.
12. The appellant must also send to the regulator at the same time copies of the Notification, the Statement and any decision or notice which is the subject matter of the appeal.
13. The Statement should include full details of the appellant's case, along with any supporting documentation they wish to provide. Appellants are advised to send their Notification and Statement by email, or by hard copy via a service which provides proof of delivery. We have provided a template at Annex 2 for the submission of the Notification and Statement. This template provides all of the relevant information and is easy to use. Appellants should provide a contact address and email address for appeal-related correspondence.
14. As mentioned above, appellants must indicate with their Notification whether they wish the appeal to be in the form of a hearing or on the basis of written representations. Further details about these procedures can be found in paragraphs 26-31 for written procedure and paragraphs 32-37 for hearing procedure. The appeal body may decide to hold a hearing even where one is not requested. A hearing may be appropriate where there are disputed questions of fact, but has the disadvantage of increased legal and resource costs to the parties (see further paragraph 25).
15. Appellants should advise in their Notification whether any of the information submitted is commercially confidential or has national security implications and, if so, why. This will be taken into consideration in the handling of the appeal e.g. whether to allow public hearings.

Timescales for making an appeal

16. The Notification and Statement are to be **given** to the relevant appeal body no later than **24 days** beginning with the date on which the decision, deemed decision or notice takes effect.
17. The appeal body has a discretion to accept an appeal given to it outside the **24 day** period, but only where it is satisfied that there is good reason that the appeal was not submitted in time. The appeal body will inform the appellant in writing whether or not the submission of the appeal has been accepted, and will give reasons for the decision to the appellant (and the regulator if it has been accepted).

Action on receipt of an appeal

18. When notice of the appeal is given within the 24 day period, or accepted outside the time limit, the appeal body will provide an email acknowledgement as soon as is reasonably practicable. This acknowledgement will contain an appeal reference number; the issuing

of which indicates the start of the appeal determination process. The appeal body will also provide details to the appellant and regulator of any Appointed Person, or if known at this stage, of any person appointed for the purposes of holding a hearing. The appeal body will also copy the reference number to the relevant regulator, and the other appeal bodies, as soon as is reasonably practicable. The Notification and Statement will also be copied for information to the other appeal bodies in cases where the appeal is rejected as out of time (see paragraph 17).

19. As set out in paragraph 12 the regulator will have been sent notice of the appeal by the appellant. The regulator will have **16 days** from the date of **receipt** of the notice of appeal from the appellant to give notice of it to any person who appears to the regulator to have a particular interest in the subject matter of the appeal. To prevent delay, appellants should therefore ensure that the notice is communicated promptly and effectively, and to the appropriate address (these are listed at the back of this guidance). The notice from the regulator to interested third parties must contain the following information:

- Statement that notice of appeal has been given.
- The name of the appellant.
- Description of the decision or notice to which the appeal relates.
- Statement that if a hearing is to be held wholly or partly in public, an interested party will be notified of the date of the hearing.
- Statement that an affected person may request to be heard at a hearing.

20. The regulator must within **8 days** of sending notice of appeal to an interested party, notify the appeal body of the persons who have been sent the notice and the date on which it was sent. The regulator is not required to notify the appeal body where no such person has been identified.

21. An interested party may request that the regulator provide a copy of the documents listed under paragraph 10 for the purposes of the appeal only. Where such a request is made, the regulator must provide the documents as soon as is reasonably practicable. The regulator may choose to provide only electronic copies of these documents.

22. An interested party may make representations with respect to the appeal to the appeal body in writing within **16 days** of the date of the notice sent by the regulator under paragraph 19. These representations must also state whether or not its civil rights will be determined in the appeal, and if so, which civil rights¹ will be determined. They should also state whether the interested party requests a hearing. The appeal body must copy these representations to the appellant and regulator. Once the appeal body has received representations from an interested party it must determine whether that person is to be regarded as an “affected party” for the purposes of the appeal. An affected party is

¹ A ‘civil right’ is a right enjoyed by a private person such as a property right or a right to carry on a commercial or professional activity.

defined as an interested party whose representations that its civil rights will be determined in the appeal have been accepted by the appeal body.

The effect of making an appeal

23. With the exception of the notices mentioned in paragraph 24, the operation of any notice that has been appealed against will be suspended from the date that the appeal is submitted to the appeal body, pending the determination of the appeal.
24. An appeal does not suspend the operation of a regulator's notice (or deemed decision) of refusal.

Whether to request a hearing

25. A request for a hearing may be made by the appellant, the regulator, or any affected party (see paragraph 22). Although such a request cannot be refused, the relevant party should consider carefully before exercising this right to have a hearing. Although their decision to do so cannot in any way prejudice the final outcome of the appeal, it may have a bearing on any eventual order for costs that is made. The appeal body has the power to order a party to pay the costs the body has incurred in relation to the hearing, and to order a party to pay another party's costs. If a request has been made for a hearing that is judged to have been unnecessary, this may be reflected in the orders that are made.

Written representation procedure

26. The written representation procedure commences with the submission of the required documents to the appeal body and the regulator, as detailed in paragraphs 10 and 11.
27. If it has not requested a hearing, the regulator must submit any written representations to the appeal body within **24 days** of receiving the Notification and Statement of appeal from the appellant. The appellant must make any further representation by way of reply to any representations from the regulator within **16 days** of the date of submission of those representations from the regulator. (Note that this is the date of submission, and not the date of receipt, of the representations.)
28. Any representations made by the appellant or regulator must bear the date on which they are submitted to the appeal body. When the appellant or regulator submits any representations to the appeal body, it must at the same time send a copy of them to the other party.

29. When the appeal body copies representations made by interested parties to the appellant and regulator as set out in paragraph 21, it must allow the appellant and regulator a period **no fewer than 16 days** in which to make representations on them.
30. The appeal body may however in a particular case set earlier or later time limits than those mentioned above. The appeal body may also require or permit further exchanges of representations in addition to those mentioned .
31. The written representation procedure is usually the quickest, simplest and most cost effective way of deciding an appeal. Before deciding whether to request a hearing, a party should therefore check carefully whether the particular circumstances of the case merit the time and expense of doing so (see paragraph 25). It is also recommended to discuss the matter with the appeal body.

Hearing procedure

32. Where requested by the appellant, the regulator or an affected party, or where considered appropriate to the specific case by the appeal body, a hearing will be held as part of the appeal process. Where the function of determining the appeal has been delegated to an Appointed Person, the hearing will be held by that Appointed Person. Otherwise the appeal body will appoint a person specifically to hold the hearing and make a Hearing Report to the appeal body.
33. If such a hearing has been requested, the procedure for it (including the submission of any further written representations by the parties) will be under the control of the person holding the hearing. . The appeal body will inform the appellant and regulator, plus any interested parties that the appeal will proceed to a hearing after the time limit described in paragraph 29 has expired.
34. The form of the hearing will be at the discretion of the person holding it. This discretion includes deciding whether the hearing should be held wholly or partially in private, requesting additional information to be provided in advance of, or at, the hearing and the form that this should take.
35. The appeal body must (unless they agree otherwise) give the appellant, regulator and any affected party **at least 24 days notice** of the date, time and place of the hearing. If the hearing is to be held wholly or partially in public, the appeal body must **at least 24 days** before the date of the hearing publish a copy of the notice of the hearing in an appropriate international aviation publication. The appeal body must send a copy of that notice to any interested party who has made written representations to the appeal body (see paragraph 22).
36. The appeal body may vary the time and place of a hearing and is required only to give such notice as appears to the appeal body to be reasonable of such changes. However, where the date fixed for the hearing is varied, the notice requirements described in paragraph 35 once again apply.

37. The appellant, regulator and any affected party are entitled to be heard at a hearing. The person holding the hearing may also permit other persons to be heard at the hearing. A representative from the appeal body may also attend to observe.

Decisions on appeals

38. Where a hearing is held, after the conclusion of the hearing the person holding the hearing must, within a reasonable time, make a written Hearing Report to the appeal body. Such written Hearing Report will include that person's conclusions and recommendations, or decision not to make any recommendation, and in all cases the reasons supporting the Report.
39. However, if the appeal body has delegated its function of determining an appeal to the Appointed Person then there will not be any Hearing Report as described in paragraph 36, since the Appointed Person will be solely responsible for the appeal determination.
40. If the appeal body has retained its function of determining an appeal, then as soon as reasonably practicable after receiving the Hearing Report, or the conclusion of the exchange of written representations, the appeal body will determine the appeal. Where appeals are related to the submission of tonne-kilometre data or applications to the special reserve the appeal body will prioritise determining these appeals to ensure the deadlines set in the Directive² can be met.
41. The appeal body must give notice of its determination to the appellant, and at the same time send a copy to the regulator, to any interested parties who made representations, and to any other person who made representations at a hearing. The appeal body will also send a copy of the Hearing Report to the appellant and the regulator only.
42. The appeal determination will, as the case may be, affirm, quash or vary the decision under appeal, and may also include directions to the regulator in relation to the subject-matter of the appeal. The appeal body may, in the case of a deemed refusal by the regulator, substitute its own decision for that of the regulator. The appeal determination is final and once made cannot be re-opened.
43. The appeal body will usually publish the appeal determination on its website, unless there is a special reason for not doing so e.g. commercial confidentiality or national security implications. When providing notice of the appeal determination, the appeal body will state the location and timing of any such publication. Any information relating to the appeal that is not published may still be subject to Freedom of Information³ requests.

² Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community

³ Further information can be found at <http://www.ico.gov.uk/>. Appellants and regulators will be informed of any such request and will be consulted with before any release of information.

Costs

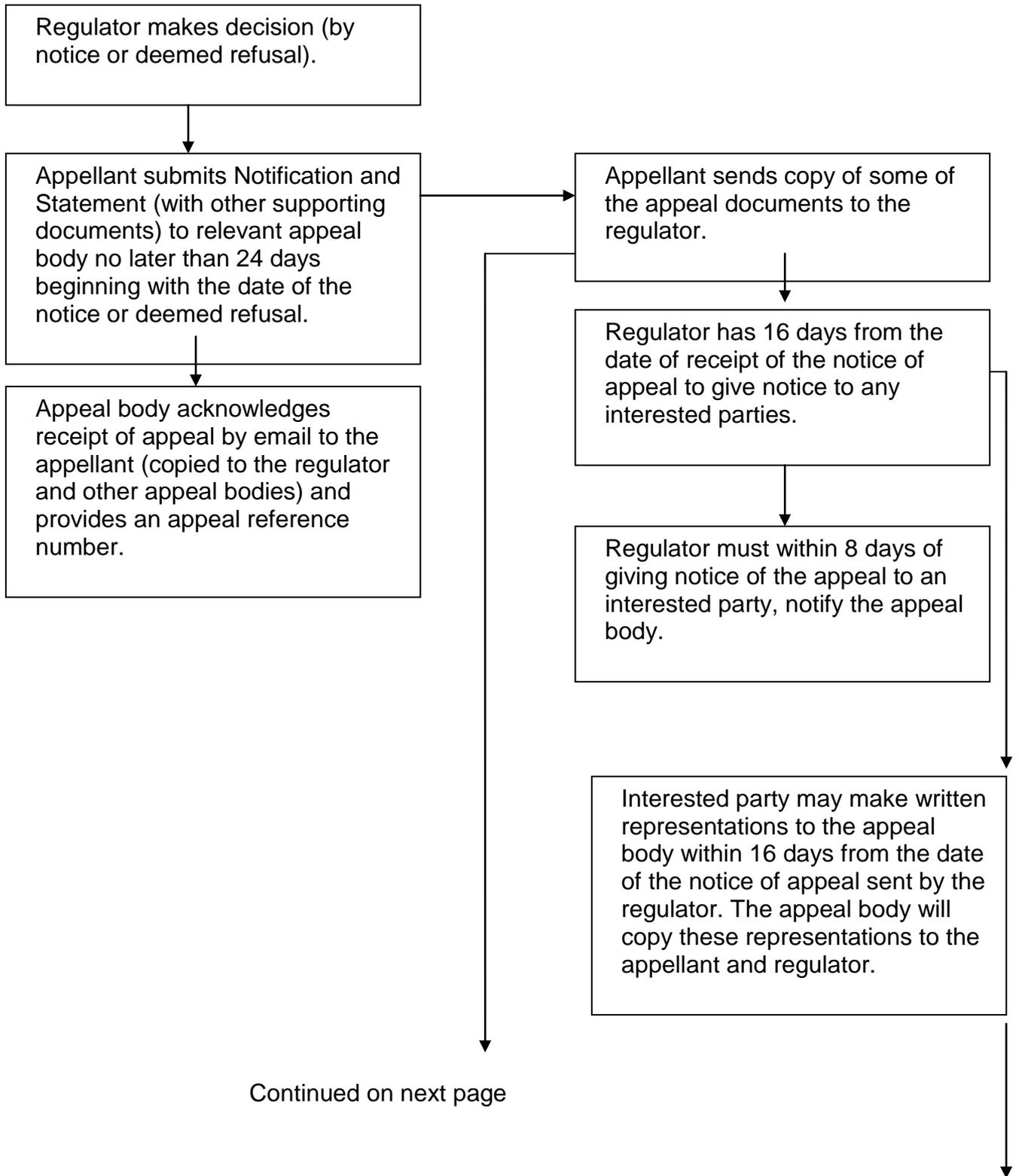
44. There are no charges to pay on lodging an appeal. Any party will normally be responsible for its own costs in respect of the appeal. However, the appeal body may award the regulator its reasonable costs if, at any point during the appeal process, the appeal body has notified the appellant in writing that it considers the appeal to be frivolous, vexatious or otherwise has no reasonable prospects of success, or that it considers that the appeal is being conducted in an unreasonable or vexatious manner. The appeal body may also award costs to other parties where a party insists on a hearing taking place, despite being advised by the appeal body that a hearing is unnecessary and/or inappropriate. The appeal body can issue such notification regardless of the fact that it has allowed the appeal to proceed, as information regarding the nature of the appeal may emerge at any point throughout the appeal. In such cases the appellant (or other party as appropriate) will be liable for these costs, the level of which will be agreed between the parties to the appeal, or in the absence of such agreement, by the appeal body⁴.

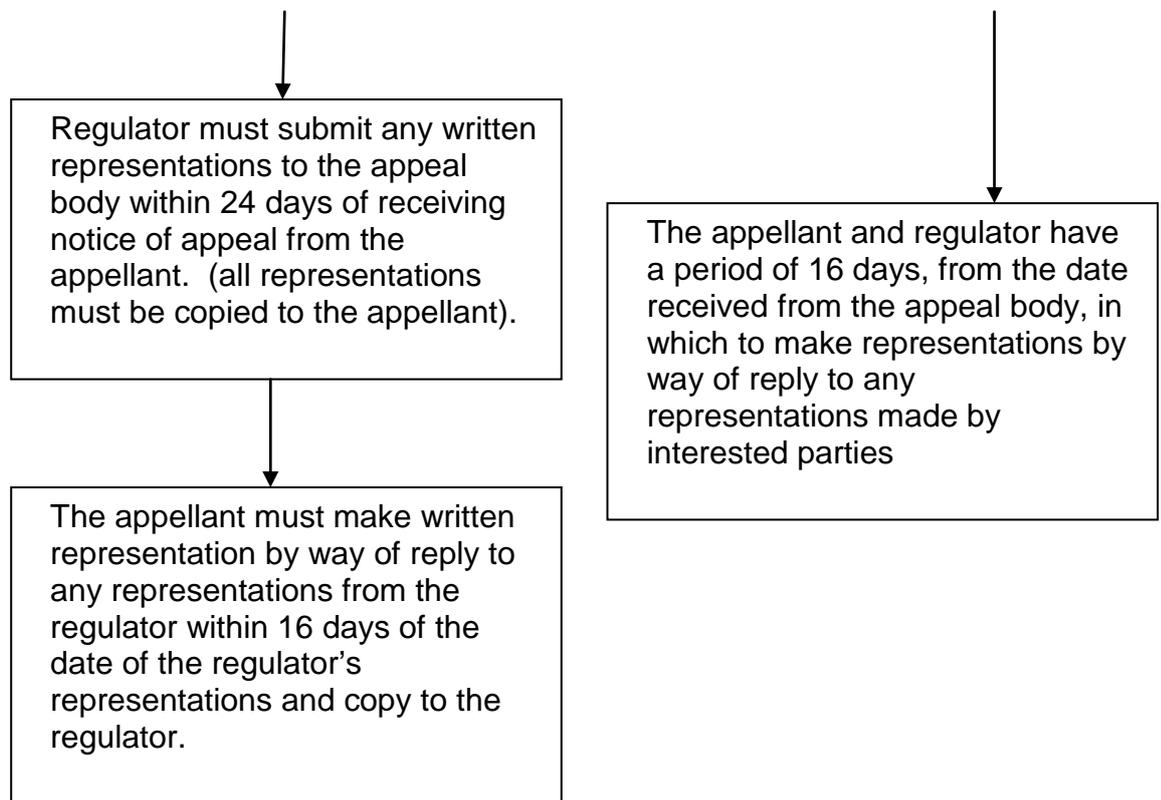
Withdrawal of appeals

45. An appellant may withdraw an appeal at any time by notifying the relevant appeal body in writing. The appeal body will send a copy of the notification withdrawing the appeal to the regulator as soon as reasonably practicable and any interested parties, if relevant. Where an appeal is withdrawn at a late stage and other parties have already incurred costs in preparing for the appeal, the appellant may be liable for those costs.

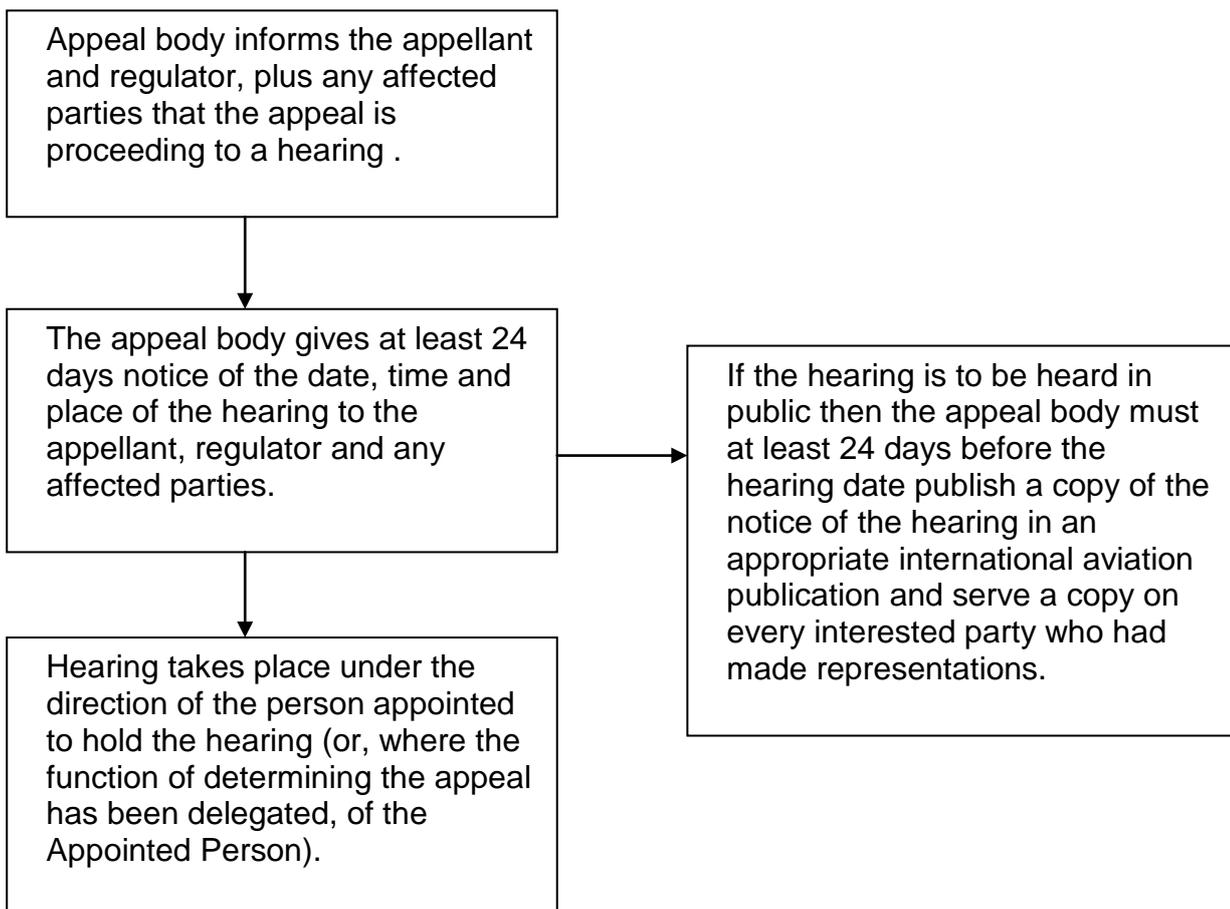
⁴ In Scotland the Auditor of the Court of Session will fix costs where the parties cannot agree.

Annex 1 – Appeals Flowchart

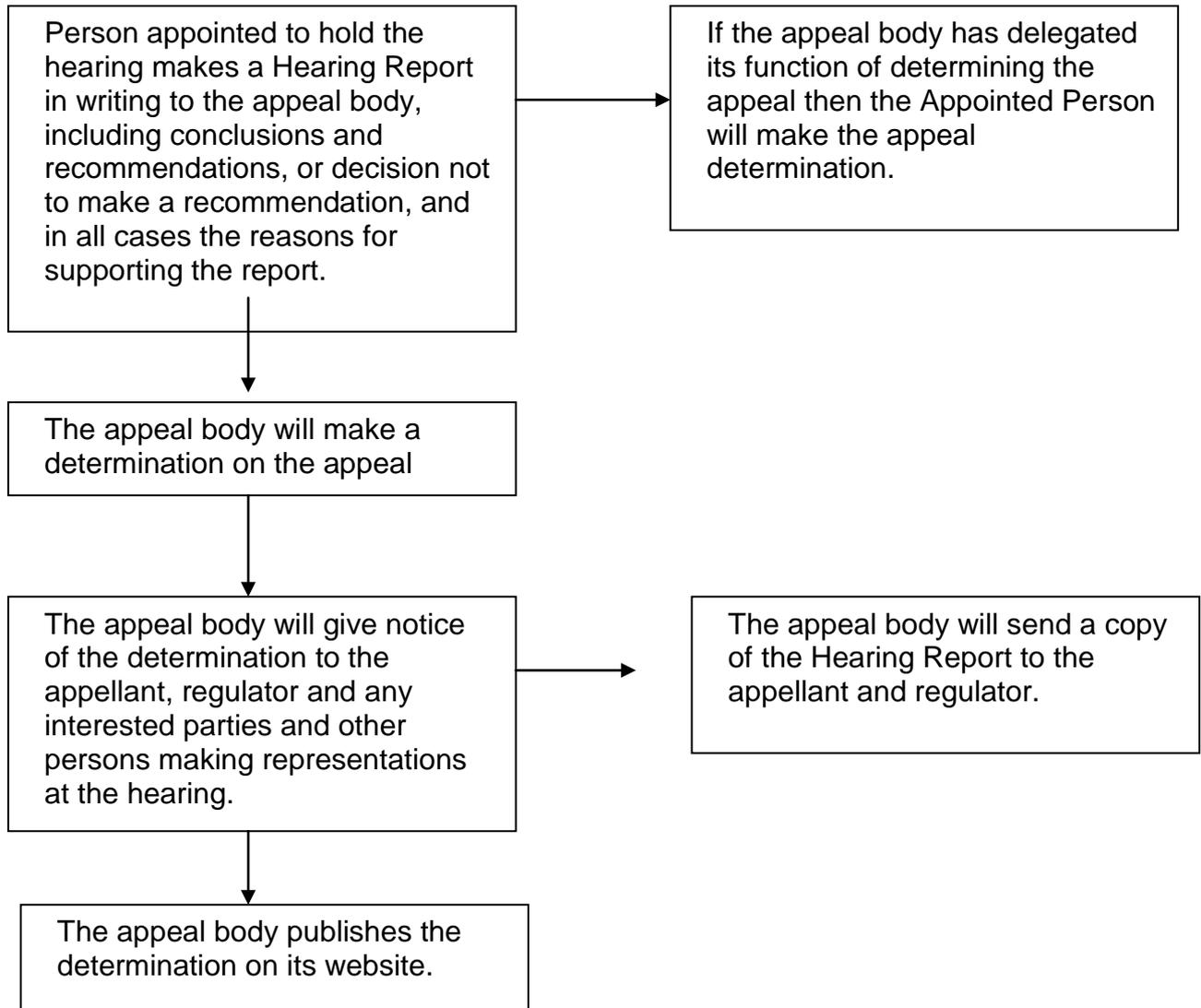




End of written procedure – the following flowchart applies to hearing procedure only.



End of hearing procedure – the flowchart on the next page covers appeal decisions and applies to all appeals.



Annex 2 – template for submission of Notification and Statement of appeal

NOTICE OF APPEAL UNDER THE AVIATION GREENHOUSE GAS EMISSIONS TRADING REGULATIONS 2010

Please complete all boxes on this template:

DETAILS OF AIRCRAFT OPERATOR

Name of aircraft operator:			
Name of representative:			
Address:			
Telephone:		Fax:	
Email address:			

REASONS FOR APPEAL

To enable the appeal body to process your appeal efficiently. Please indicate below the broad nature of your appeal.

1. Refusal or deemed refusal for application of a benchmarking plan / emissions plan
2. Refusal or deemed refusal to submit a TKM report to the Secretary of State
3. Refusal or deemed refusal to submit an application to the special reserve to the Secretary of State
4. Regulator has served a notice amending an emissions plan / determining emissions

5. Regulator has served a civil penalty notice

Please provide a statement of the grounds of appeal (this can be submitted on additional sheets of paper to the space provided below).

SUPPORTING DOCUMENTATION

Where appropriate, please provide a copy of the following documents:

- Copy of any relevant application for a benchmarking plan or emissions plan
- Copy of any relevant benchmarking or emissions plan
- Copy of any relevant correspondence between the appellant and the regulator
- Copy of any decision or notice which is the subject matter of the appeal

APPEALS PROCESS

Please tick the box below to indicate the procedure that you want your appeal to be determined via.

Appeal Body contacts:

Secretary of State

Email: eu.ets@decc.gsi.gov.uk

Post: EU ETS Appeals, Department of Energy and Climate Change, Area 1B, 3 Whitehall Place, London, SW1A 2AW

Welsh Ministers

Email:

Post: Climate Change and Water Division, Welsh Government, Cathays Park, Cardiff, CF10 3NQ

Scottish Ministers

Email: DPEA@scotland.gsi.gov.uk

Post: Directorate for Planning and Environmental Appeals, 4 The Courtyard, Callendar Business Park, Callendar Road, FALKIRK, FK1 1XR

Web: <http://www.scotland.gov.uk/Topics/Environment/Appeals>

Planning Appeals Commission

Email: info@pacni.gov.uk

Post: Planning Appeals Commission, Park House, 87 - 91 Great Victoria Street, Belfast, BT2 7AG

Web: www.pacni.gov.uk

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