

Grower-Winery Contracts and Communications about Smoke Exposure to Oregon's 2020 Wine Grape Harvest

Best Practices & Talking Points¹

1. **Be Timely:** Monitor changing conditions and expectations, avoid foreclosing alternatives, enable thoughtful decisions, and avoid unnecessary expenditures.
 - *When a smoke event occurs, early and effective communication between growers and wineries is necessary to ensure mutual understanding of potential problems. Timely communication of wineries' concerns regarding potential smoke taint problems will assist growers in pursuing potential crop insurance claims and avoiding unnecessary costs. Communications between growers and wineries should establish agreement on protocols/processes for determining status of the crop and conditions for acceptance/rejection of grapes by the winery in light of their contract, applicable law, and any alternatives that may be agreed.*
2. **Be Transparent:** Communicate frequently, clearly, and as objectively as possible about the duration and characteristics of smoke exposure, fruit conditions, prior experience, harvest windows, criteria for picking decisions, expected sampling and testing protocols, lab results, sensory evaluations, decision points, and expected use, classification, or disposition of wine.
 - *Quantitative and sensory analyses are both important for establishing the acceptability of grapes exposed to smoke. Key land grant university researchers – including Tom Collins (WSU), Anita Oberholster (UC Davis) and Elizabeth Tomasino (OSU) – recommend industry operators use the Australian Wine Research Institute's (AWRI) protocol for grape sampling and handling for analysis as the best available guidance for growers and wineries: <https://www.awri.com.au/wp-content/uploads/2019/12/grape-sampling-smoke-taint-fact-sheet.pdf>*
 - *Lab capacity and timing constraints in the face of massive demand for smoke compound testing requires alternative decision-making tools. Based on current knowledge and tools, bucket (or micro) fermentations can play a key role in determining the acceptability of smoke exposed grapes, with resulting wine tested for certain smoke taint compounds and subjected to sensory analysis. There is widespread agreement that AWRI's guidance on small-lot fermentation is the best available protocol.*
 - *Where feasible, encourage third-party and mutual grower/winery sensory evaluations to facilitate objectivity. Look to experts when possible. Use consistent sensory evaluation approaches and keep good records.*
3. **Be Reasonable:** Work honestly with facts, in good faith, to observe standards of fair dealing, mitigate damage, and develop compromise. Make consistent decisions with all available information and beware favoritism (including with decisions about contracted grower fruit versus winery grown fruit). Avoid absolutes, extreme language, and threats. Work toward fair outcomes that protect vulnerable stakeholders and enable lasting businesses and business relationships in the industry. Consider how additional out-of-pocket costs incurred in the face of uncertainty – such as harvest costs and bulk processing costs – might be fairly allocated.
4. **Be Attentive to Grape Purchase Contracts, Acceptance and Addendum Terms:**
 - a. **Specific smoke exposure terms**, if present in existing contracts, will be instructive. The presence or absence of smoke taint provisions is likely not dispositive, however.
 - b. Other common contract provisions are also pertinent. More **general quality provisions** which often include warranties or delivery obligations about “no defects”, “grapes suitable for making premium wine” and the like are relevant.
 - c. Even in the absence of applicable quality terms, the Uniform Commercial Code's **implied warranties of merchantability** (ORS 72.3140) and **fitness for a particular purpose** (ORS 72.3150) are incorporated by operation of law into every contract between businesses that deal in grapes, **unless expressly excluded** by written agreement (ORS 72.3160).
 - d. **Force majeure clauses** in contracts usually do not adequately address the uncertainty and economic risks of harvest and acceptance/rejection decisions between wineries and growers when smoke exposure events occur. They may excuse performance during the existence of the event of force majeure (i.e., wildfire or hazardous air quality prohibiting access to the vineyard), but generally do not address quality requirements or conditions for acceptance of grapes.
 - e. Generally, under the Uniform Commercial Code the **burden of proof** is on the seller whose goods are rejected, and shift to a buyer who has accepted goods (ORS 72.6070(4)). “**Rejection**” must be within a reasonable time and, after rejection, acts

¹ Assembled and prepared by Jesse D. Lyon of Davis Wright Tremaine LLP for the Oregon Winegrowers Association, in consultation with multiple industry representatives and allied stakeholder organizations, and the OWA 2020 Smoke Exposure Work Group. Last revised 9/21/2020.

of ownership by the buyer (including making grapes into wine) may be wrongful absent some alternative agreement between the parties.

- f. **“Acceptance”** generally affords buyers a reasonable opportunity to inspect the goods, and the burden is on the buyer to establish breach once accepted (ORS 72.6060 and 72.6070). Acceptance may also be later **revoked** within a reasonable timeframe after non-conformity is discovered, but usually requires that no substantial change in condition has occurred, other than changes caused by the alleged defects (ORS 72.6080). Blending with fruit from other lots will be problematic.
- g. The law on these points arguably encourages a buyer to reject potentially defective fruit absent some alternative agreement between the parties. Because it can be difficult to ascertain the full impact of smoke exposure until sometime after fermentation, **growers and wineries may wish to expressly accommodate the conditional delivery of grapes without acceptance**, enabling further evaluation of the condition of the grapes when they were delivered (and their suitability for making premium wine, passing reasonable standards of the trade, etc.) in an effort to maximize the opportunity and value of the fruit and resulting wine.
- h. **Contract addendums** should address (a) protocols and exchanges of information concerning the condition of the grapes and resulting wine; (b) decision points and timing for the determination of picking decisions, receipt of fruit, classification/de-classification, and use or disposition of wine; and (c) potential adjustments (if any) to pricing and payment terms for smoke exposure, if smoke exposure results in unusable grapes or materially diminished value wine produced from the grapes.
 - *An emerging approach includes contract adjustments such that the winery agrees to take on some risk by paying the grower a percentage of the previously negotiated purchase price, to help the grower at least cover harvest costs, with the remainder being earned as and when the wine resulting from received fruit passes specified lab testing and sensory benchmarks associated with smoke taint.*
- i. Industry members are well advised to consider the impact of any *“received but not accepted,” “conditionally received,”* or *“grower’s fruit for processing”* arrangements on a host of subsequent impacts, including the parties’ respective **accounting treatment, collateral and security interests** with lenders, **insurance and risk of loss** for juice and wine in process at the winery, and **bailment and consignment** costs, conditions, and obligations for resulting bulk wine. Consignment sale terms are prohibited for finished wine.
- j. Keep in mind that any receipt of grapes may negate potentially available **crop insurance** recovery, even if alternative arrangements are contemplated between the winery and grower to reserve subsequent rejection/revocation. Growers with crop insurance should promptly consult with their brokers and carriers for specific instructions.
- k. Consider **alternative dispute resolution** terms including mediation and informal complaint resolution with the assistance of ODA’s Farm Mediation Program, USDA’s Agricultural Marketing Service/Perishable Agricultural Commodities Act (PACA) staff, or other alternative dispute resolution bodies such as the Arbitration Service of Portland, Inc.
- l. Don’t rush to litigation, but **consult your legal counsel**. These best practices and talking points are intended to provide some helpful background for consideration, but do not constitute legal advice.