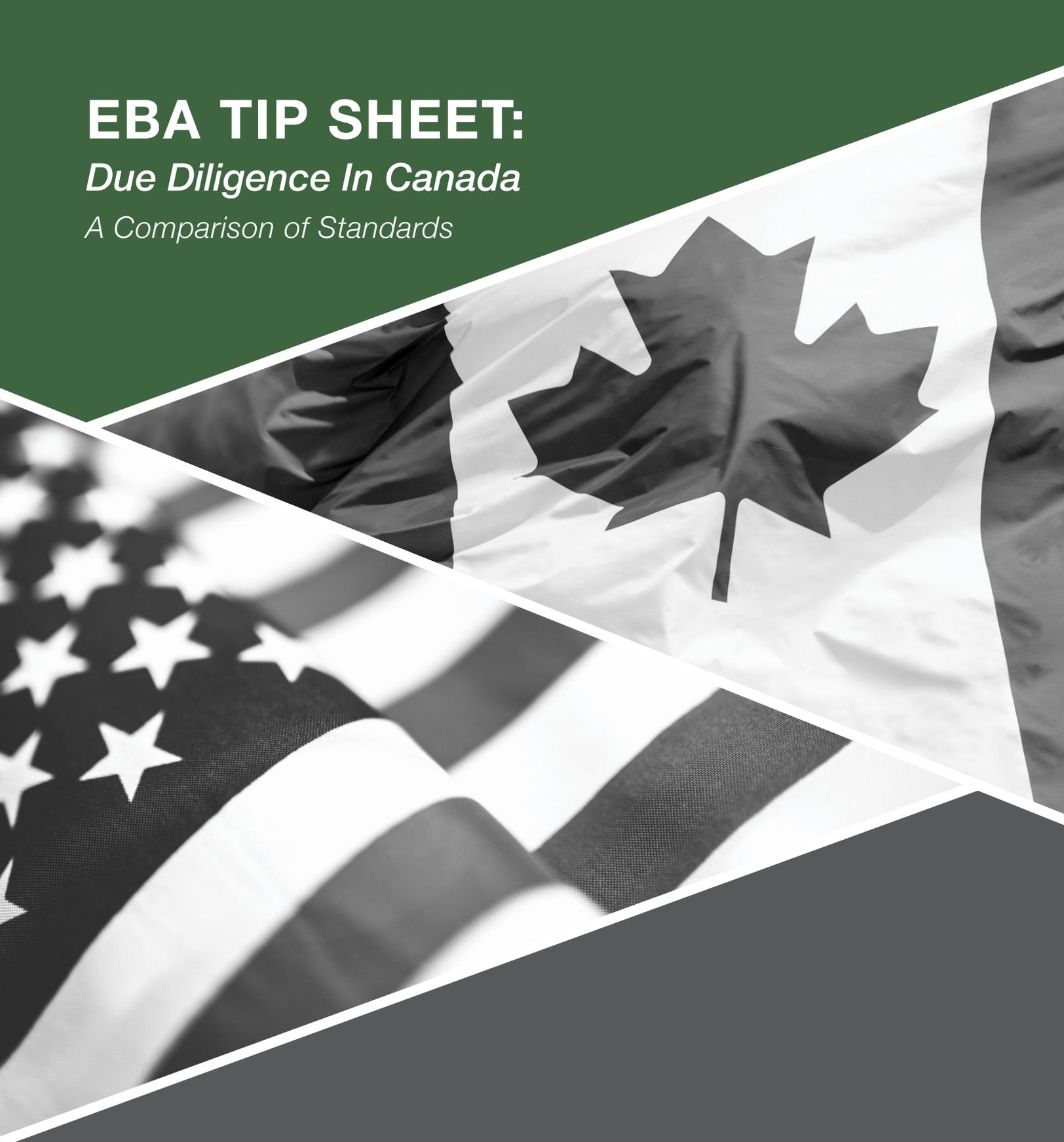


EBA TIP SHEET:

Due Diligence In Canada

A Comparison of Standards



Environmental
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ERIS 
ENVIRONMENTAL RISK INFORMATION SERVICES

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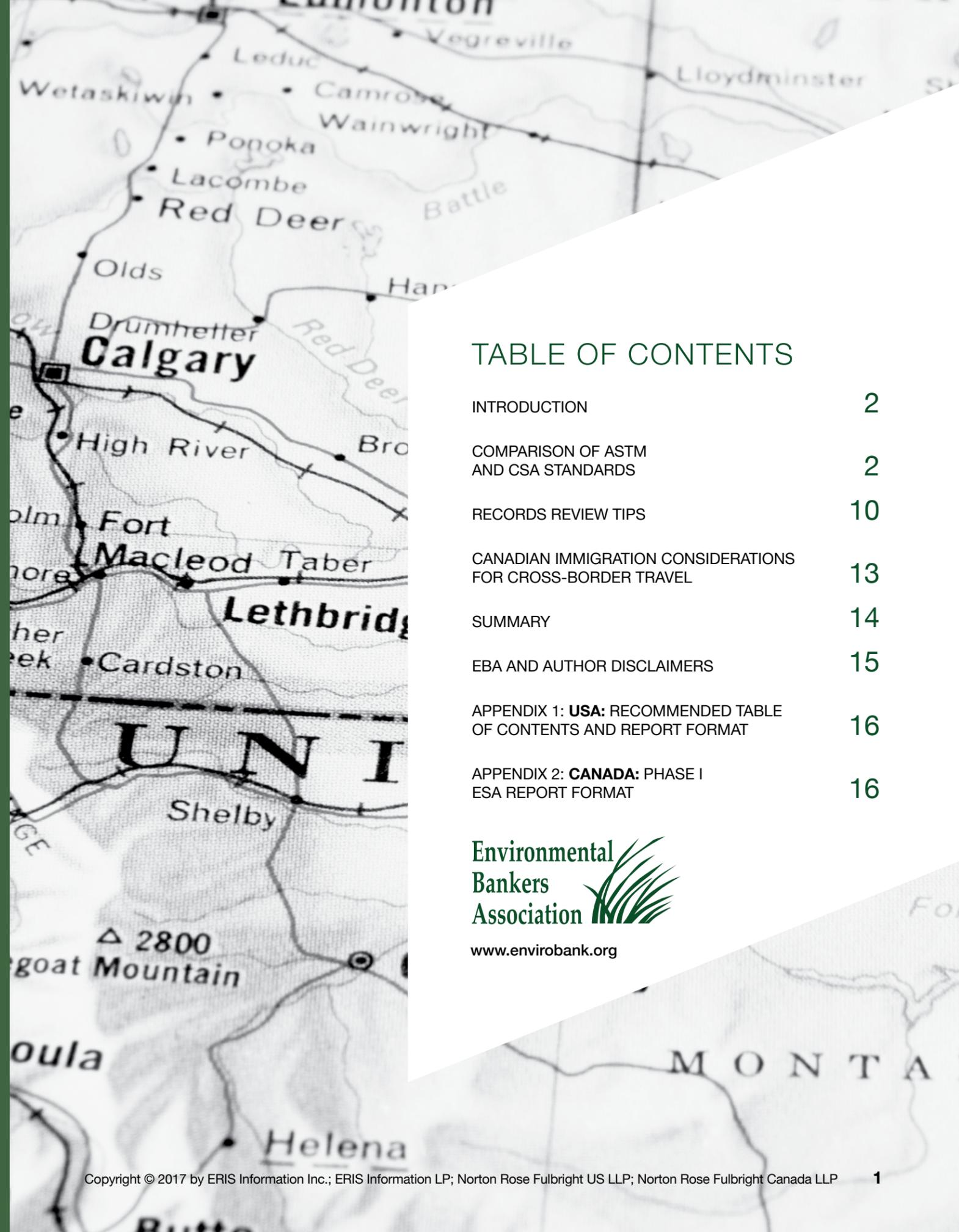


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INTRODUCTION

Cross-border transactions involving companies with commercial and industrial properties in the US and Canada are occurring with increasing frequency. Lenders and their consultants and lawyers are often called upon to review reports prepared under standards of either or both jurisdictions. There are many similarities between the ASTM E1527-13 standard for Phase I Environmental Site Assessments for Commercial Properties in the US and CSA Z768-01 standard for Phase I ESAs in Canada. There are also some key differences. The purpose of this presentation is to compare the ASTM and CSA standards and, at the end of the presentation, to offer some suggestions for using the two standards in lending transactions.

COMPARISON OF ASTM AND CSA STANDARDS

Phase 1 ESA - ASTM and CSA Comparison Chart ^{1,2}		
	USA	CANADA
Applicable Standard	ASTM E1527-13 (ASTM)	CSA Z768-01 (CSA)
Purposes	<ul style="list-style-type: none"> To define good commercial and customary practice for conducting an environmental site assessment (ESA) of commercial real estate (s.1.1) To permit a user to satisfy one of the requirements to qualify for the “innocent landowner defense” against liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), i.e., the all appropriate inquiries (s.1.1) 	<ul style="list-style-type: none"> To establish the principles and practices that are applicable to a Phase I ESA (s.0.1) The Purpose of a Phase I ESA is to identify actual and potential site contamination (s.0.1) Phase I ESAs conducted in conformance with this Standard may be a contributing factor in establishing a due diligence defense (s. 0.2.4)
Scope	<ul style="list-style-type: none"> The ESA is limited to the range of contaminants within the scope of the CERCLA and petroleum products (s.1.1). The goal of this practice is to identify recognized environmental conditions, which means the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment. De minis conditions are not included (s.1.1.1). 	<ul style="list-style-type: none"> The client and assessor shall establish a list of substances of concern for the Phase I ESA and shall identify the source of the criteria to be used in the Phase I ESA (s. 5.1.2). Criteria shall be established prior to commencing the site investigation, and may include: <ol style="list-style-type: none"> currently applicable and reasonably foreseeable legal requirements (e.g., permits); other client-defined environmental requirements (e.g., management policies); requirements or legal claims of interested third parties (e.g., insurance companies); and technological considerations, such as detection limits.
Legal Significance	Federal standard under CERCLA. ASTM Phase 1 satisfies most analogous state evaluation requirements, but states may set different standards of evaluation.	Guideline only, subject to different provincial or territorial legislations

¹This chart only summarizes the provisions where the CSA standard is different and more stringent than the ASTM standard. Provisions that are similar between the two standards or where the ASTM imposes a higher standard are not included in this table.

²This chart is current of December 20, 2016.

	USA	CANADA
Levels of Assessment	Variable , depending on the type of property, the expertise and risk tolerance of the user, and the information developed during the inquiry (s.4.5.3). But ASTM 1527-13 is adopted by 40 CFR 312.11 (b) as a minimum level of inquiry to satisfy the all appropriate inquiry for landowner liability protections under CERCLA.	The CSA constitutes a minimum level of a Phase I ESA assessment (s. 3.7).
Assessor	<ul style="list-style-type: none"> Must be performed by an environmental professional or under the supervision or responsible charge of an environmental professional (s. 4.3 and s. 7.5.1). At a minimum, the environmental professional must be involved in planning the site reconnaissance and interviews (s. 7.5.1). Review and interpretation of information shall be performed by the environmental professional (s. 7.5.1). 	<ul style="list-style-type: none"> There is currently no mechanism in Canada for certifying assessors, but the assessor shall: <ul style="list-style-type: none"> be objective and free from influence, and ideally, be independent of the client (s. 3.2); disclose to the client, and note in the Phase I Report, any conflict of interest (s. 3.3); possess knowledge based on a combination of formal education, skills, experience, and training (s. 3.4); and be familiar with applicable legislations and published guidelines and have knowledge in technical areas relevant to the subject site (s.3.4).
Enhancement to a Phase I ESA	<ul style="list-style-type: none"> ASTM Standard for Phase I ESA does not cover certain topics, which must be specified as additional scope if evaluation is desired: <ul style="list-style-type: none"> Asbestos-Containing Materials (other than waste disposal or releases to the environment from manufacturing operations) Lead-based paint Operational Environmental Compliance (e.g., permits, emissions limitations, discharge limits) Safety To preserve “innocent owner” defense, RECs must be eliminated through site investigation tailored to the REC in question (for example, following the ASTM Phase II ESA as guidance but not “rule”) If REC not eliminated through further investigation, other landowner-liability protections should be evaluated (e.g., bona fide prospective purchaser agreements) Lenders have special protections broader than owners. 	<ul style="list-style-type: none"> Some clients may wish to obtain an enhanced level of assessment that requires expanding the Phase I ESA scope of work (s. 3.7). Examples may include, but not limited to (s. 6.2): <ol style="list-style-type: none"> more-detailed conclusions; risk evaluations; steps that could be taken to confirm, refute, or delineate contamination; and recommendations respecting site remedial measures.

	USA	CANADA
User's/Client's Responsibilities	<ul style="list-style-type: none"> • “User” means the party seeking to use the ASTM to complete an ESA (s. 3.2.98). • The “All Appropriate Inquiries” Final Rule requires certain tasks be performed by or on behalf of a party seeking to qualify for an LLP to CERCLA liability (s. 6.1), including: <ul style="list-style-type: none"> – reviewing title and judicial records for environmental liens and activity and use limitations (AULs) (s. 6.2); – communicating information that is material to recognized environmental conditions in connection with the property to the environmental professional (s. 6.3 and s. 6.7); – communicating information about any environmental lien or AULs encumbering or in connection with the property to the environmental professional (s. 6.4); – identifying reasons for a significantly lower purchase price than the fair market value if the property was not contaminated (s. 6.5); and – making known to the environmental professional the reason to perform a Phase I ESA (s. 6.8). • The environmental professional shall note in the report whether or not the user has reported to him/her the above information (s. 7.3.2). 	<ul style="list-style-type: none"> • “Client” means a person or business entity that commissions an assessor to perform a Phase I ESA (s. 2.1). • Upon the assessor's request, the client shall (s.4.1.2): <ul style="list-style-type: none"> – communicate information that may be pertinent to the Phase I ESA; – produce, or provide the necessary authorization to obtain, documents (e.g. title deeds, drawings, and reports) that may be pertinent to the Phase I ESA; – provide any necessary authorization to obtain access to the property and to third-party information and documents. • The client shall: <ul style="list-style-type: none"> – provide the assessor with a contact name, phone number, and the status of any property transactions (s. 4.1.1); – identify a site representative, whenever possible; – allow the assessor unrestricted access to the property (s. 4.1.3); – provide information on any health and safety considerations that pertain to the Phase I ESA and of which the client is aware (s. 4.1.4); and – establish: <ul style="list-style-type: none"> • purpose and use (s. 5.1.1): the client shall <ul style="list-style-type: none"> – prepare a written statement summarizing the purposes and the intended use of the Phase I ESA; – identify the use and/or users of the Report; and – if possible, identify whether the Phase I ESA is a stand-alone study or part of an ongoing process. • criteria (see “Scope”); and • scope of work, which must be included in the agreement between the client and the assessor (s.5.3.2). • Users who rely on or wish to use the results of a Phase I ESA shall notify both the client and the assessor, and shall obtain the written approval of the assessor and the client (s. 4.3).
Responsibility of the Assessor	An environmental professional is not required to verify independently the information provided unless he/she has actual knowledge that certain information is incorrect or unless it is obvious that certain information is incorrect (s. 7.5.2.1).	<ul style="list-style-type: none"> • The assessor shall carry adequate insurance throughout the duration of the assessment (s. 4.2.4). • Where practical, the assessor should verify the accuracy of the information obtained. The assessor may rely on the information obtained if the assessor has personal knowledge that the information is correct or can be corroborated (s. 6.4).

	USA	CANADA	
Records Review³	Time Frame	<ul style="list-style-type: none"> • From the present, back to the property's first developed use, or back to 1940, whoever is earlier (s. 8.3.2) • Only requires reviewing as many of the standard sources as necessary and both reasonably ascertainable and likely to be useful (s. 8.3.2) 	Back to the first property use that may have affected the site's environmental condition or to the extent that historical information allows (s. 7.1.3)
	Search Distance	Uses in the area surrounding the property shall be identified, but only to the extent that this information is revealed in the course of researching the property itself (s. 8.3.3).	As a minimum , adjoining properties shall require a review of reasonably ascertainable records of aerial photographs, property-use records, title search and assessment rolls and the required regulatory information (see “Regulatory Information”) (s. 7.1.4)
	Property-Use Records	The standard historical sources includes: <ul style="list-style-type: none"> • Fire insurance maps (s. 8.3.4.2); • Local street directories (s. 8.3.4.6); • Building department records (s. 8.3.4.7); and • Zoning/Land Use Records (s. 8.3.4.8). 	Property-use information includes (S. 7.1.6.2): <ol style="list-style-type: none"> Insurance records (e.g., fire insurance maps); Property-use directories (e.g., industrial or city directories); and Contaminated site and property use registries, where available.
	Prior Phase I ESA Reports	Standard historical sources reviewed as part of a prior ESA do no need to be searched for or reviewed again, but uses of the property since the prior ESA should be identified if reasonably ascertainable (s. 8.4).	May be included, but financial institutions generally require Phase I ESAs on which financing is to be based to be less than one year old (s. 7.1.6.4).
	Regulatory Information	The standard environmental information includes: <ul style="list-style-type: none"> • Standard Federal, State, and Tribal Environmental Record Sources (s. 8.2.1); • Regulatory Agency File and Records (s. 8.2.2); and • Additional Federal, State, Tribal, and local Environmental (s. 8.2.3). 	The assessor shall obtain information regarding (s. 7.1.6.7): <ol style="list-style-type: none"> permits that pertain to activities that may impact the condition of the property; past, pending, outstanding, or continuing prosecutions, work orders, or control orders, or complaints related to environmental compliance that may impact the condition of the property; and violations of environmental statutes, regulations, by-laws, approvals, and permits that may impact the condition of the property.
	Company Records	Not listed as a separate category, but may be required under “Other Historical Sources” (s. 8.3.4.9)	For commercial and industrial properties, company records shall be examined (s. 7.1.6.5).

³The ASTM and CSA categorize the required records differently. This table uses the CSA categorization and reorganize the ASTM required records in accordance with the CSA categories.

		USA	CANADA
Records Review ³	Geological and Geotechnical Reports	<ul style="list-style-type: none"> Only requires a current USGS 7.5 Minute Topographic Map (or equivalent) (s. 8.2.4) Other physical setting sources may be obtained in the discretion of the environmental professional subject to the requirement set out in this section (s. 8.2.4). 	Existing geological and geotechnical reports containing information that pertains to the nature of soils and/or groundwater at the subject property shall be obtained and reviewed (s. 7.1.6.6).
	Optional Records Review	<ul style="list-style-type: none"> No separate category of optional records. However, where necessary, the environmental professional shall make a reasonable effort to compensate for mistakes or insufficiencies in information reviewed that are obvious in light of the environmental professional's knowledge (s. 8.1.3); and Moreover, in addition to the designated sources, other sources may also be obtained in the discretion of the environmental professional based on the criteria set out in the ASTM (s. 8.2.3, s. 8.2.4 and s. 8.2.4.9). 	<p>The following records may be reviewed if deemed appropriate by the client and assessor (s. 7.1.5 and s. 7.1.7):</p> <ul style="list-style-type: none"> Geological and soil maps; Topographic maps; Agreement of purchase and sale; Land use documents; Public health concerns; Utility company records; Local information sources; and Helpful information as listed in s. 7.1.8.
Site Reconnaissance/Visit	Timing	The ASTM standard is silent.	The site visit should be conducted after completion of the records review (s. 7.2.1.2).
	Storage Containers	Drums, which often hold 55 gal (208L) of liquid, shall be described. Containers as small as 5 gal (19L) should also be described (s. 9.4.2.7).	The presence, condition, and, where possible, contents of storage containers such as drums, totes, and/or pails shall be identified and described (s. 7.2.1.9)
	Special Attention Items	Electrical or hydraulic equipment known to contain PCBs or likely to contain PCBs shall be described (s. 9.4.2.10).	<ul style="list-style-type: none"> The assessor shall identify the potential presence of substance including, but not limited to (s. 7.2.1.12): <ul style="list-style-type: none"> (a) polychlorinated biphenyls (PCBs); (b) asbestos-containing materials (ACMs); (c) lead; (d) ozone-depleting materials; and (e) urea foam formaldehyde insulation (UFFI). These substances and other conditions (e.g., radon, mold, noise, electric and magnetic field, and vibration) require special attention because of heightened public concern or special environmental legislation.

		USA	CANADA	
Site Reconnaissance/Visit	Interior Observations	Heating/cooling	The means of heating and cooling, including the fuel source shall be identified (s. 9.4.3.1).	The energy (fuel source) and methods used to release of or dispose of waste products (e.g., combustion gases and ash) shall be identified and described (s. 7.2.2.2).
		Stains	Stains or corrosion shall be described (s. 9.4.3.2)	Stains, the areal extent of the staining (if practical), the likely spill sources (if practical), and any other opportunities for contaminants to migrate away from a source shall be identified and described (s. 7.2.2.3).
		Mechanical Equipment	The standard is silent.	The presence and, where possible, the current and past condition of hidden hydraulic lift equipment shall be identified and described (s. 7.2.2.5).
	Exterior Observations	Observation of Neighboring Properties	The standard is silent.	The grounds of the neighboring properties and associated structures shall be observed from the property and from publicly accessible vantage points (s. 7.2.3.2).
		Topographic, Geologic, and Hydrogeologic Conditions	If any information obtained shows there are likely to be hazardous substances or petroleum products on the property or on nearby properties and they are of a type that may migrate, topographic observations shall be analyzed in connection with geologic, hydrogeologic, hydrologic, and topographic information obtained to evaluate whether they are likely to migrate to the property, or within or from the property, into groundwater or soil (s. 9.4.1.6).	Where exposure of the subsurface exists (e.g., trenches, pits, and ponds), the assessor shall observe and describe, in general terms, the geologic and hydrogeologic conditions (s. 7.2.3.3).
		Stressed Vegetation	Areas of stressed vegetation shall be described (s. 9.4.4.3).	The location and extent of stressed vegetation shall be identified and described (s. 7.2.3.9).
Rights of Way	The standard is silent.	Rights of way shall be identified (s. 7.2.3.13).		

		USA	CANADA
Interviews	Third Parties	The standard is silent.	Third parties, such as neighbors and former employees, may be interviewed with consent from the client (s. 7.3.5.2).
	Government Officials	<p>A reasonable attempt shall be made to interview at least one staff member of any one of the following governmental agencies (s. 11.5):</p> <ul style="list-style-type: none"> • the local fire department; • the local health agency (or local office of the state health agency); • a local agency or local office of a state agency having jurisdiction over hazardous waste disposal or other environmental matters in the area in which the property is located; or • a local agency responsible for issuance of building permits or groundwater use permits that document the presence of activity or use limitations. 	<ul style="list-style-type: none"> • Similar to the ASTM requirements, except that the interviewee can also be from the engineering and works departments (s. 7.3.5.3). • The assessor shall document the reasons for having chosen the subject agency (s. 7.3.5.3).
	Interview Conducted for Prior Phase I ESAs	Persons interviewed as part of a prior Phase I ESA do not need to be questioned again about the content of answers they provided at that time (s. 10.5.3 and s. 11.6).	Information obtained from prior Phase I ESA interviews conducted by the same assessor may be used as information in conducting interviews for current Phase I ESAs (s. 7.3.6).
Evaluation		The ASTM does not have a separate section for “Evaluation”, but combines “Evaluation” with “Reporting”. It does not have similar requirements of evaluation as s. 8 of the CSA, except that the environmental professional is required to provide certain information in the report, including: opinions of the impact on the property of conditions identified, and the logic and reasoning used in evaluating information (s. 12.6).	<ul style="list-style-type: none"> • The assessor shall (s. 8): <ul style="list-style-type: none"> (a) Distinguish fact from opinion; (b) Clearly identify areas of actual or potential contamination and the basis for all findings, including nil findings; and (c) Indicate the relative degree of uncertainty associated with evidence of potential contamination.
Reporting	Confidentiality	The standard does not address confidentiality. State environmental regulations and professional licensing laws may address an environmental professional’s reporting and/or disclosure rights and responsibilities.	The assessor shall not report the results of the investigation to any government entity or other third party unless required by law or authorized to do so by the client (s. 9.1).
	Report Format	The report should follow the recommended format attached as Appendix 1, unless otherwise required by the user (s. 12.1).	A suggested format is outlined in Appendix 2 (s. 9.2).

		USA	CANADA
Reporting	Deviations	All deviations from this practice shall be listed individually and in detail (s. 12.10).	<ul style="list-style-type: none"> • Deviations and the reasons for those deviations from the principal components of a Phase I ESA shall be stated (s. 9.3). • Any enhancements, as agreed upon in the scope of work, shall be listed individually and in detail (s. 9.3).
	Assessor-Client Relationship	The Phase I ESA must be conducted by an environmental professional either “by” or “on behalf of the user” (s. 6.1). CERCLA does not specify whether an environmental professional is required to be independent. See 40 CFR 312.10.	Where a Phase I ESA has been conducted by in-house personnel , the report shall clearly describe the relationship of the assessor to the client and the property being assessed. The assessor should make a similar declaration where it is deemed appropriate to clarify the relationship of the assessor to the client or property being assessed (e.g., an assessor is retained jointly by a buyer and a seller of a property being assessed) (s. 9.5).
	Findings	Only require identifying known or suspect recognized environmental conditions, controlled recognized environmental conditions, historical recognized environmental conditions, and de minimis conditions (s. 12.5)	All findings, including nil findings, resulting from the investigations performed shall be included (s. 9.6)
	Conclusions	<ul style="list-style-type: none"> • The conclusions section shall summarize all recognized environmental conditions connected with the property as well as a statement substantially similar to one of the following statements (s. 12.8): <p>“We have performed a Phase I Environmental Site Assessment in conformance with the scope and limitations of ASTM Practice E1527 of [insert address or legal description], the property. Any exceptions to, or deletions from, this practice are described in Section [] of this report.</p> <p>“This assessment has revealed no evidence of recognized environmental conditions in connection with the property.” (s. 12.8.1)</p> <p>or</p> <p>“This assessment has revealed no evidence of recognized environmental conditions in connection with the property except for the following: (list).” (s. 12.8.2)</p> 	<ul style="list-style-type: none"> • The conclusions section shall state that the Phase I ESA has revealed no evidence or evidence of potential or actual contamination in connection with the property (s. 9.7.1). • The assessor shall (s. 9.7.2): <ul style="list-style-type: none"> (a) present the conclusions in a manner designed to help the client understand their significance; (b) describe methods to reduce the level of uncertainty; and (c) provide the rationale for proposing such methods.
Names of Participants	Credentials of the environmental professional and persons involved in report preparation must be included in an Appendix to the Report.	The report shall name the key participants involved in performing the four principal components of the Phase I ESA (s. 9.8)	

The authors wish to acknowledge the contributions by:

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RECORDS REVIEW TIPS

1. Nomenclature of Data Acronyms

Although there are many similarities with environmental due diligence procedures between Canada and the US, one area that varies widely is the terminology used to describe data sources. In the US, the EPA has determined and States have followed, to use similar acronyms for specific types of data. For example, 'LUST' is an acronym used for leaking underground storage tank data at the State and Federal level. In Canada the LUST acronym is not used. Alternatively, leaking tanks records can be found within contaminated sites data, tank data, or spills data among others. All of the data is there and will show up as a record on a database report, however, the name may be quite different than what one would find in a similar US report.

Many State departments make their underground storage tank data freely available online through searches or downloadable files. In Canada, services like these are the exception, not the rule. Tank regulations vary greatly by Province with some Provinces having no regulations whatsoever. And, while the Provincial ministries determine and enforce tank regulations, most assign crown corporations to manage regulatory activities – meaning that the Provincial government bodies often do not maintain or provide data. An experienced data provider – of which there are few in Canada – would have extensive experience navigating the various agencies and their relationships with Access to Information legislation in order to obtain the data required for due diligence records review.

Tanks is but one example, many of the private and provincial sources use differing names for spills, contaminated sites, and waste disposal sites, etc. In Canada, there is no RCRA or CERCLIS or SEMS. The data contained within those types of databases can be located in alternate data sources – matching and searching can be confusing. For this reason, it is often advisable to work with a local environmental professional to navigate the data.

2. Search Distances and Radii

Another major difference between environmental due diligence procedures in the US and Canada is the distance databases are required to be searched from the subject property. The ASTM standard clearly defines the search radius for each data source, the CSA standard and most provinces do not.

US database reports have five different search radii applied. These are property only, an eighth of a mile, a quarter of a mile, a half a mile and a mile. For example, in the US, leaking underground storage tanks (LUSTS), are searched a half of a mile from the subject property, while other tanks are searched out to a quarter of a mile.

On the contrary, in Canada, the CSA standard only states that data sources should be searched for the subject site and adjacent properties. This generally results in a 250 meter or .15 mile buffer for Canadian reports. There are few exceptions—for example, there are databases in BC, Alberta, and Ontario which require 300 or 500 meter radii. On account of this, records reviews can be conducted with larger or custom radii applied, although it is not a requirement for a standard Phase I.

3. Historical Products

FIRE INSURANCE MAPS

Canada has very few Sanborn maps, however, there are many Goad Maps available, which are also hand-drawn fire insurance maps. These are available primarily for the larger populated areas across Canada. Many of these maps are available for viewing at reference or university libraries, as well as being available for purchase from data providers.

AERIAL PHOTOS

Many provincial and municipal governments, as well as universities, and other organizations, maintain aerial collections of Canadian cities and locales dating back to the 1920s. The scale, resolution, and quality vary among and within collections. The historical collection held in the National Archives in Ottawa, Ontario offers comprehensive national coverage. In addition, many provinces have their own collections offering superior scales and coverage.

CITY DIRECTORY SEARCHES

Canada has very similar criss-cross directories of city directories to that of the United States. These directories are housed in the National Archives Library. There are firms that will do the research for you at the library, however, the turn around times are slow and the rates are high. Again, these searches are available from most database providers with improved turn around times and costs.

TOPOGRAPHIC MAPS

There are historic and current topographic maps available for most places in Canada. The collection is available online, however, this option may be cumbersome to search.

Database providers have topographic maps downloaded and geo-referenced to ease the search process.

A significant difference between Canada and the US is that many of these historical products are owned or housed by government sources, requiring unique research to obtain. In the United States several sources are more readily available and accessible.

In the US, most tank data sources are referred to as UST, AST, or TANK; in Canada there are various acronyms.

DATA SOURCE	PROVINCE (FED IF EMPTY)	REPORT ACRONYM	NAME
RST		RST	Retail Fuel Storage Tanks
FOFT		FOFT	Fisheries & Oceans Fuel Tanks
TCFT		TCFT	Transport Canada Fuel Storage Tanks
PCFT		PCFT	Parks Canada Fuel Storage Tanks
IAFT		IAFT	Indian & Northern Affairs Fuel Tanks
FST	YT	FST	Fuel Storage Tanks
CFST	NT	CFST	Crown Land Fuel Storage Tanks
CFST	NU	CFST	Crown Land Fuel Storage Tanks
---	BC	---	There are currently no specific provincial regulations to govern petroleum storage tanks.
EPST	AB	EP TANKS	Alberta Environment & Parks Storage Tanks
NCST	AB	NC TANKS	PTMAA Non-Compliant Storage Tanks
FST	AB	FST	PTMAA Fuel Storage Tanks
HMS	SK	HMS	Hazardous Material Storage
FUEL	MB	FUEL	Bulk Fuel Distributors
FST	ON	FST	Fuel Storage Tank
VAR	ON	VAR	TSSA Variances for Abandonment of Underground Storage Tanks
CFOT	ON	CFOT	Commercial Fuel Oil Tanks
PEP	QC	PEP	Petroleum Equipment Usage Permits
FUEL	NS	FUEL	Fuel Oil Retailer and Wholesaler Approval
FST	PE	FST	Fuel Storage Tanks
HHT	PE	HHT	Home Heat Fuel Tanks
HHT	NL	HHT	Home Heat Fuel Tanks

In Canada, Phase I ESAs should adhere to the CSA Standard Z768-01 (R2016) - Phase I Environmental Site Assessment.

In Canada, tank regulations are determined and enforced by provincial/territorial ministries. Federal tank sources are generally lists of tanks that fall under the purview of the associated government body.

Many provinces assign Crown corporations to manage tank regulation. Crown corporations are organizations that are owned in whole by federal or provincial governments, but which are structured like independent enterprises, providing public services that don't fall directly within the scope of any given ministry.

In the US, most leaking tank data sources are referred to as LUST, LAST, or LST; in Canada they are mostly included in spills, incidents, and/or contaminated sites/environmental registries.

DATA SOURCE	PROVINCE (FED IF EMPTY)	REPORT ACRONYM	NAME
FCS		FCS	Contaminated Sites on Federal Land
CS	YT	CS	Contaminated Site Inventory
FSPL	YT	FED SPL	Spills
SPL	YT	SPL	Spills
SPL	NT	SPL	Spills
SPL	NU	SPL	Spills
SREG	BC	SREG	Site Registry
FIS	AB	FIS	Field Inspection Reports
ESAR	AB	ESAR	Environmental Site Assessment Repository
ES	SK	SASK SPILLS	Environmental Spills (Sask Spills)
OGS	SK	OGS	Upstream Oil & Gas Spill Sites
CS	MB	CS	Contaminated/Impacted Sites
SPL	MB	SPL	Manitoba Spills
INC	ON	INC	TSSA Incidents
HINC	ON	INC	TSSA Historic Incidents
CS	QC	CS	Contaminated Site Inventory Le Répertoire des terrains contaminés
RESP	QC	RESPONSE	Environmental Response Registry

CANADIAN IMMIGRATION CONSIDERATIONS FOR CROSS-BORDER TRAVEL

In an increasingly globalized marketplace, the movement of personnel across borders to work at subsidiary offices or provide short term advisory services is commonplace. It is important for legal professionals to be aware of the duties that foreign employees and contractors can perform in Canada as business visitors, and those activities which require the issuance of a work permit. With the appropriate knowledge, proper planning can be undertaken to ensure project timelines and goals are achieved.

Business Visit vs. Work Permit

A foreign national is a person who is not a Canadian citizen or permanent resident. Foreign nationals who enter Canada temporarily to provide employment-related services require a work permit unless they fit into one of the specifically enumerated criteria for entry as a business visitor. The challenge is differentiating between business and employment activities. The common misconception held by companies is that if the foreign national is not being paid in Canada, then he/she is automatically a business visitor. In fact, the most important criteria in determining whether an individual is a business visitor or requires a work permit is an analysis of the actual duties to be performed in Canada – not the source of remuneration, duration of entry or nationality of the individual.

A business visitor is a foreign national who seeks to engage in international activities in Canada without directly entering the Canadian labor market. The phrase ‘without directly entering the Canadian labor market’ can best be described as the foreign national not doing an activity that a Canadian could have theoretically been hired to undertake.

Examples of permissible business visitors activities that fit within the definition, or are specifically exempted through the Immigration Regulations include:

- attending conferences or trade shows
- attending business meetings to obtain project updates and discuss requirements
- negotiating contracts and general marketing activities
- providing after-sales service pursuant to an international warranty for a product manufactured entirely outside Canada
- receiving or providing intra-company training at a related company
- leading a seminar or workshop of five business days or less

If a foreign national undertakes a work activity, then a work permit is required. Clear examples of functions requiring a work permit include a foreign-based employee who holds a title within a Canadian office, has direct reports in Canada, or provides direction to a Canadian office. This captures senior managers who have cross-border managerial responsibility for employees or a function. Also included are foreign management consultants engaged on a project for a Canadian client. When a Canadian office obtains the assistance of a foreign office’s employees to aid in the completion of a project or execute a feasibility study, then those employees require work permits.

Work Permit Categories

Once it is determined that a work permit is required, then the appropriate work permit category must be selected. There are over twenty work permit categories, each with its own procedure, processing time and documentation requirements. It is extremely important that the appropriate and most expedient category be selected.

The Intra-company Transfer category, which permits the entry of key foreign employees from a related company, is among the most facilitative and common application categories. In addition, pursuant to the NAFTA as well as the parallel agreements with Chile and Peru, accelerated work permits are issued to American, Mexican, Chilean and Peruvian citizens in strategic professions, which include engineers, accountants, economists, computer systems analysts, technicians/technologists, most scientists, lawyers and management consultants.

If a foreign national does not qualify under one of the many “fast-track” work permit categories, then the Canadian company is required to obtain a labor market opinion approval from Service Canada. This process requires demonstrating local recruitment efforts confirming the skill set is not readily available in the Canadian labor market, a process that may require extensive documentation and several weeks processing time.

It is therefore essential that human resource professionals not only evaluate whether a foreign national is a business visitor or a worker, but also select the most expeditious and least onerous application category when a work permit is required. The penalties for non-compliance with the Immigration rules can result in fines to the company and exclusion of the foreign national from Canada for up to two years. To limit the risks associated with international travel, the development of a comprehensive Immigration policy is highly recommended.

SUMMARY: TIPS FOR PHASE I ESAs

1. Consult federal and state law in addition to the ASTM Phase I ESA standard. US EPA rules approve the ASTM Phase I ESA standard for “all appropriate inquiry”; however, there are elements of the landowner liability protections in the law and regulations not in the standard. And state laws may differ.
2. In Canada, it is important to also consult provincial or territorial laws in addition to the CSA Phase I ESA Standards to determine a scope of work for the review. There may be a legal and or business reason why a Phase I ESA maybe undertaken to a local regulatory standard versus a CSA Standard.
3. As a lender, consider the business purpose of a Phase I ESA in evaluating its substantive adequacy and whether an update is required. In Canada, the CSA Phase I ESA may be used as guidance or a factor in the government’s or a court’s evaluation of a lender’s liability for site cleanup. In the US, ASTM 1527-13 for Commercial Properties is expressly approved in EPA’s rules to satisfy the “all appropriate inquiry” element of various “landowner liability protections” from CERCLA liability. In the US, under federal law, there is an exemption from CERCLA (Superfund) liability for lenders who do not participate in management of a facility. The lender liability protections do not rely on “all appropriate inquiry.”
4. A Phase I ESA under ASTM E1527 may nevertheless be useful in determining the creditworthiness of the borrower, value of the collateral, and ease or difficulty with which the lender would be able to sell the facility if necessary. For some properties, where preserving an “all appropriate inquiry” is not desired, a more limited evaluation, such as the ASTM Transaction Screen, may be appropriate. There is also a separate ASTM Phase I standard for Forestland and Rural property that EPA has approved as “all appropriate inquiry” under federal CERCLA (Superfund) (and state laws may differ).
5. Be aware there are environmental matters that could be significant to a borrower’s creditworthiness and the value of a commercial property that are outside the scope of an ASTM Phase I ESA for Commercial Property and/or Transaction Screen. Consider whether these non-scope concerns are significant to the loan transaction and, if so, add them to the scope to be reviewed by the environmental professional. The scope of the CSA Phase I ESA standard may also shed some light on these issues and discussions regarding the scope of work essential to ensure that the lender has all the relevant information it requires.
6. If the Phase I ESA identifies recognized environmental conditions, consider whether a Phase II site investigation is desirable to evaluate / eliminate the probability of hazardous substances and remediation costs. If a Phase II site investigation is conducted and does not eliminate the probability of hazardous substance releases, consider whether other landowner liability protections (contiguous property owner or bona fide purchaser) or lender liability exemptions are available and adequate.
7. It is important to note that in Canada, some provinces have a mandatory legal requirement to report contamination and mandatory remediation/clean up obligations. Prior to undertaking any type of assessment it is important to discuss with the borrower and the lender the implication of this type of discovery.
8. Consider whether non-disclosure and confidentiality of Phase I ESA results is an issue. In Canada, the CSA guidance states that an assessor will not disclose the results. In the US, the ASTM standard is silent about disclosure and confidentiality, and an environmental professional’s responsibilities with regard to confidentiality and disclosure will depend on federal and state law, professional licensing obligations, not to mention the environmental service agreement. In some circumstances, it may be beneficial to substantively involve an attorney in ordering and supervising the Phase I ESA to help preserve any legal privileges that may be available. It is also important to note that in some jurisdictions in Canada there may be mandatory professional reporting obligations for situations where imminent harm to a person or the public that override any contractual obligations. In Canada, environmental professionals tend to be either Professional Engineers or Professional Geoscientist as those are the regulatory standards in many local jurisdictions.
9. Identify and search for databases in multiple databases – do not assume that one database is inclusive of all. For example Spills or Tanks or Contaminated Sites may be called different things in different provinces. Thorough investigation is required to be inclusive and not have any gaps.
10. Search Distances on a Standard Database Report will be much less than on an ASTM report. Requesting larger search radii from your data provider may be required, particularly if consistency to ASTM is necessary.
11. Historical Products, while available in Canada, are not as easily accessed due to many government sources and the turn around times to acquire the products is often 3 to 7 days. Liens and Chain of Title Searches are available, as well as the standard fire insurance maps, aerials, CD searches and topo maps.
12. In Canada, data is difficult to access at the governmental source and it is often expensive to obtain. Commercial (non-governmental) data sources are not required to update data within 90 days of the government’s making it available, as the ASTM Standard dictates. Historical products are collected from multiple sources/agencies and often respond slower than desired. Search radius of reports may not provide adequate distance to meet ASTM Standards; however, they do satisfy the Canadian Standard Association guidelines.
13. It is always important to understand the limitations in any contract being executed by the parties. One of the most important terms for any party retaining a professional to undertake the work is any potential limitation on liability whether it be from a dollar cap or the duration of any representation or warranty, or access to insurance. It is equally important that the parties agree who may have reliance on any report produced. Reliance agreements must be made in advance and determine if a separate reliance agreement is required.
14. It may be necessary to update a Phase I ESA and the parties should clearly understand any restrictions in relation to the length of time that may pass between the issuance of a report in the first instance and any update.

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APPENDIX 1: USA

Recommended Table of Contents and Report Format

1. SUMMARY

This section provides a summary of the Phase I Environmental Site Assessment process and may include findings, opinions and conclusions.

2. INTRODUCTION

This section identifies the property (location and legal description) and the purpose of the Phase I Environmental Site Assessment. This section also provides a place to discuss contractual details (including scope of work) as well as limiting conditions, deviations, exceptions, significant assumptions, and special terms and conditions.

3. USER PROVIDED INFORMATION

This section presents information under Section 6. User's Responsibilities and may include information from the User Questionnaire (see Appendix X3), if completed.

4. RECORDS REVIEW

This section presents a review of physical setting sources, standard and additional environmental records sources, and historical use information on the property and surrounding area as detailed in Section 8, Records Review.

5. SITE RECONNAISSANCE

This section includes site reconnaissance observations as discussed in Section 9, Site Reconnaissance, including

general site setting, interior and exterior observations, and uses and conditions of the property and adjoining properties.

6. INTERVIEWS

This section provides a summary of interviews conducted as detailed in Section 10, Interviews with Past and Present Owners and Occupants, and Section 11, Interviews with State and Local Government Officials.

7. EVALUATION

This section documents the findings, opinions and conclusions of the Phase I Environmental Site Assessment as stated in Section 12. This section also includes additional investigations, data gaps, deletions. This section is also where environmental professionals as described in 3.2.32 and Appendix X2 provide their statement, references and signature(s).

8. NON-SCOPE SERVICES

This section provides a place for recommendations (see 12.15) and summarizes additional services discussed in Section 13, which are not a part of this practice.

9. APPENDICES

This section contains supporting documentation and the qualifications of the environmental professional and other personnel who may have conducted the site reconnaissance and interviews.

10. QUALIFICATIONS OF THE ASSESSOR

11. REFERENCES AND SUPPORTING DOCUMENTATION

12. APPENDICES

- (a) Maps, Figures, and Photographs
- (b) Ownership/Historical Documentation
- (c) Regulatory Documentation
- (d) Documentation of Interviews

APPENDIX 2: CANADA

Phase I ESA Report Format - Proposed Section Headings

1. EXECUTIVE SUMMARY

2. INTRODUCTION

3. SITE DESCRIPTION

4. RECORDS REVIEW

5. SITE VISIT

6. INTERVIEWS

7. FINDINGS

8. EVALUATION OF FINDINGS

9. CONCLUSIONS

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