



AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

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Extension of Time (EOT) Claims – Separating Fairy Tales from Facts

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Introduction



WHY DO A DELAY ANALYSIS?

Time is Money!

Delay analyses help Contractors, Owners, and Fact Finders (Court/Tribunal) determine:

- What happened on the Project?
- Who is responsible for the delays?
- Who will need to pay?

Satisfies the burden of establishing Cause and Effect



"Build it, and they will sue."

TYPES OF DELAY

Types of Delay

Excusable/Compensable

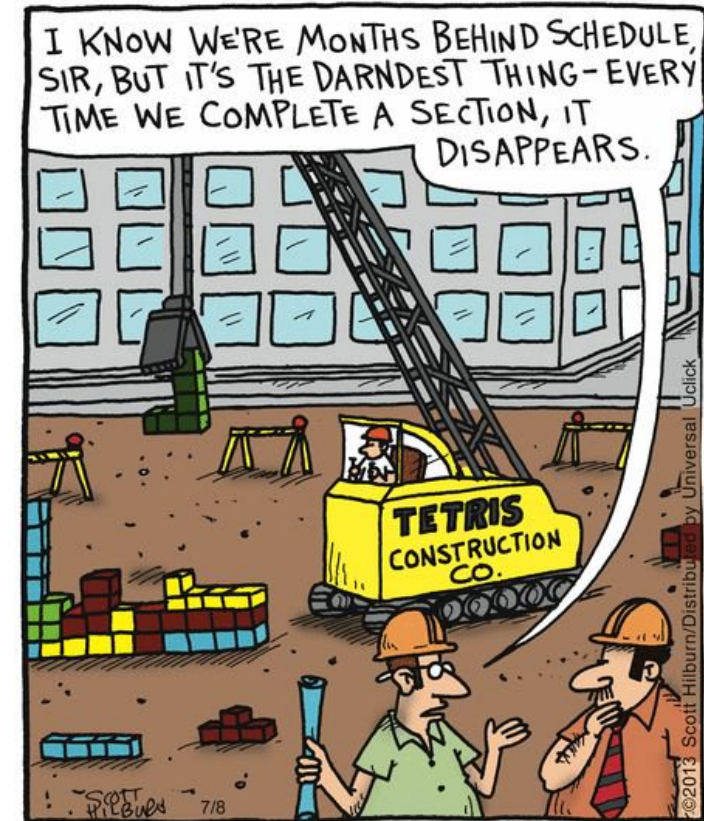
- Time and Money

Excusable/Non-Compensable

- Time but no money

Non-Excusable/Non-Compensable

- No time and no money



Legal Considerations



CONTRACTUAL QUESTIONS

The trigger for entitlement:

- Delay to Completion (i.e. critical path delay)
- Or delay in progress of the Works?

The test – contractual burden:

- “will be delayed”
- “might be delayed”
- “could be delayed”
- “is likely to be delayed”
- “is delayed”



CONTRACTUAL QUESTIONS

Should the delay be assessed prospectively or retrospectively?

Is the entitlement fair and reasonable?

What methodology is called for? Fact-based, theoretical, or silent?



CONTRACTUAL QUESTIONS

What is Excusable/Compensable under contract?

What is Excusable/Non-Compensable under contract?

What is Non-Excusable/Non-Compensable under contract?



CONTRACTUAL QUESTIONS

What are notice requirements under contract to perfect claims?

- Timing of initial notice
- Is follow up notice or presentation of claim required
- Form and content of notice
- Service of notice
- Possible waiver of notice



Delay Methodologies



DELAY ANALYSIS METHODOLOGIES

Method of Analysis	Analysis Type	Critical Path Determined	Delay Impact Determined	Requires
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	<ul style="list-style-type: none"> Logic linked baseline programme. A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	<ul style="list-style-type: none"> Logic linked baseline programme. Update programmes or progress information with which to update the baseline programme. A selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> Logic linked baseline programme. Update programmes or progress information with which to update the baseline programme.
As-Planned versus As-Built Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> Baseline programme. As-built data.
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	<ul style="list-style-type: none"> Baseline Programme. As-built programme.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	<ul style="list-style-type: none"> Logic linked as-built programme. A selection of delay events to be modelled.

DELAY ANALYSIS METHODOLOGIES

Will be dependent upon:

- Contract Provisions
- Quality of available schedules (baseline and updates)
- Quality and reliability of available contemporaneous documents (i.e., daily reports, weekly reports, monthly reports, correspondence, meeting minutes, site diaries)
- Availability of key site personnel (interviews, depositions/witness statements)



Case Study – “Mala Suerte” Project



CASE STUDY: MALA SUERTE PROJECT

60 KM oil pipeline and refinery project in Mexico

Planned construction period from January 2010 through June 2012

2 critical paths in baseline schedule – through pipeline and refinery

Completion delayed 8 months (Actually completed Feb 2013)



CASE STUDY: MALA SUERTE PROJECT

Contract Clauses:

- “If and whenever it becomes reasonably apparent that the **progress of the Works** or any Sections **is being or is likely to be delayed** the Contractor shall forthwith give notice to the Architect/Contract Administrator of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.” *JCT 2011 Edition SBC with Quantities*
- Silent as to methodology

Liquidated Damages of \$50,000 per day

No EOTs granted during the Project

CASE STUDY: MALA SUERTE PROJECT

Key Questions for Counsel:

- Is Contractor due an EOT (if so, how long)?
- Is Contractor due prolongation damages (if so, for how many days/months)?
- Is Owner entitled to LDs (if so, for how many days/months)?



CASE STUDY: MALA SUERTE PROJECT

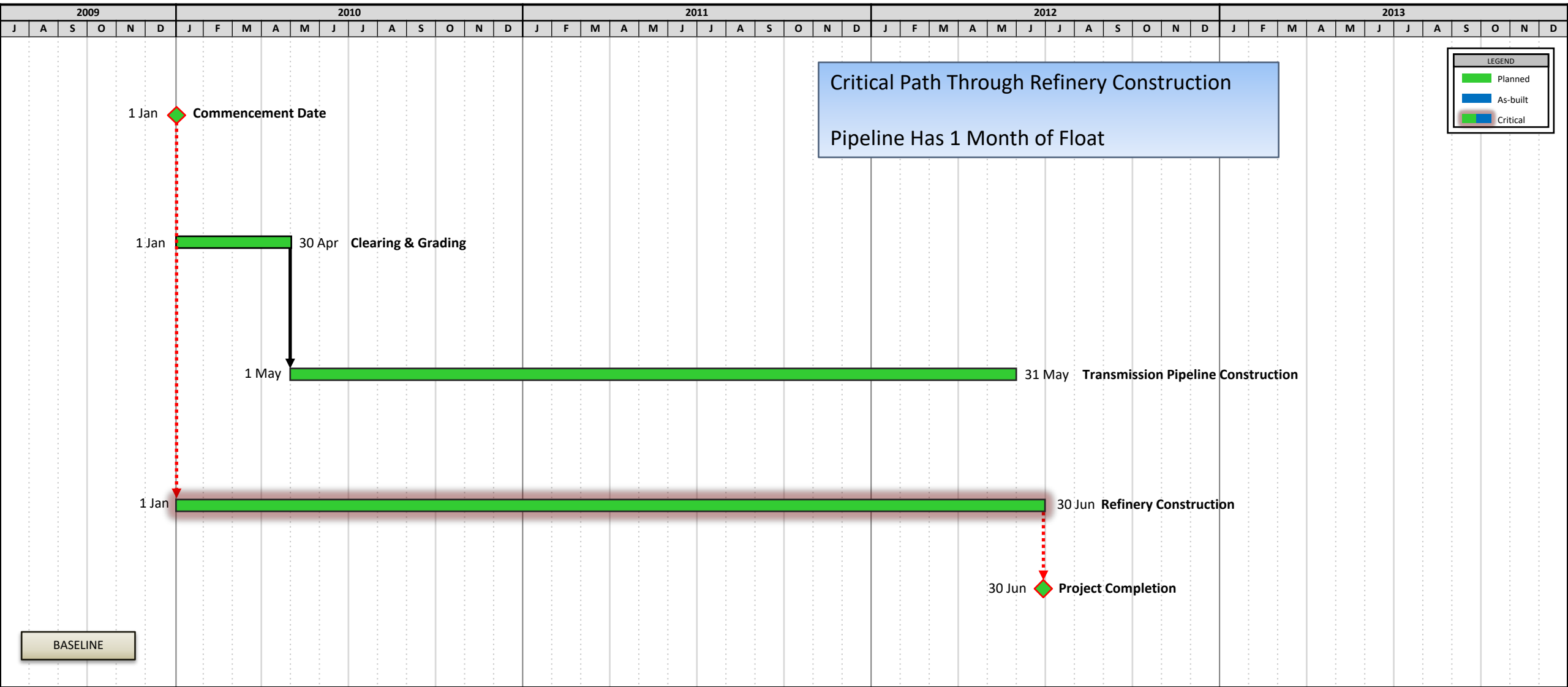
What will Counsel be looking for:

- Contract provisions
- Has compensable delay been demonstrated?
- Applicable law regarding notice and methodology for delay analysis



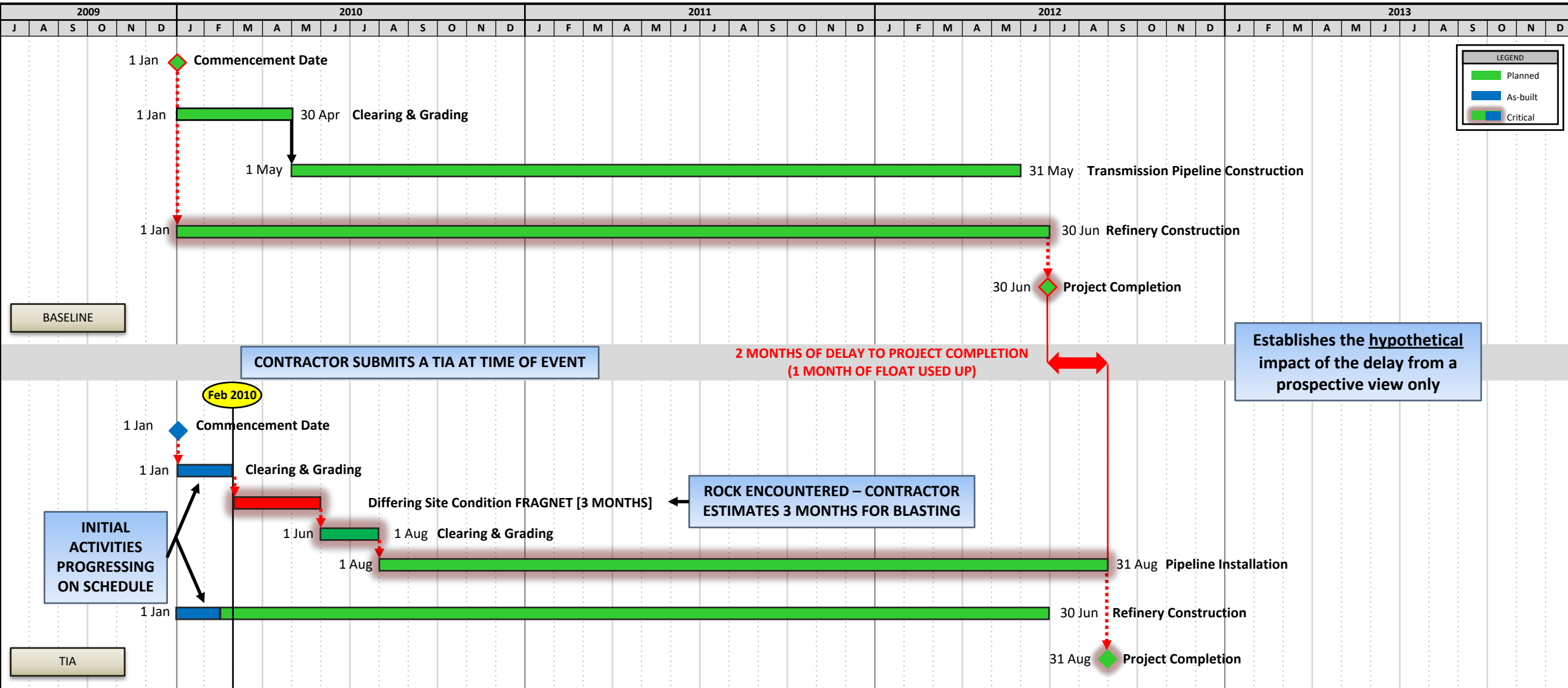
Baseline Schedule





Contractor's TIA

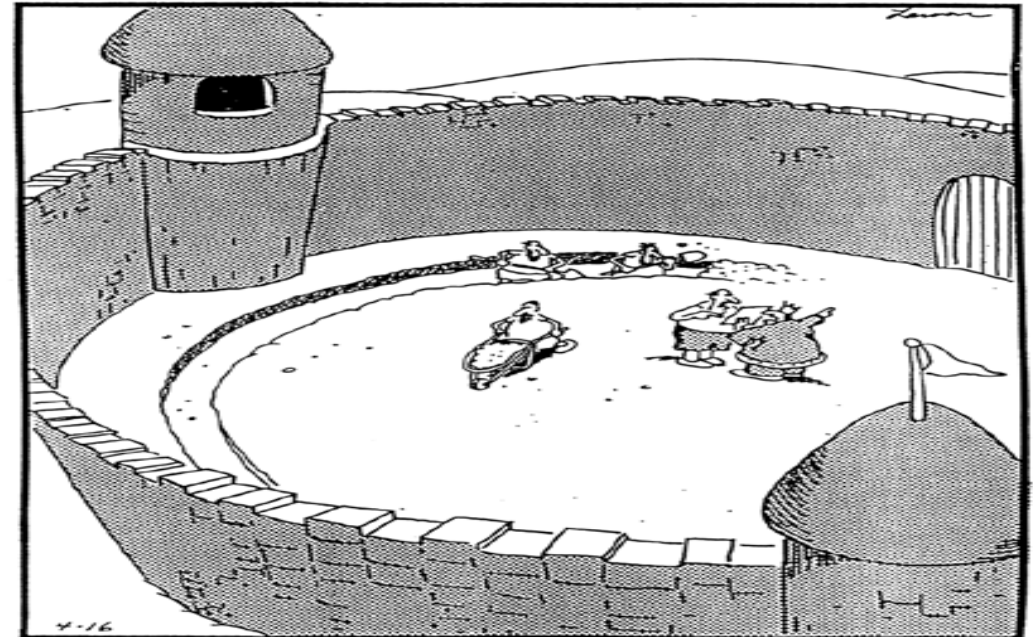




CONTRACTOR'S TIA

Question – Is the Contractor entitled to an EOT of 3 months? [Excusable]

And 2 months of delay damages? [Compensable]



CONTRACT CLAUSE

What if the contract clause stated:

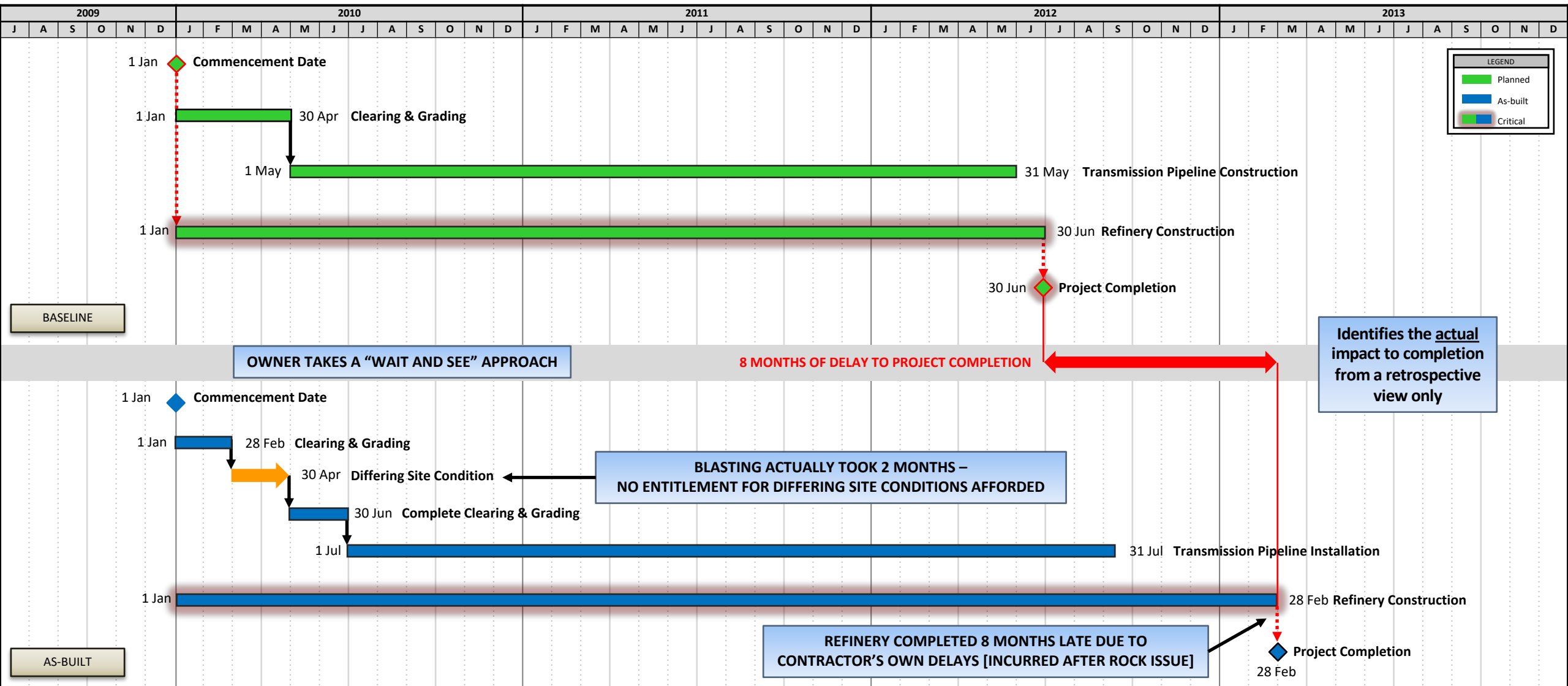
“The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of time for completion if and to the extent that **completion** for the purpose of Sub-Clause 10.1 [Taking-Over the Works and Sections] **is or will be delayed** by any of the following causes...”

FIDIC Red Book Clause 8.4



Owner's Retrospective As-Built Critical Path

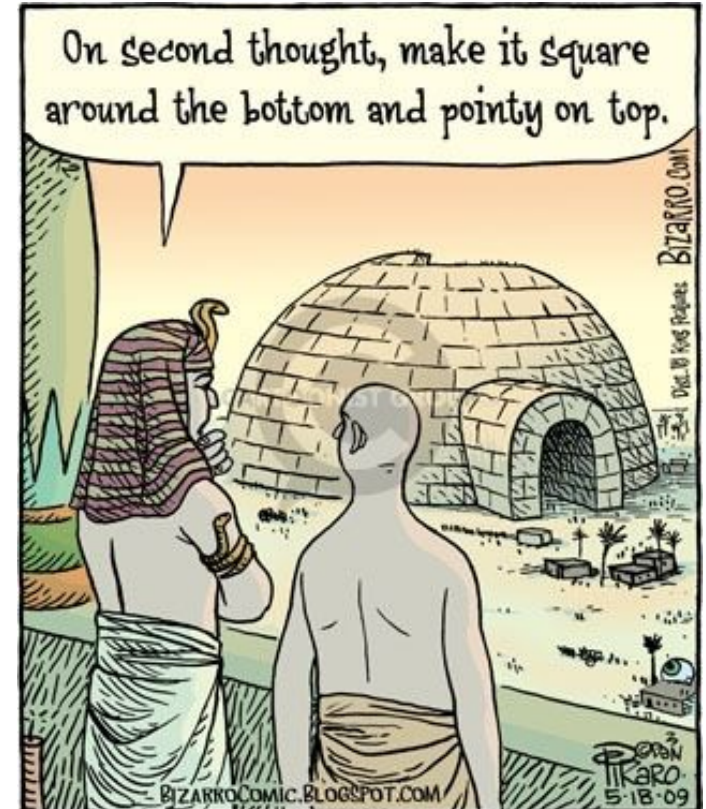




OWNER'S RETROSPECTIVE AS-BUILT CRITICAL PATH

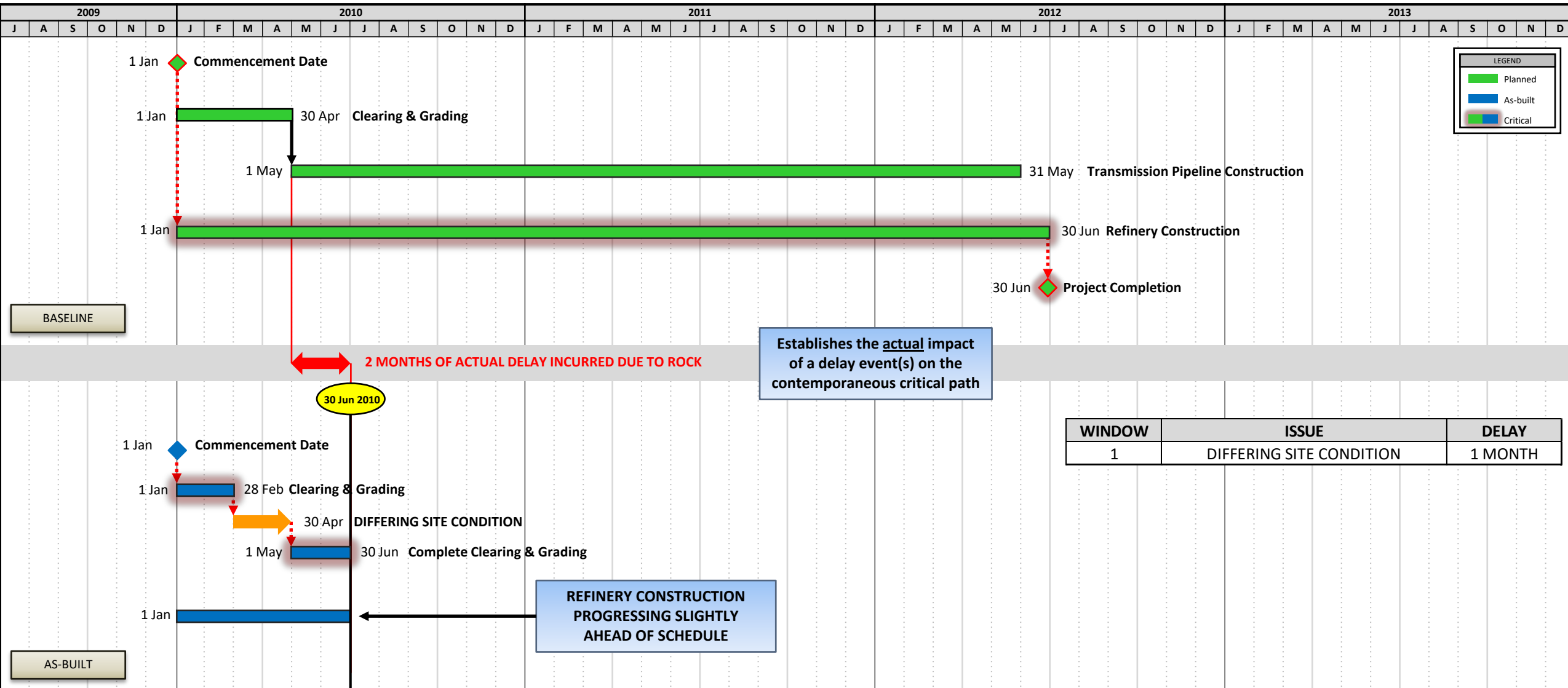
Question – Is the Owner entitled to 8 months of LDs?

And the Contractor to nothing?



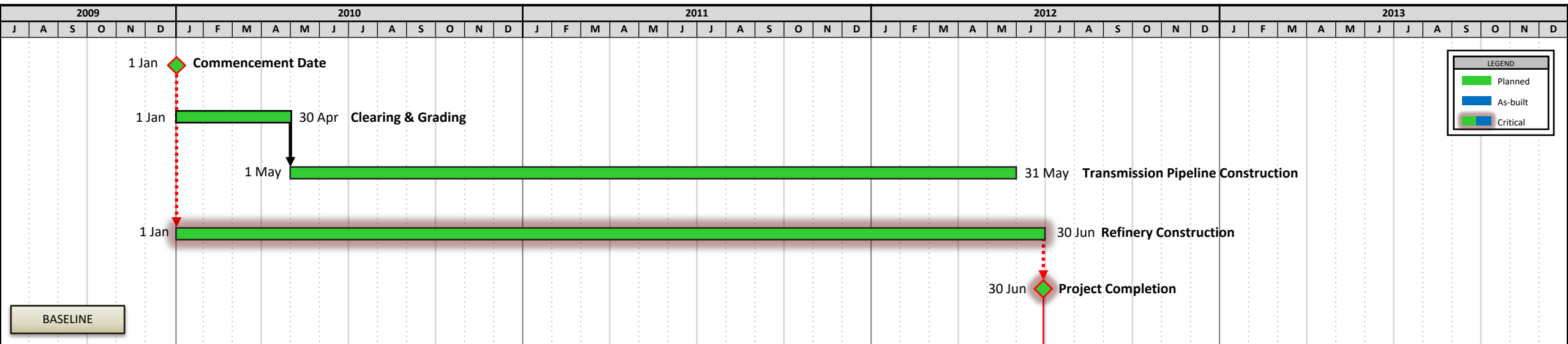
As-Planned vs As-Built – Window 1





As-Planned vs As-Built – Window 2

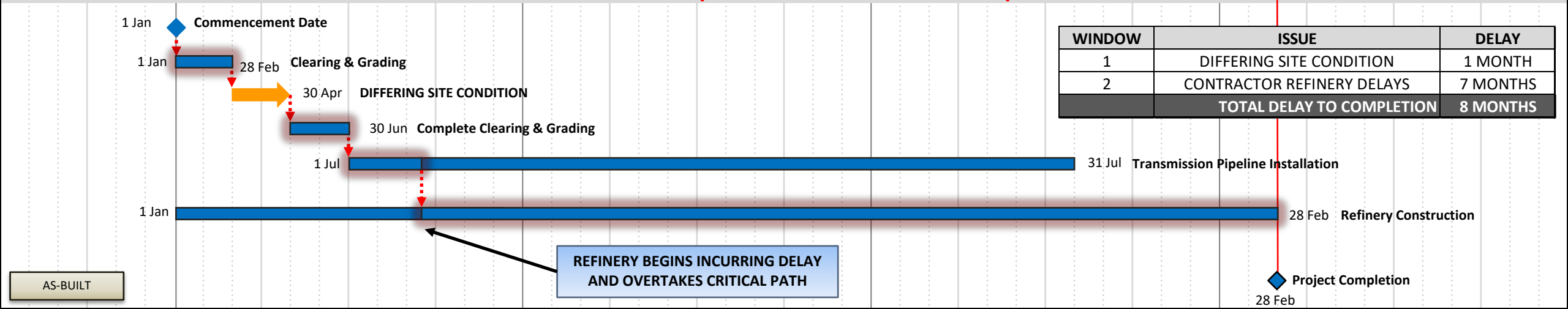




LEGEND

- Planned
- As-built
- Critical

**OVERALL DELAY TO COMPLETION OF 8 MONTHS
[6 MONTHS ADDITIONAL DELAY DUE TO REFINERY]**



WINDOW	ISSUE	DELAY
1	DIFFERING SITE CONDITION	1 MONTH
2	CONTRACTOR REFINERY DELAYS	7 MONTHS
TOTAL DELAY TO COMPLETION		8 MONTHS

WINDOWS ANALYSIS

Question for Counsel:

Had the Contractor succeeded in getting an excusable EOT of 3 months with its TIA, would the Owner only be entitled to 5 months of LDs?



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Expert Instructions



EXPERT INSTRUCTIONS

- When should an expert be engaged?
- Defining scope of engagement (and avoiding scope creep)
- Setting expectations/budget
- Instructions to the expert
- Understanding venue of dispute and impact on expert role
- Providing necessary materials
- Credibility factors: Input and influence, coercion





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