

STATE ARBITRATION BOARD

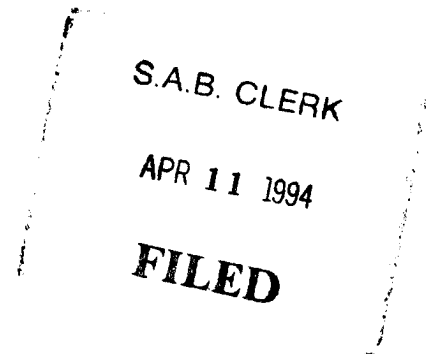
1022 LOTHIAN DRIVE
TALLAHASSEE, FLORIDA 32312
PHONE: (904) 385-2852

+++ NOTICE +++

In the case of Anderson Columbia Co., Inc. versus the Florida Department of Transportation on Project Nos. 54060-3507 & 54060-3508 in Jefferson County, Florida, both parties are advised that State Arbitration Board Order No. 1-94 has been properly filed on April 11, 1994.



H. Eugene Cowger, P.E.
Chairman & Clerk, S.A.B.
April 11, 1994



Copies of Order & Transcript to:

Mr. J.B. Lairscey, Jr., Director, Office of Construction/FDOT
Richard Dun, Project Manager/Anderson Columbia Co., Inc.

STATE ARBITRATION BOARD

ORDER NO. 1-94

RE:

Request for Arbitration by
Anderson Columbia Co. Inc. on
Job Nos. 54060-3507 & 54060-3508 in
Jefferson County

The following members of the State Arbitration Board
participated in the disposition of this matter:

H. Eugene Cowger, P. E. Chairman
Kenneth N. Morefield, P. E. Member
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a
request for arbitration commencing at 9:15 a.m., Wednesday,
February 2, 1994.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their order No. 1-94 in
this cause.

ORDER

The Contractor presented a request for arbitration of a
claim in the amount of \$188,457.78 for cost incurred in
restoring damage to the project caused by an alleged
catastrophic rainfall event that occurred on June 9, 1992.

The Contractor presented the following information in
support of his claim:

1. A series of stop work orders covering significant sections
of the project issued by the Department of Transportation
during the first five weeks of work on the project prevented
us from working in an orderly manner during that period.
In order to maintain some degree of progress with the work,
we proceeded with clearing and grubbing operations in those

areas that were available for work. When the stop work orders were lifted, it was necessary for us to clear and grub the areas of the project in which we had been prohibited from working so that utility companies could proceed with relocation of their facilities. The result of these interferences to our operations by actions of DOT was that we were forced to clear and grub the entire project early on, thus causing large areas to be subject to erosion.

2. Once all areas of the project were available to us, the utility companies failed to conduct relocations in a timely and orderly manner. These interferences caused our earthwork operations to be disrupted.

3. Plan changes effected by a Supplemental Agreement steepened the front and back slopes, making the project much more susceptible to erosion.

4. Due to interference to our operations by utility companies and the resulting piecemeal nature of grading work on this rehabilitation type project it was not feasible to grass the completed areas of earthwork as grading progressed.

5. The temporary erosion control measures provided for by the contract were grossly inadequate to meet the requirements of this project. We installed all temporary erosion control measures provided by the contract.

6. We are aware of the provision in the Standard Specifications limiting the surface area exposed to erosion to 750,000 square feet without specific prior approval by the Engineer. However, the DOT did not express a concern about

the amount of area exposed to erosion until after June 9, 1992.

8. On June 9, 1992 a 6 inch rainfall in approximately 3 hours caused extensive damage to previously graded areas of the project. We contend that the condition of the job at the time the severe rain occurred was a primary contributing factor to this damage and that actions by the Department of Transportation contributed to the job being in that condition. The Department of Transportation should exercise the discretion provided in the Acts of God clause contained in Article 7-14 of the Standard Specifications and reimburse us the costs we incurred in repairing this catastrophic damage.

9. The several Supplemental Agreements executed on this project resolved our claims for the individual issues addressed by each of these documents. However, in negotiating those Supplemental Agreements, no consideration was given to the impact of changes to the work on the susceptibility of the project to severe erosion in the event of a catastrophic rain storm.

The Department of Transportation rebutted the Contractor's claim as follows:

1. The description of events that disrupted the progress of work on this project by the Contractor are essentially correct.
2. If the Contractor had a concern with the impact of steepening slopes on erodibility, he should have addressed

this in conjunction with the negotiations for the Supplemental Agreement dated April 1, 1992.

3. In our opinion, it was feasible to install permanent grassing on some of the areas that eroded on June 9, 1992 prior to that date.

4. The plans provided a Baled Hay item to be used as a temporary erosion control measure. The plan quantity for this item is only an estimate and we made no representation to the Contractor that the quantity would be limited. The plans contain details for construction and spacing of baled hay temporary erosion control barriers in unpaved ditches. The Contractor did not install baled hay barriers at the frequency or in accordance with the construction details shown in the plans. In some instances hay bales were anchored with only one stake instead of two as shown in the plans.

5. Article 104-6.2 of the Standard Specifications authorizes the use of temporary erosion control devices until permanent erosion control features can be installed and Article 104-7.1 makes the Contractor responsible for maintenance of in-place devices.

6. Article 104-6.1 of the Standard Specifications limits the area of erodible earth that may be exposed by clearing and grubbing to 750,000 square feet without specific prior approval by the Engineer. On this project such approval was not requested by the Contractor. In any event, the Contractor retains the responsibility to provide adequate erosion control regardless of the area to be protected.

7. It is our position that the Contractor failed to achieve even a minimum level of erosion control on this project and was inviting an outcome like that of June 9, 1992. A letter from the Department of Environmental Regulation dated June 3, 1992 substantiates our position. ("No filter fences and few hay bales were observed on the approximately nine miles of disturbed right-of-way during a recent rain event")

Also, the situation in regard to lack of and condition of hay bale barriers prior to June 9, 1992 is documented by photos.

8. Local reports were that 6 inches of rain occurred in the afternoon of June 9, 1992. Weather records from NOAA stations at Tallahassee and Monticello and Rainfall Intensity-Duration-Frequency Curves in the DOT Drainage Manual raise a question as to the actual severity of that rain event.

9. The Contractor contends that we should invoke the Acts of God clause contained in Article 7-14 of the Standard Specifications to reimburse him for repairs to catastrophic damage to the work due to causes that are unforeseeable, beyond the control of the Contractor and without fault or negligence of the Contractor. There are several court cases that have been decided in favor of the owner where circumstances were similar. In any event, invoking of this clause is at the discretion of DOT.

10. We object to the Contractor raising this issue, because several Supplemental Agreements on which agreement was reached after June 9, 1992 contained a clause reading in part: "...The Contractor accepts the terms of this

Supplemental Agreement as full compensation for all costs of equipment, manpower, materials, overhead, profit and delay damages and for all their costs, whether direct or indirect, or whether incurred now or in the future, related to issues set forth in the Agreement".

11. We granted a extension of the contract time due to the effects of the June 9, 1992 rain event. The Contractor is not due the additional compensation he is claiming because he was responsible for erosion control on the project and the damage on which his claim is based resulted from his poor erosion control practices.

12. Since we found that the Contractor is not entitled to any additional compensation, we did not analyze the quantities and costs related to this claim. However, we note that the quantities on which the claim is based are a majority of the work done on the items prior to the rain event.

The Board in considering the testimony and exhibits presented found the following points to be of particular significance:

1. The minutes of the preconstruction conference reflect that the Contractor stated work would be accomplished in conjunction with preventing pollution of water and damage to adjacent property and as it becomes apparent that other areas require protection, we stand ready to perform as directed by the Department to ensure that pollution of surrounding area does not occur. He suggested that an inspector meet with the

Contractor every morning to review erosion control devices and issue instructions as to repair or replacement of devices. Nothing is mentioned in these minutes by either DOT or the Contractor about incorporating permanent erosion control features into the project at the earliest practical time.

2. Nothing in the evidence reveals that DOT expressed a concern about installation of temporary erosion control devices prior to the Department of Environmental Regulation (DER) inspection on May 28, 1992 or about installation of permanent erosion control features prior to the June 9, 1992 rain event.

3. The temporary erosion control devices in place prior to May 28, 1994, the date of the DER inspection, were rather minimal.

4. The Contractor stated that by June 9, 1992 work on the job had not progressed far enough that permanent erosion control measures could be in place in most places. The position of DOT is that permanent erosion control measures could have been constructed on some of the back slopes. DOT admitted that it was not feasible to have done grassing of the front slopes by June 9, 1992.

5. The computations used by the Contractor to arrive at the amount claimed are based on unsubstantiated quantities of bid items. The quantities claimed ranged between 50% and 80% of the total quantity paid to date for those items.

6. The Board recognizes that compensation to a Contractor for

repair of catastrophic damage to the work due to Acts of God, as provided for in Article 7-14 of the Standard Specifications, is at the discretion of the Department of Transportation.

From the foregoing and in light of the testimony and exhibits presented, the State Arbitration Board finds as follows:

The Department of Transportation is ordered to compensate the Contractor \$50,000.00 for his claim.

NOTE: This award is not predicated on overturning the right of the Department of Transportation to apply the Acts of God clause contained in Article 7-14 of the Standard Specifications at the discretion of the Department.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$336.40 for Court Reporting Costs.

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S.A.B. CLERK

APR 11 1994

Tallahassee, Florida

Dated: 11 April 1994

Certified Copy:

H. Eugene Cowger
H. Eugene Cowger, P. E.
Chairman & Clerk, S.A.B.

11 April 1994
Date

FILED
H. Eugene Cowger
H. Eugene Cowger, P. E.
Chairman & Clerk

K. N. Morefield
K. N. Morefield, P. E.
Member

John P. Roebuck
John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

APR 11 1994

FILED

ANDERSON COLUMBIA CO., INC.)

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DEPARTMENT OF TRANSPORTATION)

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PROJECT NO. 54060-3507 &
54060-3508

LOCATION: Jefferson County,
Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Wednesday, February 2, 1994

PLACE: Florida Transportation Center
1007 Desoto Park Drive
Tallahassee, Florida

TIME: Commenced at 9:15 a.m.
Concluded at 11:00 a.m.

REPORTED BY: CATHERINE WILKINSON
CSR, CP, CCR
Notary Public in and for
the State of Florida at
Large

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida 32317

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Ken Morefield
 Mr. Jack Roebuck

APPEARING ON BEHALF OF ANDERSON COLUMBIA CO., INC.:

Mr. Joe Anderson
 Mr. Richard Dun

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Eric Benson
 Mr. Harvey Brewton
 Mr. Bill Armstrong

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1, 2 and 3 in evidence	4

CERTIFICATE OF REPORTER

67

P R O C E E D I N G S

1
2 CHAIRMAN COWGER: This is a hearing of the
3 State Arbitration Board established in accordance
4 with Section 337.185 of the Florida Statutes.

5 Mr. Ken Morefield was appointed as a member
6 of the Board by the Secretary of the Department.
7 Mr. John Roebuck was elected by the construction
8 companies under contract to the Department of
9 Transportation.

10 These two members chose me, H. E. Cowger, to
11 serve as the third member of the Board and as Chairman.

12 Our terms of office began July 1, 1993, and
13 expire June 30, 1995.

14 Will all persons who intend to make oral
15 presentations during this hearing please raise your
16 right hand and be sworn in.

17 (Whereupon, all witnesses were duly sworn by the
18 Chairman.)

19 CHAIRMAN COWGER: The documents which put this
20 hearing into being are hereby introduced as Exhibit
21 No. 1. Exhibit 1 consists of the contractor's request
22 for arbitration and all of the attachments to that
23 request.

24 Does either party have any other information it
25 wishes to put into the record as an exhibit?

1 (Discussion off the record)

2 CHAIRMAN COWGER: While we were off the record,
3 some exhibits were presented. The DOT presented a
4 bound package of information which we will identify as
5 Exhibit 2.

6 The contractor presented six sheets consisting of
7 typical sections, both original and modified, and some
8 supplemental information in regard to modification to
9 the typical sections, and a summary of erosion control
10 items. We will identify those as Exhibit 3.

11 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in
12 evidence.)

13 CHAIRMAN COWGER: Does either party wish to have
14 some time to examine the other party's exhibits?
15 I think it would be up to the contractor because the
16 DOT exhibit is more voluminous than the contractor's,
17 obviously. What do you all say?

18 MR. DUN: No, sir, we are ready to proceed.

19 CHAIRMAN COWGER: Both parties having stated that
20 they're ready to proceed, we will.

21 During this hearing the parties may offer such
22 evidence and testimony as is pertinent and material to
23 the controversy and shall produce such additional
24 evidence as the Board may deem necessary to an
25 understanding and determination of the matter before

1 it. The Board shall be the sole judge of the relevance
2 and materiality of the evidence offered.

3 The parties are requested to assure that they
4 receive properly identified copies of each exhibit
5 submitted during this hearing and to retain these
6 exhibits. The Board will furnish the parties a copy of
7 the transcript of this hearing along with its final
8 order, but we will not furnish copies of the exhibits.

9 The hearing will be conducted in an informal
10 manner. The contractor will elaborate on their claim,
11 and the DOT will offer rebuttal.

12 Either party may interrupt to bring out a point
13 by coming through the Chairman. However, for the sake
14 of order, I must instruct that only one person speak at
15 a time.

16 Also, so that we can be sure that our court
17 reporter is able to produce an accurate record, I will
18 ask that each of you introduce yourself the first time
19 you speak.

20 It is now appropriate for the contractor to make
21 an opening statement. We would like for the first
22 thing you state to be the amount of your claim and then
23 proceed on from there.

24 MR. DUN: The claim presented by Anderson
25 Columbia as detailed in Exhibit 1 is in the amount of

1 \$188,457.78.

2 I believe Exhibit 1 fairly well details what
3 Anderson Columbia believed to be the pertinent issues
4 with regard to this claim, but let me take a few
5 minutes to summarize.

6 The contract that gave rise to this claim
7 consisted of two state project numbers, 54060-3507 and
8 54060-3508. Those two projects involved the widening,
9 resurfacing, and the construction of paved shoulders on
10 two contiguous sections of State Road 59 running from
11 County Road 259 north 9.3 miles through the town of
12 Lloyd in Jefferson County, which is just east of
13 Tallahassee.

14 The project was bid based on the plans and
15 specifications, and those plans and specifications
16 included typical sections, which you will see as the
17 first two pages in Exhibit 3.

18 Those typical sections indicated that the work
19 would consist of expanding the existing 20-foot roadway
20 to a 24-foot roadway, constructing a shoulder partially
21 paved and partially grassed, and constructing lateral
22 ditches with a six-to-one front slope and a four-to-one
23 back slope maximum slope shown on the typical sections.

24 Also, in the original package or the original
25 plans and specifications, bid plans and specifications

1 were provisions for certain pay items for erosion
2 control which are summarized on the last sheet of
3 Exhibit 3 and provided for 46 tons of baled hay or
4 straw, no turbidity barrier, no silt fence, 301,000
5 plus square yards of seed and mulch and 28,000 plus
6 square yards of sod.

7 CHAIRMAN COWGER: May I interrupt you just a
8 second. The first three items that you described were
9 temporary-type items, and the last two are what are
10 sometimes referred to as permanent?

11 MR. DUN: That is correct, yes, sir.

12 MR. ROEBUCK: Did that change occur in the
13 supplemental agreement, the big one that you signed?

14 MR. DUN: There are quite a number of
15 supplemental agreements signed on the project. The
16 changes occurred through several of the supplemental
17 agreements.

18 MR. BREWTON: The major items were in the first
19 supplemental.

20 MR. DUN: Two other pertinent facts with regard
21 to the plans and specifications as presented for the
22 purpose of preparing the bid were that there were a
23 number of utility relocations that were required on the
24 project, primarily with Central Telephone and Florida
25 Power. There were other utilities involved.

1 Those utility relocations essentially went from
2 one end of the project to the other. There were very
3 little areas of the project that were not affected by
4 utility relocation work to be performed by those
5 utility companies.

6 CHAIRMAN COWGER: Again, is all of this overhead
7 or some of it underground?

8 MR. DUN: Underground and overhead, and a lot of
9 poles. In fact, all the poles along the right-of-way
10 had to be moved.

11 Finally, the original plans, the original
12 profile -- and if any of you have had the opportunity
13 to drive down State Road 59 you will notice this is a
14 nice little two-lane country road in a relatively hilly
15 section.

16 Just to give you an idea of what it's like, the
17 centerline profile, as reflected in the cross sections
18 of the plan show just under a 12 and a half foot
19 differential between the highest elevation point and
20 the lowest point in elevation, and with a maximum
21 change in grade along the profile being seven and
22 three-quarters feet over a 300-foot station-to-station
23 measure.

24 So, there are some fairly severe lateral slopes
25 with regard to the project.

1 The work commenced on February 3, 1992.
2 Immediately there were changes, and there were numerous
3 changes throughout the course of the project, all of
4 which have been discussed and resolved between the
5 Department and Anderson Columbia Company, with the
6 exception of the matter that is before the Board right
7 now.

8 It is important to mention some of these changes
9 because they ultimately affected the situation that
10 we're addressing today.

11 There were a series of stop-work orders that were
12 issued in order to correct some problems with the
13 right-of-way and to allow for archeological surveys to
14 be done.

15 If you will refer to Exhibit 1, Tab 5, you will
16 see a schematic of the project with the areas where
17 stop-work orders were ordered delineated as well as the
18 dates of the stop-work orders.

19 You will note that for the first five weeks of
20 work over 50 percent of the project area access was
21 denied to Anderson Columbia so that additional work or
22 data could be gathered by the Department.

23 Subsequent to those first five weeks, for the
24 next ten weeks various areas were denied, and they
25 weren't necessarily the same areas that were denied

1 previously for access, so that additional data could be
2 gathered by the Department.

3 CHAIRMAN COWGER: May I interrupt just one
4 second --

5 MR. DUN: Please.

6 CHAIRMAN COWGER: -- to instruct the DOT
7 something, if I could. He's going through now kind of
8 a factual statement of what occurred.

9 When he completes that, I would like for DOT to
10 come back and say, yes, we agree with the facts, or
11 these are the particular facts that we rebut or don't
12 agree with, before we get into the matter of the rain
13 event and all of that, so that we can kind of zero in
14 and say, okay, we agree on this. I think that would be
15 a good point.

16 MR. BENSON: We're trying to make notes here so
17 we can respond.

18 CHAIRMAN COWGER: I'm asking you, Mr. Dun, when
19 you get to that point where you're through outlining
20 the facts, stop, let them come back, and let's get that
21 out on the table and resolved before we move on to the
22 more controversial part of it.

23 MR. DUN: Yes, sir.

24 CHAIRMAN COWGER: I think that would save us
25 time.

1 MR. DUN: Yes, sir. During the period of time
2 the first 15 weeks, Anderson Columbia could only work
3 in certain areas of the project. Of course, the
4 clearing and grubbing operations were the first
5 operations to get started. During the first five
6 weeks, most of the area where work was allowed was in
7 fact cleared and grubbed.

8 But then when the second stop-work order came
9 out, some of that cleared and grubbed area was then
10 removed from access for additional work to be done, and
11 other areas that previously we had not been able to
12 work in, we were allowed to go to work in and clearing
13 and grubbing could start in those areas.

14 Once the clearing and grubbing was done, the
15 utilities were then able to move in and begin their
16 relocations. It was a prerequisite for the utilities
17 to do their relocation work, as stated in the utility
18 relocation documents in the bid package, that clearing
19 and grubbing be completed by the contractor prior to
20 them starting their work.

21 Unfortunately, once areas were cleared and
22 grubbed and made available to the utilities, the
23 utilities did not move immediately in to do their
24 relocation work and did not do their relocation work
25 necessarily in an orderly fashion, from one end of the

1 project to the other, or one end of the section to the
2 other. They skipped around.

3 That is the subject that has been addressed by
4 another supplemental, and in fact has been determined
5 that there was significant disruption to Anderson's
6 operations as a result of the way the utilities tackled
7 their work, both in terms of when they moved in, how
8 long they took, and the fact that they moved around the
9 project from place to place.

10 What this essentially did, though, was leave
11 areas that were cleared and grubbed unavailable for the
12 continuation of other operations, be they earthwork
13 operations or paving operations, because the utilities
14 were still in the way and had not completed their work.
15 So, substantial areas of the site were left cleared
16 longer than would have been desired.

17 The last thing that happened, the changes or the
18 change to the typical sections that resulted from the
19 additional survey work and the archeological survey
20 that was performed for the DOT during the first 15
21 weeks of the project.

22 You will see those new typical sections in
23 sheets 3 and 4 of Exhibit 3. And in sheet 5 of
24 Exhibit 3, you will see a brief synopsis of the
25 difference both on the right roadway and the left

1 roadway of the two typical sections.

2 Basically what happened with the issuance of
3 the supplemental agreement number 1 in the typical
4 sections, the new typical sections, were no change to
5 the pavement construction, no change to the shoulder
6 construction, but significant changes to the front and
7 back slopes.

8 Basically the amount of right-of-way that was
9 allowed to be used was narrowed, which required much
10 steeper slopes in order to either meet the existing
11 elevations at the edge of the work area or -- and/or to
12 allow for the construction of lateral ditches to move
13 water.

14 All of these facts -- let me also mention that
15 supplemental agreement number 1 is in Exhibit 1 under
16 Tab 6, I believe, and attached to that you can see in
17 the last three pages under that tab, you can see the
18 changes that were made with regard to the temporary and
19 permanent erosion control items. And you will note
20 that the temporary erosion control items, the only
21 change that was made with the supplemental was the
22 addition of 1,000 feet of silt fence.

23 CHAIRMAN COWGER: In order to find that thousand
24 feet, we've got to go through and add up some numbers,
25 don't we? Doesn't it show up more than one place?

1 MR. DUN: It will show up in two places because
2 there are two project numbers. I'm sorry, I made a
3 misstatement. It was just pointed out to me --

4 MR. BENSON: The Department concedes the fact
5 that a thousand feet were added by supplemental
6 agreement number 1.

7 MR. DUN: There was also some ditch pavement
8 added in that supplemental.

9 CHAIRMAN COWGER: Okay.

10 MR. DUN: That basically sets the stage for the
11 condition of the job when we come up to the rain then
12 of June 9. I will pause at this point.

13 CHAIRMAN COWGER: I think now would be the time
14 for the DOT to come back and confine yourself to the
15 facts that have been stated and any rebuttal that you
16 have of that.

17 MR. ROEBUCK: Could I ask a question. The
18 original job, how many days was the original contract?

19 MR. DUN: 360?

20 MR. BENSON: 310.

21 MR. DUN: Thank you.

22 MR. BENSON: You're welcome. Okay. In response
23 to the contractor's opening statement, the Department
24 finds itself in agreement on a number of issues, or at
25 least on the surface of a number of issues.

1 The contractor is correct, there were 46.2 tons
2 of baled hay or straw provided in the original
3 contract, no temporary turbidity barrier or silt fence
4 was provided in the original contract. Supplemental
5 agreement 01 addressed the silt fence.

6 It was at the request of the contractor at the
7 preconstruction conference. He notified the Department
8 there was no silt fence or silt barrier. Supplemental
9 agreement 01 among other things added a thousand feet
10 of staked silt fence. That was a quantity agreed to
11 and a price agreed to by the Department, the
12 contractor, and a supplemental agreement was signed.

13 This is also included in the Department's
14 Exhibit 2, Tab G.

15 The supplemental agreement 02, among other
16 things, added an item for turbidity barrier. Again,
17 quantity and the amount were agreed to by both the
18 Department and the contractor.

19 The contractor is correct as well in spelling out
20 pretty much the events related to delays and effects of
21 utilities, archeological, historical site preservation.
22 You name it, we had a lot of problems out there.

23 Again, those were, in the terms of the
24 Department, were resolved to the satisfaction of both
25 parties.

1 We have executed supplemental agreements not only
2 for the delays because of utilities but also because of
3 the State historical preservation impacts.

4 The Department has not gone back and verified
5 actual dates and locations of impacts, but we would say
6 that substantially what the contractor represented as
7 being off limits to him was pretty much correct.

8 These changes and impacts to a large degree
9 were not the responsibility of the Department either,
10 although we do have relocation agreements with
11 utilities. We don't have sometimes what it takes to
12 get them to move.

13 In any regard, we thought that these issues were
14 settled. And like I say, supplemental agreements were
15 prepared that supposedly settled the issue.

16 It's the Department's feeling at this
17 particular -- at least for these particular issues that
18 these supplemental agreements signed represented full
19 and final compensation for the impacts, whatever, of
20 all of these delays, and that bringing these issues up
21 is more or less a violation of some of the previous
22 supplemental agreements that we have entered into.

23 THE COURT: Could I interrupt you a minute and
24 ask you a couple of questions.

25 MR. BENSON: Yes, sir.

1 CHAIRMAN COWGER: Pick up contractor's Exhibit 1.
2 Look at Tab 5. Is your testimony that you essentially
3 agree with that?

4 MR. BENSON: Yes, sir, I think probably the facts
5 would bear that out. We have numerous -- they're not
6 included in the Department's Exhibit 2, but there were
7 numerous stop-work orders issued. Our supplemental
8 agreement bears that out.

9 CHAIRMAN COWGER: I understand. I just wanted to
10 make sure. Your testimony says that information is
11 essentially correct?

12 MR. BENSON: Yes, sir.

13 CHAIRMAN COWGER: That's all I wanted to find
14 out, just wanted to make sure we have it pulled
15 together.

16 MR. BENSON: Yes, sir.

17 CHAIRMAN COWGER: Also, in regard to your
18 testimony that you just gave prior to being
19 interrupted, you said that you felt that the
20 supplemental agreements that had been executed in
21 essence provide full compensation for any extra work.

22 What date was the last of those supplemental
23 agreements entered into? Do you have a feel for that?

24 MR. BENSON: Yes, sir. All of the -- let me put
25 it this way. Basically what is giving rise to this

1 claim is the rain event of June 9. So, beginning with
2 supplemental agreement 02, it was -- the date of the
3 agreement is 23 July 1992. It was the earliest of the
4 remaining nine supplemental agreement 01, which added
5 staked silt fence prior to the rain event, was dated
6 April 1, 1992. I think the last supplemental agreement
7 was signed or at least the date of the supplemental
8 agreement was August 9, 1993.

9 CHAIRMAN COWGER: What tab of yours is that?

10 MR. BENSON: Okay, tabs -- let's see, Tabs G
11 through O are supplemental agreements, exhibits.
12 Exhibits H through O are the ones that occurred after
13 the rain event, that were after the rain event.

14 CHAIRMAN COWGER: Okay.

15 MR. BENSON: Again, the -- all the delays that
16 were mentioned by the contractor, as he mentioned, were
17 all settled. All outstanding issues were settled
18 except for the issue that brings us here today.

19 CHAIRMAN COWGER: Do I understand that your
20 testimony is the issue that we're here on today,
21 through all of this chain of supplemental agreements,
22 was left outstanding?

23 MR. BREWTON: No, it was agreed that the impacts
24 were justified in the settlement. We feel that it was
25 both our faults and that basically we gave them extra

9
1 days to correct the problem. And we left the borrow
2 pit open to supply any excess dirt that he needed that
3 we paid for.

4 So we compensated him in time and materials. And
5 his half of the thing was to supply the labor to do the
6 work.

7 CHAIRMAN COWGER: You said the borrow pit was
8 left open. Is it true that DOT did compensate him for
9 all of the borrow under a contract item that was
10 required to do this repair work after the storm event?

11 MR. BREWTON: He had three pits to begin with.
12 We left, I think, the middle one open.

13 MR. BENSON: To the best of my knowledge we did
14 not deny payment of borrow.

15 MR. ANDERSON: We didn't use any extra borrow.
16 We used a little less than plan quantity.

17 MR. ROEBUCK: You had to go chase what you lost
18 and bring it to your source?

19 MR. BREWTON: Changing the back slopes, bringing
20 them in, it cut the quantity down.

21 MR. MOREFIELD: We're starting to get into the
22 issues.

23 CHAIRMAN COWGER: Okay, let's go on.

24 MR. BENSON: Anyway, I'm not sure exactly what it
25 has to do with the issue, but the baled hay and straw,

1 the plan quantity was 46.2. The contractor did use a
2 little over 85 tons.

3 The quantities provided in the contract are just
4 estimates. They make no representation that if you use
5 this amount the project will be saved or will meet
6 standards. It's just the engineer's best judgment at
7 the time as to the quantity that should be provided.

8 You know, oversight no doubt played into no silt
9 fence being provided, but quantities were provided and
10 agreed to by all parties.

11 MR. MOREFIELD: That was prior to the rain event?

12 MR. BENSON: Yes, sir.

13 MR. MOREFIELD: So all the items that were on the
14 final project were there or not?

15 MR. BENSON: No, sir, with the exception of the
16 turbidity barrier, the floating turbidity barrier.

17 MR. MOREFIELD: Floating? Was there staked?

18 MR. BENSON: Yes, sir. We put staked in on
19 April 1.

20 MR. MOREFIELD: So you had the staked prior?

21 MR. BENSON: Yes. It's obvious now in retrospect
22 that the quantity was not sufficient. The Department
23 paid at the contract unit price, entered into a
24 supplemental agreement toward the end of the job to
25 document and pay for and recover funds for any

1 additional -- any overruns and stuff.

2 So we basically provided prior to the storm event
3 staked silt fence and baled hay or straw.

4 Unless the Board has any more questions, I guess
5 that that is the Department's statement.

6 CHAIRMAN COWGER: I think that covers things
7 very well. The items that were added in the erosion
8 control area, though, you added two items, didn't you,
9 turbidity barrier and silt barrier by different
10 supplemental agreements?

11 MR. BENSON: Yes, sir. Supplemental agreement 2
12 added the turbidity barrier. We must admit it was
13 after the rain event of June 9.

14 MR. BREWTON: That was added for a 96-inch pipe
15 culvert extension. That item was left out and we had
16 to readdress the culvert. That was -- the original
17 survey called for --

18 MR. BENSON: Basically after our discussion with
19 general counsel in Tallahassee, they informed us that
20 case law has established that basically the owner is
21 only responsible for granting time in a situation like
22 this. And we have provided some case studies.

23 CHAIRMAN COWGER: I think we are beyond what we
24 set out to do at this point. You can get back into
25 that later.

1 Now, the silt fence was added by supplemental
2 agreement prior to 6-90?

3 MR. BENSON: Yes.

4 CHAIRMAN COWGER: Mr. Dun, why don't you go ahead
5 and proceed.

6 MR. DUN: Okay. I have a question as a matter of
7 procedure here. I do have some comments in rebuttal to
8 the comments just made by DOT's representative.

9 CHAIRMAN COWGER: Now is the time to bring them
10 out. We are talking about the factual situation right
11 now.

12 MR. DUN: Well, I'm not disputing any facts that
13 was brought up by him, just some understanding of the
14 way things proceeded.

15 Just to continue in that regard, the dates as
16 testified to of the supplemental agreements are
17 correct, there's no question about that. We have all
18 got copies of the agreements.

19 All the issues that were addressed by
20 supplemental agreements, from supplemental agreement
21 number 3 through the last one which I believe is 8 --

22 MR. BENSON: Number 9.

23 MR. DUN: -- were on the table in the June, July,
24 August '92 time frame. They were resolved individually
25 in working with the district personnel for the DOT,

1 the early June '92 time frame, by that time Anderson
2 Columbia had been granted access to the entirety of the
3 site. Most, if not all, of the site had been cleared
4 and grubbed.

5 The utilities were far from complete with their
6 relocation work. In fact, utility relocation work did
7 not complete until November, some five months later
8 when the final utility relocation work was completed.

9 Then on June 9 a tremendous rain hit. Joe, help
10 me with the quantity and the inches.

11 MR. ANDERSON: About six inches.

12 MR. DUN: Six plus inches of rain overnight.

13 MR. ANDERSON: It was within about three hours.

14 MR. DUN: At this point I would like to introduce
15 the photographs, just to give everyone an idea of what
16 we were looking at. I've got them in two sets here.

17 The first set -- all of these were basically
18 taken after the rain event. The set of photographs
19 that you're looking at now are really intended to give
20 you an idea of the amount of severe slope that was
21 present on the job. Keep in mind that the maximum
22 slope that this job was bid for was a four to one.

23 CHAIRMAN COWGER: Some of these photographs show
24 the repair work underway?

25 MR. DUN: Yes, sir.

1 CHAIRMAN COWGER: What you're really trying to
2 indicate is what the configuration of the cross section
3 is?

4 MR. DUN: Yes, sir.

5 CHAIRMAN COWGER: To some amount of damage. But
6 some photographs don't show the damage because the
7 repairs are underway, is that correct?

8 MR. DUN: Yes.

9 MR. ANDERSON: A lot of that is maintenance work,
10 keeping it --

11 MR. DUN: These are photos that were taken in the
12 same time frame after the event, and they will give you
13 more of an idea of the extent of the damage and the
14 amount of water that we were faced with handling, not
15 only the water, but its effect.

16 CHAIRMAN COWGER: What do I see on the back
17 slope? Is that --

18 MR. BREWTON: Topsoil, isn't it?

19 CHAIRMAN COWGER: Is that the topsoil? I see a
20 brown looking material that's eroded away.

21 MR. BENSON: That's topsoil, isn't it?

22 MR. DUN: Yes, it's not grass.

23 CHAIRMAN COWGER: Was there any sod in place at
24 this time?

25 MR. DUN: I don't believe so.

1 CHAIRMAN COWGER: Did you use any sod on this job
2 at all?

3 MR. BENSON: Yes, sir, 97,000 square yards.

4 CHAIRMAN COWGER: But it was put in later, after
5 the rain event?

6 MR. BREWTON: Much later. It looks like the back
7 slope stayed pretty well intact. It's just the front
8 slope that he was working on.

9 MR. DUN: I think you will find some of the back
10 slopes disappeared.

11 CHAIRMAN COWGER: For the record, the photographs
12 that were presented in two groups, the Board examined
13 the photographs. The photographs were then passed on
14 down to the DOT to examine.

15 DOT, I will give you a minute to answer this
16 question, but in your mind are these photographs
17 factual that depict the situation on or about June 9,
18 1992?

19 MR. ROEBUCK: The day after.

20 MR. BENSON: Yes, the 10th. It's my
21 understanding the rain occurred late in the evening,
22 overnight. So, these would be the -- what happened.
23 Yes, the Department -- this seems to be pretty
24 representative.

25 CHAIRMAN COWGER: I think we can move on then,

1 Mr. Dun.

2 MR. DUN: Faced with the situation of having to
3 do some extensive repair work, and as a result of the
4 rain event, Anderson Columbia requested that the
5 Department consider in accordance with its own
6 specification reimbursement for the work.

7 And the Department has the ability to reimburse
8 the contractor for the cost of repairs that result
9 from extensive or catastrophic damage. That is in the
10 specifications, stated being at the discretion of the
11 Department.

12 It is Anderson Columbia's position, and it was
13 at that point in time and it is to this day, that the
14 primary contributing factors to the damage were the
15 condition of the job at the time of the rain.

16 And those conditions were dictated by the delays
17 in starting work, the fact that work was allowed to be
18 undertaken only sporadically in various sections of
19 the project in the opening weeks.

20 The delays in the utilities significantly
21 affected being able to proceed with sodding because
22 with the utilities not having finished their relocation
23 efforts in an area, placing sod would have meant having
24 it dug up by the utilities, destroyed, and then
25 replaced later.

1 And finally, of course, the significant change to
2 the severity of the slopes that were dealt with which
3 contributed more to the damage.

4 That's basically Anderson's position. We felt
5 that the major, major cause of the damage was due to
6 certain acts that were not Anderson's fault, and
7 Anderson had no option with how to deal with them, and
8 we are therefore requesting that the Department at its
9 discretion be allowed to reimburse for the cost.

10 The quantities of material for rework that were
11 required are presented to you in Tab 8, under Tab 8 of
12 Exhibit 1. Those quantities to our knowledge have
13 never been disputed, only whether or not there was
14 going to be payment made for those quantities has been
15 the only dispute that we are aware of.

16 MR. ROEBUCK: Explain in item 121, regular
17 excavation, on your Tab 8 it shows 18,000 yards, yet in
18 your claim you show 36, more or less doubled. Is there
19 a reason for that?

20 MR. ANDERSON: One is for one job and the other
21 is for the other job.

22 MR. ROEBUCK: Each of them had about half?

23 MR. ANDERSON: One job was about half.

24 MR. ROEBUCK: Okay.

25 CHAIRMAN COWGER: Do you have a satisfactory

1 answer, Mr. Roebuck?

2 MR. ROEBUCK: Yes, just in Tab 8 he only has one
3 job shown there.

4 MR. DUN: The other copy we could not locate.
5 There were two pages to that FAX transmission. If you
6 will look at Tab 9, the engineer addresses the total
7 quantities for both jobs. That's where the 36,000 came
8 from.

9 The unit prices that are requested are the
10 contract unit prices that were agreed to by the
11 Department and Anderson Columbia for those work items
12 under the contract. Of course, we added the
13 arbitration filing fee in the total of the claim.

14 CHAIRMAN COWGER: Before you leave that, I need
15 to ask you a couple of questions. First, when looking
16 at this, and correct me if I'm wrong, the unit prices
17 you're asking for on the topsoil and the embankment
18 are not the original prices, they are prices that were
19 adjusted at some point in time by supplemental
20 agreement?

21 MR. DUN: Yes, sir.

22 MR. BENSON: I think supplemental agreement 1
23 addressed the contract price changes in recognition of
24 the fact that the work changed.

25 CHAIRMAN COWGER: We picked that up. That's all

1 I really want to know at this point.

2 MR. DUN: That is correct.

3 CHAIRMAN COWGER: The other question, how did you
4 arrive at those quantities? DOT is bound to ask that
5 question.

6 MR. BENSON: The Department is interested in
7 that.

8 CHAIRMAN COWGER: We might as well get that out
9 right now, then we won't have to deal with that later.

10 MR. ANDERSON: We don't have the plans here, but
11 we had from station 1 to station 250. We knew how
12 many -- how much there was, plan quantity on the job.
13 We had the job up to grade, had the dirt on the job
14 from this station to this station. I don't remember
15 those stations, never knew them really, but had the
16 dirt up to grade on the site.

17 After the rain -- and we knew how many loads of
18 dirt a day we was moving. We kept up with our loading
19 counts.

20 Then as we started repairing that work, we had
21 the same amount of equipment, same people doing it. We
22 kept up with it for several days. I don't know if it
23 was every day. I couldn't say every day, but we kept a
24 load count on the job for several days.

25 We know how many days we worked on repairing this

1 rain damage. And that's what we come up with, me and
2 the engineer that was on the job. We got it from the
3 superintendent on the job. That's how we arrived at
4 these numbers.

5 CHAIRMAN COWGER: When you mentioned the
6 engineer, that was your engineer, right?

7 MR. ANDERSON: Sir?

8 CHAIRMAN COWGER: I said the engineer you
9 referred to was your engineer, not the DOT's engineer?

10 MR. ANDERSON: No, it was Sandra Norton. I give
11 her the -- she seen the quantities.

12 CHAIRMAN COWGER: DOT, I think you will want to
13 address that when you get ready for your rebuttal, but
14 let's not do it right now because we will get off track
15 if we do.

16 A question about these quantities, though. The
17 topsoil quantity appears to be about 25 percent of the
18 revised plan quantity, the plan quantity that was in,
19 I guess, supplemental agreement number 1 or 2. The
20 embankment quantity appears to be about twice what was
21 in that revised plan quantity for regular excavation.

22 Does that seem to make sense?

23 MR. ANDERSON: On the topsoil, a lot of the
24 topsoil stayed pretty well intact. We just did some
25 repairs to it. The regular excavation we did move it

1 twice.

2 MR. DUN: The thought there, if I may address
3 that, there were quantities of regular excavation and
4 borrow excavation. The borrow, of course, gets put in
5 place. There was not additional borrow required in
6 order to make the repairs.

7 What had to be done was material that had already
8 been moved to the project and put in place on the
9 project got moved by the rain to some place where it
10 shouldn't have been. So it had to be moved back, which
11 was more in the line of a regular excavation pay item
12 than a borrow excavation or any other type of pay item
13 that was available in the contract.

14 CHAIRMAN COWGER: I think I understand.
15 Actually, just to make things clear, you all call it
16 embankment, but the bid item was actually regular
17 excavation?

18 MR. DUN: Yes, sir.

19 MR. BREWTON: Uh-huh.

20 CHAIRMAN COWGER: Unless the Board has any
21 further questions at this point, I think we -- if
22 you're complete with your statements for the moment,
23 I think we ought to let DOT rebut.

24 MR. DUN: Thank you.

25 CHAIRMAN COWGER: Thank you. Okay, DOT.

1 MR. BENSON: Mr. Dun is right, the Department --
2 I don't know that we have ever contested the
3 quantities, primarily because it's the Department's
4 judgment that, you know, we're not obligated to
5 reimburse him anyway for repairs that were done.

6 As Mr. Brewton stated earlier, the Department
7 did give, as allowed in the specification, we did give
8 him time for weather delays. We understand that he
9 couldn't work on controlling items of the work. So a
10 time extension was given.

11 As I was stating earlier, upon conversation with
12 the general counsel's office in Tallahassee, they said
13 that there was case law that supported the Department's
14 position that in this particular case when there's an
15 act of God -- and of course all the rain is an act of
16 God -- that when the contract does not specify who is
17 responsible, you know, then the Department or the
18 owner's only responsibility is just to provide
19 additional time, which we did.

20 Those were documented on daily diaries. In this
21 particular case, I think the contractor even signed
22 agreeing, you know, that the effects of weather were
23 such, and those days were granted.

24 So far as -- and to the Department, that's the
25 main issue, is to whether we have responsibility or

1 not. We don't dispute the damage that occurred.

2 MR. BREWTON: I would like to step in here. The
3 nature of the work on this job was we came in here, did
4 a two-foot widening on the existing pavement, then came
5 back and built a four-foot shoulder.

6 So after the clearing and grubbing, the basic
7 process was to roll off the first clip, build your
8 two-foot widening, then come back and rolled off
9 another clip, build your four-foot shoulder and then
10 shape it to meet your four-point slope.

11 A lot of the dirt on this job was balanced pretty
12 well to begin with. So basically all he was doing was
13 moving it off the front slope and putting it on the
14 back slope, moving it down the road a couple hundred
15 feet, a quarter mile, half mile, to balance it out.

16 So, I think if you look at the pictures you can
17 see the damage that was from where he had been working
18 on the front slopes. That was the erodible material.

19 Then if you look at the indexes, we provided a
20 silt fence. If you look at that and the slope of the
21 roadway, you should have had a ditch barrier every 400
22 foot. That wasn't done.

23 Very minimal output on the erosion control items.
24 After the clearing and grubbing, he didn't shape the
25 back slopes then and there and sod them or seed them,

1 whatever the slope needed. He waited until the very
2 end. That's an item you can look in the estimates that
3 was taken care of, you know, on September, October,
4 November.

5 CHAIRMAN COWGER: At a convenient point I would
6 like to stop you. I think you are on a very key point
7 that we need to know as the Board. And let me restate
8 what you just said to be sure that I understood what
9 you said, and then we will let the contractor have the
10 opportunity to make a statement about it.

11 What you're saying is at the time of the rain
12 event on June 9, 1992, he had done no grassing work at
13 all? Is that what I heard you say?

14 MR. BREWTON: Yes.

15 CHAIRMAN COWGER: All the grassing work was done,
16 I don't care when, except it was subsequent to June 9?

17 MR. BENSON: I think the photographs that have
18 been presented by the contractor will present that.
19 I don't see any grass anywhere.

20 MR. MOREFIELD: I saw some pictures that had
21 something on the back slope. Was that natural
22 revegetation?

23 MR. BREWTON: Yes.

24 MR. MOREFIELD: Did that sustain? Did the areas
25 that had natural grass or weeds grow back? Did it

1 survive the rain event?

2 MR. BREWTON: Yes, sir, it panned out very well.

3 MR. MOREFIELD: There are some pictures that the
4 contractor showed me that showed a back slope in one
5 picture. I couldn't tell whether it was sod or weeds.
6 I just noticed it was still there.

7 MR. BENSON: Correspondence between one of the
8 project engineers on the project from RS and H to the
9 Department, to the construction engineer noted that in
10 areas where there was natural revegetation, that these
11 areas faired much better than those that had no
12 vegetation whatsoever.

13 MR. MOREFIELD: Did you all -- I notice the
14 contractor said six inches. Did you all verify that?
15 How did you get the six inches of rain?

16 MR. ANDERSON: It was recorded there at the fire
17 tower on the job site. There were several rain gauges,
18 more than one on the job.

19 MR. BENSON: On the surface whenever -- and let
20 me preface my comments by saying that on the date in
21 question, I was resident engineer in Pensacola, so
22 I wasn't there to know whether it rained. But I do
23 know, and I think you all realize that six inches in
24 three hours is a pretty substantial rain. That's quite
25 extensive.

14 1 What I did do is contact National Weather
2 Service, who in turn put me in touch with -- NOA,
3 National Oceanic Atmospheric Administration, and got
4 information for them from the month of June. They have
5 a recognized recording station three miles west of
6 Monticello. They've also got one at the -- and that's
7 some northeast of the project approximately eight or
8 nine miles to Monticello or so. They've also got one
9 in Tallahassee.

10 Tallahassee recorded for that date a total
11 accumulation of only 2.8 inches for the entire day.
12 The recording station in Monticello recorded only two
13 inches.

14 And I don't know, in my mind I can't, you know,
15 determine whether it's more significant the total
16 volume or whether it is the intensity of the rain.

17 CHAIRMAN COWGER: Rather than us discussing this,
18 if Mr. Morefield will agree, those weather stations
19 were remote from the project, so they're somewhat
20 suspect.

21 MR. BENSON: I understand.

22 MR. ROEBUCK: And you have some correspondence
23 that relatively agrees to the amount?

24 MR. BENSON: Let me show you. If you will, look
25 at Tab S in the Department's Exhibit 2. That was the

1 daily diary for that date, and the second page gives
2 the weather report.

3 Under general comments it said, "Heavy rains
4 began at three o'clock and continued through the
5 evening." No actual representation of the duration of
6 the storm, but it says, "Locals report up to six
7 inches."

8 So, what we wanted to show, and I'll be brief,
9 Mr. Chairman, realizing, you know, there were some
10 flaws in the Department's approach to this, but using
11 some -- using the data provided by NOAA and also using
12 some design criteria established by the Department out
13 of the drainage manual, a six-inch storm in that
14 particular area represents about a 75-year storm, a
15 75-year storm event.

16 The six inch, the one point eight or so inches in
17 three hours, just assuming the duration of the storm
18 was three hours, represents more along the lines of
19 about an annual event, which on the surface seems a lot
20 less severe.

21 The Department's contention is not the severity
22 of the rain, it's the condition of the project.

23 CHAIRMAN COWGER: At that point I'm going to shut
24 the conversation about the rain off and let's go on.
25 We agree that it was a rather severe rain, and we saw

1 photos to show what the rain did. Now let's go on and
2 talk about the key issue, which is what you proposed to
3 start talking about.

4 MR. BENSON: The condition of the project at the
5 time?

6 CHAIRMAN COWGER: Correct.

7 MR. BENSON: Okay. The Department basically has
8 three areas that we use to discuss erosion control:
9 the standard specifications, Section 104 of the
10 standard specs, the standard index 102 and I believe
11 103 of the standard index shows typical installation,
12 best management practice, I guess you could call it,
13 for erosion control. And then there's the contractor's
14 erosion control plan that was approved by the
15 Department.

16 There are just two or three things. One in
17 particular, the standard index 102, if you will look
18 at Tab D in the Department's Exhibit 2, it shows a
19 little -- a chart. What that chart does is it shows
20 recommended spacing for Type 1 and Type 2 hay bale
21 barriers and Type 3 and Type 4 silt fences in ditch
22 paving.

23 Basically minimum installation for the hay bales.
24 They give a variety of circumstances, light cohesive
25 soil, light rain, heavy rain, and all sorts of

1 combinations of rain and soil conditions.

2 The interesting thing to note in my opinion is
3 even on zero grade, regardless of the types of soil,
4 the chart -- all the curves converge there at 400 feet,
5 400-foot spacing, which we interpret as meaning to be
6 minimally protected. You should see hay bales and/or
7 silt fences every 400 feet.

8 Naturally, in the condition of this project,
9 given its, you know, exposed condition and the grading
10 on the ditches, you know, you could expect to have seen
11 more substantial or more frequent spacings in between
12 the hay bales and/or silt barriers.

13 Granted, if the contractor had done this on
14 June 9, who knows, we still may have had a lot more, or
15 more erosion than what was required, but the contractor
16 would have fulfilled his obligation under the contract.

17 The other thing, too, had the contractor
18 installed hay bales and/or silt barriers at the minimum
19 frequency called for in the standard index, we would
20 have severely overrun the quantity. But that's not a
21 factor. The Department does not govern, or we don't
22 allow money -- we're not supposed to allow money and
23 quantities to enter into the equation. What we want to
24 do is protect the project.

25 Another thing I wanted to point out, too, in the

1 contractor's erosion control plan and also in the
2 standard index --

3 CHAIRMAN COWGER: Excuse me just a minute,
4 Mr. Benson, before you leave this index and before you
5 leave the discussion on hay bales, let me ask you a
6 couple of questions.

7 MR. BENSON: Yes, sir.

8 CHAIRMAN COWGER: First off, you talk about what
9 should have been done according to the index as an
10 absolute minimum. What was done as far as hay bales
11 are concerned? Or were you going to get to that in a
12 minute?

13 MR. BENSON: I'm going to get to that, but I can
14 go ahead and present that now.

15 CHAIRMAN COWGER: I would like to hear that now.
16 I think it fits together better.

17 MR. BENSON: The contractor has a lot more
18 photographic documentation than the Department, but Tab
19 X, I believe it is, what we have done, we have tried to
20 represent, Mr. Chairman, the project in three areas.
21 One is -- and we're not sure of the exact dates of the
22 photographs, but we think that they generally show the
23 condition of the project prior to the event of 6-9-92.

24 CHAIRMAN COWGER: To interrupt you just a second,
25 in Tab X, some of them according, to the back, are

1 dated later. But the first three pages --

2 MR. BENSON: The first two --

3 CHAIRMAN COWGER: -- are 6-9-92 or earlier?

4 MR. BENSON: Yes. Now if the contractor wishes
5 to dispute that, we really can't refute that a whole
6 lot. It doesn't represent a lot of shoulder damage,
7 as was represented previously on some of the other
8 photographs.

9 Basically two things I want to point out on the
10 first page. If you look at the lower right-hand
11 corner -- lower left-hand corner, the picture with the
12 hay bales that are displaced, if you will notice, first
13 of all, in the line of sight you can't see any more hay
14 bales in there.

15 The other thing is that in the contractor's
16 erosion control plan, which is also tabbed in the
17 Exhibit 2 and in the standard index is a minimum
18 staking requirement is two stakes per bale. That's not
19 provided. Would it have provided more substantial
20 erosion control capabilities had they been staked
21 properly, you know, it's anybody's guess. But like
22 I say, the standard index calls for two stakes.

23 In the other photos you will see in the upper
24 right-hand corner a substantial length of a ditch
25 section. Obviously you can see at least 400 feet. You

1 don't see any hay bales.

2 On the next page, the next four photos, again in
3 the lower right -- lower left-hand corner you see
4 another set of hay bales, which is nice. Then you see
5 some more up the road. It could be 400 feet. That may
6 be okay. But you continue to see one stake per bale.

7 CHAIRMAN COWGER: I think we have enough on that.

8 MR. BENSON: We offered the next set of photos
9 just to show the damage and to show primarily that the
10 damage was to the front slope, to the area where
11 material had been brought in. It went down to a
12 hardpan, so it appears.

13 CHAIRMAN COWGER: In your opinion, in looking at
14 all of this, let's say in your interpretation of
15 looking at all of this, the damage was substantially to
16 the front slope?

17 MR. BENSON: Yes, sir. I think the evidence will
18 bear that out.

19 CHAIRMAN COWGER: Okay.

20 MR. BENSON: And also that -- in the photographs,
21 the final photographs, while they probably don't meet
22 the minimum requirements, you will see that on 9-11-92
23 the contractor has the project in a much better shape.
24 He's utilized a lot of silt barrier, some hay bales and
25 stuff, and the attempt was made following the rain

1 event, I think, to do better.

2 The final thing we want to offer is a commentary
3 that would be Tab U. This was an independent letter
4 sent to the Department from the Department of
5 Environmental Regulation. Basically what that does is
6 as a result apparently of a rain event the DEP or
7 DER -- now DEP went out and inspected the project.

8 MR. MOREFIELD: When was that?

9 MR. BENSON: The inspection was on May 28, 1992
10 approximately two weeks prior to the event. The letter
11 was sent by Sandy Norton of the Department and copies
12 went basically to the district director of production
13 in Chipley.

14 But basically their -- Mr. Bush, who wrote it,
15 Eric Bush, he noted that there were no filter fences
16 and few hay bales observed on approximately nine miles
17 of disturbed right-of-way during a recent rain event.

18 So, it wasn't just the Department's opinion that
19 these bales weren't in or the appropriate erosion
20 control devices weren't in.

21 MR. MOREFIELD: Let me ask you real quick. On
22 the contractor's exhibit Tab 10 there is a memo to
23 Anderson from --

24 MR. BENSON: Sandy Norton?

25 MR. MOREFIELD: No, Steve. And then apparently

1 down at the bottom he's referencing Department of
2 Environmental Resources has notified project personnel
3 two times that you're not in compliance with our
4 general permit.

5 Is that what you're talking about there or is
6 that something different?

7 MR. BENSON: Yes, sir. That's one of those
8 instances that they notified us. Basically we had
9 seven days to get the project in shape. And I will say
10 now -- I will say that from review of the records and
11 stuff, the contractor spent a lot of effort from the
12 receipt of this letter up until the rain event
13 installing hay bales and a silt fence. They did put
14 things in.

15 MR. MOREFIELD: On the same general -- looking
16 at your pictures now, the DOT exhibit, going to the
17 September pictures, is there, other than what I see as
18 just normal weed growth, is there any grassing that he
19 did?

20 MR. BENSON: No, sir.

21 MR. MOREFIELD: Is that all natural growth?

22 MR. BREWTON: That's topsoil that was stripped
23 off the job, stockpiled, just the natural weed and
24 seed.

25 MR. BENSON: It appears this is natural

1 revegetation.

2 MR. MOREFIELD: My point is then was -- either
3 contractor or the DOT can answer -- was there any
4 permanent grassing done between the June 9 and this
5 9-11-92, other than I see some obvious silt barriers
6 and hay bales added.

7 MR. BENSON: In defense of the contractor, now
8 these photographs were taken and documented, hay bales
9 and silt fence. We didn't take these from the aspects
10 of --

11 MR. MOREFIELD: That's why I'm asking in general.

12 MR. BENSON: I can't answer that question.

13 MR. MOREFIELD: I don't see any, in the
14 photographs, any sod adjacent to the pavement.

15 MR. BENSON: Mr. Brewton testified earlier that
16 the majority of the grassing items were done late in
17 the project. So, I'm not sure how late in the project
18 those were done. But based on the photographs here and
19 those that were given by the contractor, I don't think
20 there was substantial grassing as of 9-11-92.

21 CHAIRMAN COWGER: DOT, are you approaching the
22 end of your rebuttal, or is there going to be
23 considerable more?

24 MR. BENSON: Yes, sir, we can --

25 CHAIRMAN COWGER: I'm not asking you to stop, I'm

1 asking how close are you to finishing your rebuttal?

2 MR. BENSON: I think we are --

3 MR. BREWTON: I would like to say a couple of
4 more things. We had numerous claims on this job. The
5 utility claims with the telephone, which was the major
6 poles and pedestals out there for lines were corrected,
7 you know, solved July 1.

8 And then the last one with the power company was
9 later on in September. I think it was September.

10 Basically we feel that DOT has compensated for
11 all of the delays, all the way through the job, and the
12 contractor has agreed because he signed each one of the
13 SAs.

14 CHAIRMAN COWGER: We understand what you're
15 saying.

16 MR. ANDERSON: We've been compensated for those.

17 MR. ROEBUCK: You put this on the record early
18 on, and it never was addressed in your supplemental
19 agreements?

20 MR. ANDERSON: We're not discussing that.

21 CHAIRMAN COWGER: Gentlemen, I don't think we
22 need to discuss that issue. The Board can rule on
23 that. We have enough testimony from both sides on
24 that.

25 MR. BENSON: Let me add one more thing and then

1 I will be finished. Sections 104-6.2, this is out of
2 the standard specifications, it's Tab C, about the
3 third or fourth page, "Temporary erosion control
4 features may be authorized for use in controlling
5 erosion in areas where station structure or other
6 conditions not under control of the contractor," i.e.,
7 the areas where work has been suspended or the
8 contractor is held up because of utilities.

9 The contractor is still responsible for those,
10 even though he may not be able to go out and do what
11 you would term a major item of work, i.e., regular
12 excavation, topsoil or other items. He's still
13 responsible for that. The fact that there are delays
14 does not relieve him of any erosion control
15 responsibilities.

16 CHAIRMAN COWGER: We can read that.

17 MR. BENSON: Okay. That's it.

18 CHAIRMAN COWGER: All right. Now let me ask you
19 a couple of questions, if I could. You mentioned
20 that in your exhibit here there is a copy of the
21 contractor's erosion control plan.

22 MR. BENSON: Yes, sir.

23 CHAIRMAN COWGER: Without getting into any detail
24 on that, was that plan approved by the DOT? Without
25 getting into any detail at this point. Was that plan

1 approved by DOT?

2 MR. BENSON: Yes, sir.

3 CHAIRMAN COWGER: There was quite a bit of
4 discussion in Section 104, since it was brought to our
5 attention in the contractor's original presentation,
6 I went back and looked at it. It talks considerable
7 about temporary and permanent erosion control features.

8 DOT, tell us a little bit about any discussions
9 or correspondence that took place in the period during,
10 let's say, the month of May '92 and up in June, up
11 until the major rain event occurred between DOT and the
12 contractor about permanent erosion control features.
13 That's the first part of my question.

14 The second part is -- well, answer that, and then
15 I will ask the second part.

16 MR. BENSON: As to where the Department
17 specifically directed installation of permanent
18 features?

19 CHAIRMAN COWGER: Or even suggested.

20 MR. BENSON: I'm not aware of any discussions.
21 As you know, I was not affiliated with the project at
22 that time. I don't have any correspondence that would
23 indicate that the Department directed or suggested to
24 the contractor to put any in or not.

25 CHAIRMAN COWGER: Were you employed in your

1 present capacity or in a capacity high enough within
2 the Department during that period of time that we just
3 described to know what DOT's -- what District 3's
4 policy was on pressing for enforcement of the
5 provisions of the contract that deal with installation
6 of permanent erosion control features at the earliest
7 possible moment?

8 MR. BENSON: During this time I was the resident
9 construction engineer for Pensacola, Pensacola
10 residency.

11 It was always our philosophy -- and I don't know
12 if there's been anything written down -- that -- any
13 more than the specification -- that it makes a lot of
14 sense where it's possible to incorporate permanent
15 erosion control features into the project at the
16 earliest possible date.

17 CHAIRMAN COWGER: Did you push it?

18 MR. BENSON: In Pensacola? Yes.

19 CHAIRMAN COWGER: Let me ask the contractor.
20 Were they pushing you to put in your permanent erosion
21 control features prior to the rain event?

22 MR. ANDERSON: I have a letter here from the DOT
23 that says, "All erosion" -- this is in Tab T from the
24 DOT. It says six inches of rain fell.

25 "All erosion control features that were approved

18

1 for this contract at the time of the rain were in
2 place, but most of it was destroyed by the heavy rain."

3 CHAIRMAN COWGER: But that refers to temporary
4 erosion control features, does it not?

5 MR. ANDERSON: There was never no permanent
6 erosion control.

7 CHAIRMAN COWGER: Now, my next -- I think you've
8 answered my question there.

9 MR. MOREFIELD: While you're rethinking your next
10 one, let me ask the contractor this. You know, you've
11 done enough work in Florida to know at that time of the
12 year it does rain. Why were you not putting out the
13 permanent as soon as you could to cover it up?

14 MR. ANDERSON: You mean the permanent, the sod
15 and seed?

16 MR. MOREFIELD: I'm not saying on this job. Why
17 would you not be pressing to do that because you know
18 it's going to rain?

19 MR. ANDERSON: You would do that on a job, on a
20 new construction job. This is a rehabilitation
21 project, maintenance project, upgrade.

22 We all agreed that most of the damage was done to
23 the front of the slope. I disagree with Mr. Brewton as
24 to how we done the work. I mean, the ditch is moved
25 over, the shoulder is moved over because we put six

1 more foot of pavement and made the shoulder wider.
2 That's why we used borrow.

3 Eight foot of that shoulder of the front slope
4 was stabilized. You couldn't do no permanent work on
5 that shoulder because you was moving it. You moved two
6 foot over, you put in two foot of new roadway, you put
7 asphalt over the two foot, then you had another stage
8 that you put in a four-foot shoulder paved, you put it
9 in, you put another cap of asphalt.

10 These was in stages. You couldn't dispute the
11 stages. It's in the plans.

12 Then you got a four-foot stabilized shoulder
13 beyond the four-foot paved shoulder. That comes last.

14 And every time you are over two foot, you get
15 material to build a four-foot. Then you roll a
16 four-foot out, you get material to build the other four
17 foot. I mean every step of that you do in some regular
18 excavation.

19 You can't do no permanent until you get the
20 permanent done.

21 MR. MOREFIELD: I agree with that, Joey, but like
22 the pictures on 9-11, and I can't say that's totally
23 representative, because that's only one set of pictures
24 in the last set. All of that operation has already
25 been done.

1 MR. ANDERSON: All of what?

2 MR. MOREFIELD: Pushing everything out, It's
3 already been widened.

4 MR. ANDERSON: It hasn't been paved.

5 MR. MOREFIELD: The shoulder?

6 MR. ANDERSON: If that is the shoulder. I'm not
7 even sure that is the shoulder.

8 MR. MOREFIELD: That looks like new asphalt on
9 the road.

10 MR. ANDERSON: I suppose that is a four-foot
11 shoulder. Now the topsoil had to be placed on there.

12 MR. MOREFIELD: I understand. I'm just saying at
13 some point, I don't know what would have happened if
14 you got another rain event like that. That's all I'm
15 asking, at what point would you be putting out your
16 permanent? Always waiting until the very last to do
17 it?

18 MR. DUN: Can I make a comment? I think that --

19 MR. MOREFIELD: That's what I'm asking, I'm not
20 telling.

21 MR. DUN: I think it's a very valid question.
22 One thing I think you may have lost in the discussion
23 is on June 9 where were we on this project. It almost
24 seems like why weren't permanent erosion control
25 measures in place because you've been on the job a long

1 time, you are almost finished with it, but the job was
2 only 30 percent complete on June 9.

3 We had been on the job for several months, but
4 hadn't been able to work much of the site area for a
5 lot of that time. The job had not progressed far
6 enough that permanent measures could be in place in
7 most places.

8 MR. MOREFIELD: Okay.

9 CHAIRMAN COWGER: DOT, what do you think about
10 that?

11 MR. BENSON: Think about what?

12 CHAIRMAN COWGER: What he just said.

13 MR. BENSON: Well --

14 MR. MOREFIELD: When you answer that, were there
15 temporary grassing items included in there, not
16 permanent?

17 MR. BENSON: No, sir. For several years, for
18 whatever reason, we have not included in our contract
19 plans or contracts temporary grass, temporary sod,
20 temporary seed and mulch. For some particular reason
21 those have been omitted.

22 However, the Section 104 does allow, if you have
23 permanent items to use those as temporary and make
24 payment under the regular contract item.

25 MR. MOREFIELD: Just overrun the item?

1 MR. BENSON: Yes, sir. The mechanism is there.
2 When I first came with the Department about ten years
3 ago, they were a separate item. We don't have that
4 anymore. There is reluctance on the part of the
5 contractor and the DOT maybe to force the issue.

6 CHAIRMAN COWGER: Does that answer your question?

7 MR. MOREFIELD: Yes.

8 CHAIRMAN COWGER: Let's go back to the original
9 question I asked, and that was DOT to rebut what the
10 contractor just said about the practicality of doing
11 permanent grassing prior to June 9.

12 MR. BREWTON: I think he could have probably done
13 the back slopes and I don't think any -- not all the
14 back slopes. I would say maybe half to maybe 60
15 percent he could have either put out the sod or the
16 grass on just the back slopes.

17 CHAIRMAN COWGER: Were you on the job?

18 MR. BREWTON: I was on the job probably once a
19 month to twice to three times a month.

20 CHAIRMAN COWGER: You don't have anybody here
21 that was on the job constantly?

22 MR. BENSON: No, sir. The project inspection was
23 done by RS and H. They were the consultant.

24 What I will say is, you know, yes, you can look
25 back and say, well, they should have pushed for more

1 permanent erosion control.

2 Our stance now is that even if using, you know,
3 the minimum temporary measures may have, you know,
4 helped the situation some. All I can look back to is
5 over the project, the pictures, the documentation.
6 I don't have the luxury like Mr. Anderson did to see
7 the project.

8 CHAIRMAN COWGER: I think we have enough on that.
9 A couple of other questions. First off, the contractor
10 mentioned that 30 percent of the work was completed on
11 June 9, or plus or minus. How much of the grading was
12 completed? Thirty percent, I think you are referring
13 to the overall project?

14 MR. DUN: Yes, sir, I --

15 MR. BENSON: I can tell you what the Department
16 had paid for, if you think that's an indication of what
17 work had been completed.

18 CHAIRMAN COWGER: Yes.

19 MR. BENSON: As of May -- let's say as of
20 June 21, this is a few days after the storm event, on
21 both jobs we had paid for a little over 45,000 square
22 yards of Type B stabilization.

23 MR. MOREFIELD: What was the total amount, total
24 quantity? That's 45 out of what?

25 CHAIRMAN COWGER: I think we are more interested

1 in how much topsoil had been paid for and what
2 percentage of the regular excavation had been
3 completed, not the borrow, but the roadway part.

4 MR. BENSON: Okay. As of June 21, 1992, 27,000
5 cubic yards of regular excavation had been paid for out
6 of a plan quantity of 71,000. So, we had roughly gone,
7 what, a third.

8 MR. ROEBUCK: Maybe a third.

9 MR. BENSON: Approximately a third.

10 CHAIRMAN COWGER: What about the topsoil?

11 MR. BENSON: For the topsoil we had paid for
12 35,000 square yards out of 329,000 square yards, a
13 tenth of that. And the Type B stabilization, we paid
14 for 45,000 square yards of that out of 108,000, or
15 roughly 50 percent.

16 I know this may not be the appropriate time, but
17 it seems like a good one to me. We have established
18 what the pay quantities were up through June 21. The
19 contractor in his claim is requesting payment for
20 22,000 square yards of Type B stabilization of the
21 45,000 that were in place at that time.

22 Of the 35,000 square yards of topsoil paid
23 through 6-21-92, he's requesting payment for 30,000 of
24 those, and I assume this is over and above what we have
25 already paid for.

1 Regular excavation is kind of neat. Regular
2 excavation, the Department had paid through 6-21-92 for
3 27,000 cubic yards. And the contractor is requesting
4 payment for 36,000.

5 MR. ANDERSON: For the job.

6 MR. BENSON: Right, for the job.

7 CHAIRMAN COWGER: I think that's enough on that
8 for DOT. I want to come back and ask you one more
9 question. I want to give the contractor an opportunity
10 to comment on the quantity on the job.

11 And, gentlemen, we are starting to wrap up here.
12 So if the Board members have anything, they need to
13 think about it. Go ahead.

14 MR. DUN: I'm going to take the issues in reverse
15 order. I want to talk about the quantities, which was
16 the last thing that was talked about. Those quantities
17 were determined as best we could by the actual quantity
18 of work that was done by tracking the rework that was
19 required. That's why the quantities were -- it was the
20 30th of June before those quantities were given.

21 Again, the quantities were never disputed, even
22 though initially the indication was there was going to
23 be some payment.

24 MR. BENSON: Indication given by whom?

25 MR. DUN: To Anderson.

1 MR. BENSON: Who made the indication?

2 MR. DUN: Reynolds, Smith and Hill. It didn't
3 come from the Department.

4 MR. BENSON: I understand.

5 MR. DUN: And they never objected to those
6 quantities. With regard to the request for payment of
7 more regular excavation than had been paid for before,
8 I've got to draw your attention again to the fact that
9 there's a borrow excavation quantity, and there had
10 been 28,000 plus -- I've got two jobs I want to look at
11 here a second -- there had been 35,000 yards of borrow
12 excavation that had been paid for.

13 Again, we didn't have to, in order to recover,
14 get more borrow, we just had to move some of the borrow
15 material that had been brought to the job back to where
16 it had been originally placed. Again, that was a
17 regular excavation type of work as opposed to borrow.

18 So in looking at the quantities, or the pay items
19 that were available --

20 MR. ANDERSON: Looking at the estimate, this
21 estimate is on June 24, 1992. The rain happened
22 June 9. This estimate on June 24, we didn't get paid
23 for no regular excavation.

24 MR. BENSON: On 3508?

25 MR. ANDERSON: That's right. And there had been

1 19,000 cubic yards done. The same on borrow. We got
2 1100 cubic yards for the month.

3 CHAIRMAN COWGER: I think we don't need to hear
4 any more about those quantities. I have one more
5 question I think is pertinent. I haven't heard any
6 testimony on this from DOT.

7 The contractor early on in his testimony about
8 the impacts on his operations of various events talked
9 about the fact that the inability to work in certain
10 sections of the project early on influenced how he was
11 able to clear and grub and grade the job, then at some
12 point in time all of that was cleared up. Then he was
13 further impacted by the fact that utilities were in the
14 way.

15 DOT, how do you rebut that? Were his operations
16 so impacted by those events that it caused the project
17 to have to be graded in kind of a sporadic manner?

18 MR. BREWTON: I think basically the first
19 agreement we changed the clearing and grubbing from 50
20 foot to 42 foot. And that later on down the line
21 caused the utility problems because it wasn't cleared
22 all the way to the right-of-way lines, so the utility
23 company had to come in there and do select clearing to
24 move their poles back and string their lines, which did
25 impact the contractor.

1 It did make it sporadic on the first job where we
2 did the narrowing of the -- our project portion of it.
3 I would say 50 to 60 percent of the first job. I don't
4 think the second job had that much.

5 We delineated only about two or three sections of
6 special trees that we put guardrail around in that
7 area, and it was about a four-mile section, about a
8 four point something mile section. Very little on that
9 job.

10 Did I answer your question?

11 CHAIRMAN COWGER: Yes. They testified that there
12 were some problems, too, with the utilities not working
13 in --

14 MR. BREWTON: Harmony?

15 CHAIRMAN COWGER: -- in harmony with the
16 contractor you may say.

17 MR. MOREFIELD: Was he not compensated for those
18 delays in one of the supplemental agreements and for
19 the right-of-way pull in?

20 MR. BREWTON: Yes.

21 MR. MOREFIELD: So, if he was going to have to
22 modify his operations down the line, that was the
23 purpose of that supplemental agreement?

24 MR. BENSON: That was the intent.

25 MR. BREWTON: The first supplemental agreement

1 paid him X number of dollars. In that supplemental
2 agreement, we realized that pulling it into a 42-foot
3 right-of-way, that we would increase the slopes and
4 would overrun the sodding and lessen the grassing
5 items, and that was accounted for in that item.

6 CHAIRMAN COWGER: I think we understand that, but
7 the point that I was trying to get out is did the fact
8 that the utilities did not progress maybe in what you
9 might call a normal sequence, a normal --

10 MR. BENSON: Let me answer that question this
11 way. If we're out on the job and the contractor could
12 not work in area A, but he could go to area B and work,
13 I don't think the Department would sit idly by and let
14 him just sit there and have delay claims because
15 there's places to go.

16 That's what he did. He did that to mitigate
17 whatever possible damages. Otherwise we may have been
18 looking at much more severe claims, settlements.

19 Plus, as a policy nowadays, we pretty much clear
20 the right-of-way in areas to allow the utilities to go
21 in there. That's another thing that was spelled out in
22 the original contract. I would say he's got some merit
23 to that. The Department still maintained, though, that
24 does not preclude him from providing erosion control in
25 those areas.

1 CHAIRMAN COWGER: I wanted to ask you one other
2 thing. In the contractor's submittal, there's a letter
3 dated 8-14-92 from the project manager. Is it 8-14 or
4 8-4?

5 MR. DUN: 8-14.

6 MR. BENSON: That was discussed previously,
7 I think.

8 CHAIRMAN COWGER: There was a comment about
9 numerous -- I can't find it, but there was a comment in
10 one of these letters about numerous driveways being
11 blown out.

12 MR. BENSON: That's not unusual to happen if you
13 have a velocity of water that's not checked along the
14 ditch. That's the purpose of putting those ditch
15 blocks up there is to salvage material, keep it from
16 eroding further, and also to provide some kind of a
17 dissipation for the velocity. So that's not unusual to
18 happen if you don't have expert erosion control.

19 CHAIRMAN COWGER: Here it is. Let's look at
20 Exhibit 11 in the contractor's -- the statement that
21 I wanted to have DOT address, and I promise this is my
22 last question.

23 The second paragraph of that letter, second
24 sentence, "Numerous driveways blew out and have
25 required larger pipes under them. Large quantities of

1 soil were displaced along the job site."

2 Now my question is, did the fact that some of
3 those pipes were apparently a size too small have any
4 impact on what happened here on June 9?

5 MR. BENSON: I know it's obvious, but reading
6 this memorandum from Ms. Norton, it would tend to
7 indicate that. As I stated earlier, depending, you
8 know, on how good a job you do prior to getting to the
9 pipe -- you've got to remember, this is all runoff.
10 Soil was eroded, too. It's not like there was a lot of
11 infiltration.

12 So, everything that hit the ditch pretty much ran
13 into the pipes. It's possible that the pipes were not
14 large enough. Then again, you know, it could have been
15 the conditions of the erosion control that contributed.

16 MR. BREWTON: You will find, too, on those
17 personal driveways that usually the maintenance okays
18 the permit. All they do is look up to the next
19 driveway and see what size pipe they have.

20 CHAIRMAN COWGER: Okay. I'm not interested in
21 hearing that, but may I put some words in your mouth to
22 answer my question.

23 MR. BENSON: All right.

24 CHAIRMAN COWGER: This erosion that occurred,
25 I think it's earlier been testified was substantially

1 on the front slopes and to some degree on the back
2 slopes, and the size of the pipes probably didn't have
3 an awful lot to do with it.

4 MR. BREWTON: Every pipe out there had a mitered
5 end section added to it. You can almost say it was
6 under construction at the same time period.

2
7 MR. BENSON: If all of the erosion was confined
8 to the pipe areas, the driveway areas, then there might
9 be some validity to that. It seems like from what I've
10 seen, an equal amount of erosion occurs upstream or
11 downstream from the pipe locations as much as occurs at
12 the pipe locations.

13 CHAIRMAN COWGER: I think we have enough on that,
14 unless the contractor wants -- since I asked the
15 question, do you have anything to say?

16 MR. DUN: I don't think we have anything.

17 CHAIRMAN COWGER: We are going to wind this up.
18 First I'm going to ask either party do you have
19 anything you want to close out with? If the Department
20 doesn't have an objection, can we have those
21 photographs to keep?

22 MR. DUN: Yes, sir.

23 CHAIRMAN COWGER: We will not identify them as an
24 exhibit. Everybody has looked at them, agreed they're
25 reasonably factual. I'm going to put them as a part of

1 contractor's Exhibit 3, but we only have one copy of
2 them. So the Board will use them when we deliberate.

3 Mr. Morefield, do you have any questions?

4 MR. MOREFIELD: No.

5 CHAIRMAN COWGER: Mr. Roebuck?

6 MR. ROEBUCK: Yes. You feel a large part of
7 your defense was the fact that you don't believe the
8 Department has any economic liability except for time
9 in this condition?

10 MR. BENSON: Right. That's right. And --

11 MR. BREWTON: And the borrow.

12 MR. BENSON: I think that's one reason the
13 Department never disputed the contractor's quantities
14 originally.

15 MR. ROEBUCK: Okay.

16 CHAIRMAN COWGER: This hearing is hereby closed.
17 The Board will meet in approximately six weeks to
18 deliberate on this claim. You will have our final
19 order shortly thereafter.

20 (Whereupon, the hearing was concluded at 11:00 a.m.)

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