

Public Notice

**U S Army Corps
of Engineers**
Huntington District

In reply refer to Public Notice No.
200401280

Issuance Date: October 6, 2004

Stream: Open Fork

Closing Date: November 5, 2004

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

ATTN: CELRH-OR-F Public Notice No. (*reference above*)

502 Eighth Street

Huntington, West Virginia 25701-2070

Phone: (304) 399-5710

PUBLIC NOTICE: The purpose of this public notice is to inform you of a proposal for work in which you might be interested. It is also to solicit your comments and information to better enable us to make a reasonable decision on factors affecting the public interest. We hope you will participate in this process.

REGULATORY PROGRAM: Since its early history, the U.S. Army Corps of Engineers (Corps) has played an important role in the development of the nation's water resources. Originally, this involved construction of harbor fortifications and coastal defenses. Later duties included the improvement of waterways to provide avenues of commerce. An important part of our mission today is the protection of the nation's waterways through the administration of the Corps Regulatory Program.

SECTION 10: The Corps is directed by Congress under Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) to regulate all work or structures in or affecting the course, condition or capacity of navigable waters of the United States (U.S.). The intent of this law is to protect the navigable capacity of waters important to interstate commerce.

SECTION 404: The Corps is directed by Congress under Section 404 of the Clean Water Act (33 USC 1344) to regulate the discharge of dredged and fill material into all waters of the United States, including wetlands. The intent of the law is to protect the nation's waters from the indiscriminate discharge of material capable of causing pollution and to restore and maintain their chemical, physical and biological integrity.

TO WHOM IT MAY CONCERN: The following application has been submitted for a Department of the Army Permit under the provisions of Section 404 of the Clean Water Act. This notice serves as the Corps of Engineers' request to the West Virginia Department of Environmental Protection to act on Section 401 Water Quality Certification for the following application.

APPLICANT: Open Fork Mining, LLC
1051 Main Street
Milton, West Virginia 25130

LOCATION: The proposed project is located on the Beckwith USGS quadrangle at latitude 38° 02'08" and longitude 81° 13'27" within Open Fork and numerous unnamed tributaries to Open Fork and Loop Creek approximately 2.3 miles west of Kincaid, in Valley District of Fayette County, West Virginia as depicted on the attached **Drawing 1**. The location of the proposed valley fills and associated sediment ponds is depicted on **Drawing 2** titled "Proposed Permit Area Location Map." The unnamed tributaries of Open Fork flow into Open Fork. Open Fork flows into Loop Creek. The unnamed tributaries of Loop Creek flow into Loop Creek. Loop Creek flows into the Kanawha River, a navigable (Section 10) water of the United States.

DESCRIPTION OF THE PROPOSED WORK: The applicant proposes to place fill material into waters of the U.S. in conjunction with the construction of three valley fills and three in-stream sediment ponds as well as the removal of bituminous coal reserves underlying stream beds at the Open Fork Surface Mine. The construction of the proposed valley fills would result in the discharge of fill material into approximately 3,320 linear feet or 0.38 acre of intermittent streams and 4,712 linear feet or 0.29 acre of ephemeral streams for a total impact of approximately 8,032 linear feet or 0.67 acre of waters of the United States. Further, approximately 1,005 linear feet or 0.15 acre of intermittent streams would be temporarily impacted by the construction of the proposed sediment ponds. Approximately 1,378 linear feet or 0.07 acre of ephemeral stream would be permanently impacted in conjunction with the removal of coal reserves underlying the stream bed of the headwaters of Open Fork. Additionally, approximately 755 linear feet or 0.041 acre of ephemeral stream located in Taylor Branch would be temporarily impacted by the removal of coal reserves underlying its bed. Lastly, approximately 250 linear feet of intermittent streams would be indirectly affected by sediment transport. In total, approximately 11,420 linear feet or 0.98 acre of waters of the U.S. would be impacted by the proposed project. **Table A** of this public notice details the proposed mining activities and corresponding information with respect to the proposed impact locations and stream loss (linear feet and acres). All of the proposed valley fills would drain watersheds of less than 250 acres and range from 85.32 acres to 123.37 acres as detailed on the **Table B** of this public notice. The West Virginia Department of Environmental Protection (WVDEP) has approved the applicant's Surface Mining Permit application (S-3016-01) pursuant to the Surface Mining Control and Reclamation Act of 1977. The proposed project would be accomplished in ten general phases over a period of 10 years. Details regarding the phases can be found in Section N of the applicant's Surface Mining Application on file at the WVDEP.

According to the applicant, the purpose of the project is to construct valley fills to dispose of excess overburden spoil generated by surface mining operations into waters of the United States in order to achieve optimal recovery of available coal reserves within the project area and to provide the mandatory sediment control and access.

Plans for the proposed valley fills and associated sediment ponds are attached to this public notice.

ALTERNATIVE ANALYSIS: This project is not considered to be water dependent; therefore, the applicant is required to show that other less damaging practicable alternatives are not available that would achieve the applicant's goal. No permit will be issued until our review of the alternative analysis clearly shows that upland alternatives are not available to achieve the applicant's goal.

MITIGATION PLAN: The applicant has submitted a conceptual compensatory mitigation plan (CMP) to compensate for permanent and temporary impacts to waters of the U.S. regulated by the Department of the Army, Corps of Engineers. To compensate for permanent impacts to waters of the U.S., the applicant proposes to mitigate on-site through out-of-kind enhancement of aquatic resources. Approximately 9,410 feet of the main channel of Loop Creek would be enhanced. The Loop Creek Watershed Association, CMLI, West Virginia Division of Natural Resources and WVDEP were involved in the mitigation site selection.

To compensate for temporary impacts to waters of the U.S., the stream segments temporarily impacted by sediment pond construction and associated drainage corridors would be restored to their pre-mining conditions. Restoration of the temporarily affected stream channels would include the re-establishment of bankfull and flood prone areas as well as a 50-foot vegetated riparian zone.

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WATER QUALITY CERTIFICATION: A Section 401 Water Quality Certification is required for this project. It is the applicant's responsibility to obtain certification from the West Virginia Department of Environmental Protection.

HISTORIC AND CULTURAL RESOURCES: The National Register of Historic Places (NRHP) has been consulted and it has been determined there are no properties currently listed on the register that are in the area affected by the project. The applicant retained the services of DuVall & Associated, Inc. to complete a Phase I archaeological survey. The survey is titled "An Archaeological Survey on approximately 510 acres for the Open Fork Mine in Fayette County, West Virginia" and is dated March 27, 2002. The Phase I survey found no evidence of archaeological sites within the proposed project area.

The project area has a very low potential for archaeological sites due to the steep slopes, narrow, rocky toe-slopes and valleys, and an absence of rock outcrops. In a letter dated April 25, 2002, the West Virginia Division of Culture History (SHPO) stated the Phase I report addressed their concerns regarding the presence of archaeological resources with the proposed project area. The SHPO concluded no known archaeological sites listed on or eligible for inclusion in the National Register of Historic Places will be affected by the proposed project. Section 106 requirements under the National Historic Preservation Act of 1966 have been fulfilled and no further consultation is required, unless requested by the SHPO. A copy of this public notice will be sent to the SHPO for their review. Additional comments concerning archeological sensitivity of a project area should be based upon collected data.

ENDANGERED/THREATENED SPECIES REVIEW: Two federally listed endangered species, the Indiana bat (*Myotis sodalis*) and Virginia big-eared bat (*Corynorhinus townsendii virginianus*) may occur within the project area. The applicant retained the services of Compliance Monitoring Laboratories, Inc. to conduct a bat mist net survey to determine presence or probable absence of the Indiana bat. Six mist net sites were selected and surveyed between August 6 and 12, 2004. Thirteen bats, representing three species, were captured. The northern long-eared bat (*Myotis septentrionalis*) was the most frequently captured bat, representing 53.8 percent of the total bats captured. The eastern red bat (*Lasiurus borealis*) was the second most common bat captured, representing 23.1 percent of the total. The Big brown bat (*Eptesicus fuscus*) was the next most common bat and represented 15.4 percent of the total captures. No Indiana bats were captured during this survey. Details regarding the captures can be found in the applicant's mist net survey titled "Open Fork Surface Mining, LLC Open Fork Surface Mine Permit No. S-3016-01 Mist Net Bat Survey." No Indiana bats were captured during this survey. Additionally, no old, open abandoned mine portals were observed within the proposed project area that could support summer or winter colonies of the endangered Virginia big-eared bat or provide hibernaculum for the Indiana bat.

Based on the fact no Indiana bats were captured during the mist net survey and no old, abandoned mine portals are located within proposed project area, the Corps has determined the proposed project will have no effect on endangered or threatened species or their critical habitat. Therefore, neither a biological assessment nor further consultation under Section 7 of the Endangered Species Act is warranted.

This public notice serves as a request to the U.S. Fish and Wildlife Service for any additional information they may have on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the activity, pursuant to Section 7(c) of the Endangered Species Act of 1972 (as amended).

PUBLIC INTEREST REVIEW AND COMMENT: Any person who has an interest that may be adversely affected by the issuance of a permit may request a public hearing. The request must be submitted in writing to the District Engineer on or before the expiration date of this notice and must clearly set forth the interest which may be adversely affected and the manner in which the interest may be adversely affected by the activity. This application will be reviewed in accordance with 33 CFR 320-331, the Regulatory Program of the U. S. Army Corps of Engineers (USACE), and other pertinent laws, regulations, and executive orders. Our evaluation will also follow the guidelines published by the U. S. Environmental Protection Agency pursuant to Section 404(b)(1) of the CWA. Interested parties are invited to state any objections they may have to the proposed work. The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit that reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors that may be relevant to the proposal will be considered including the cumulative effects thereof; of those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. Written statements on these factors received in this office on or before the expiration date of this public notice will become a part of the record and will be considered in the final determination. A permit will be granted unless its issuance is found to be contrary to the public interest.

SOLICITATION OF COMMENTS: The Corps of Engineers is soliciting comments from the public; Federal, state, and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity. For accuracy and completeness of the administrative record, all data in support of or in opposition to the proposed work should be submitted in writing setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition. Any comments received will be considered by the Corps of Engineers to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity.

CLOSE OF COMMENT PERIOD: All comments pertaining to this Public Notice must reach this office on or before the close of the comment period listed on page one of this Public Notice. If no comments are received by that date, it will be considered that there are no objections. Comments and requests for additional information should be submitted to Mrs. Teresa Spagna, Project Manager, South Regulatory Section, CELRH-OR-FS, U. S. Army Corps of Engineers Huntington District, 502 Eighth Street, Huntington, West Virginia 25701-2070. Please note names and addresses of those who submit comments in response to this public notice may be made publicly available. Thank you for your interest in our nation's water resources. If you have any questions concerning this public notice, please call Mrs. Teresa Spagna of the South Regulatory Section at 304-399-5710.


Ginger Mullins, Chief
Regulatory Branch

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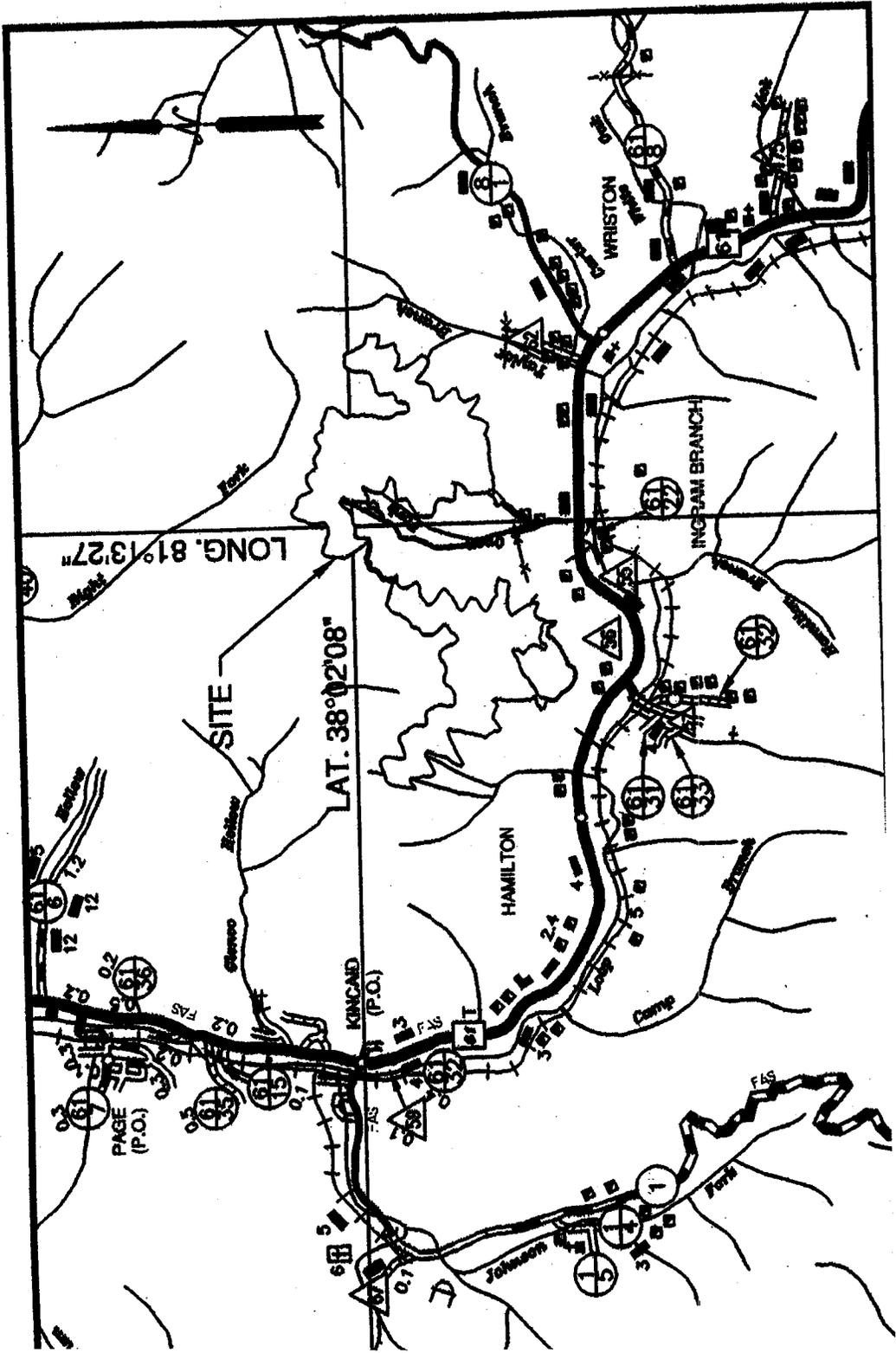
Table A
Open Fork Mining, LLC
Open Fork Surface Mine Jurisdictional Waters Impact Summary

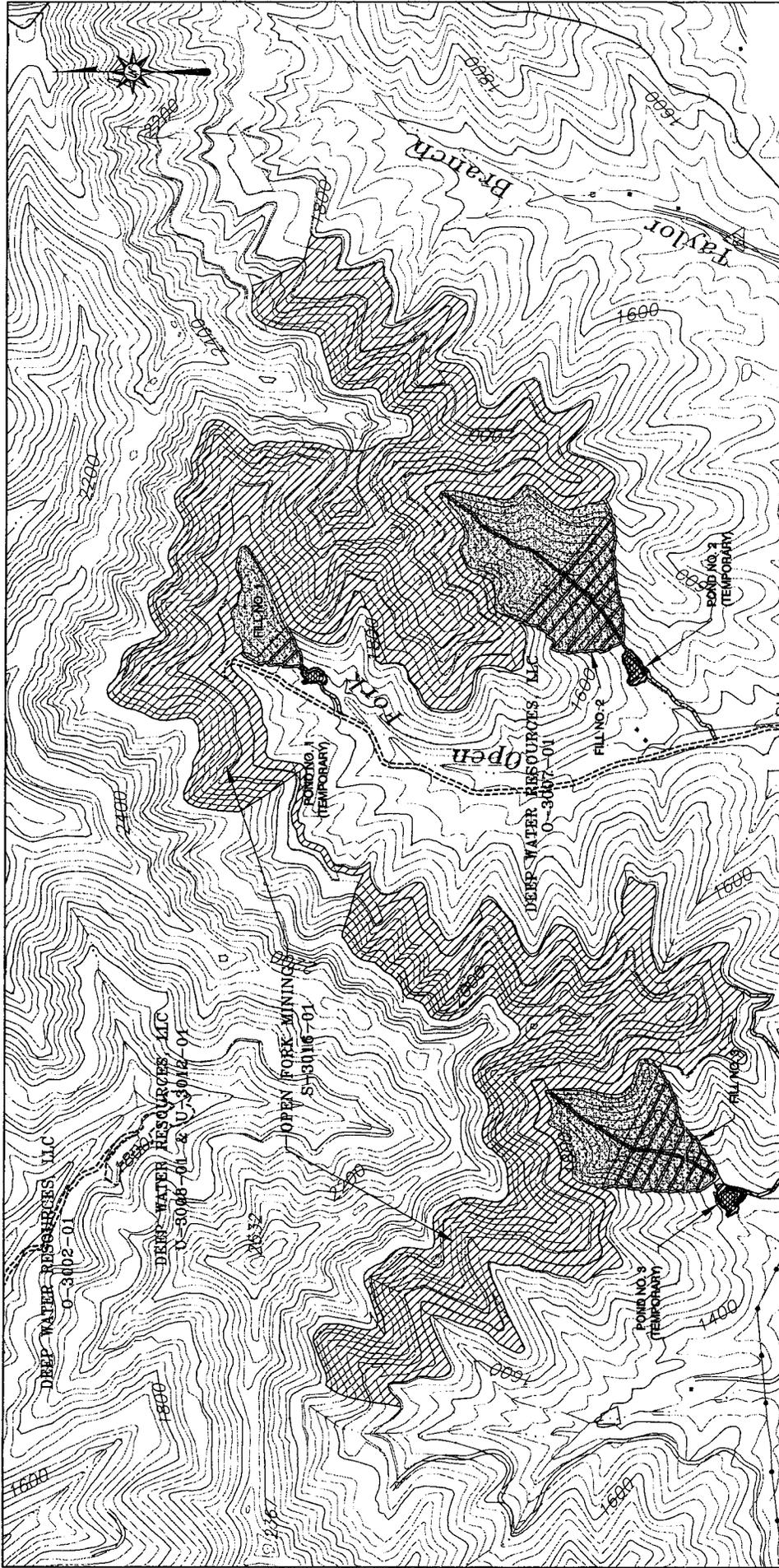
Structure	Permanent Intermittent		Permanent Ephemeral		Total Permanent Impact		Temporary Intermittent		Temporary Ephemeral		Total Temporary Impact	
	feet	acres	feet	acres	feet	acres	feet	acres	feet	acres	feet	acres
Mine Through - Fill No. 1			1378	0.072	1,378	0.072						
Valley Fill No. 1	1,040	0.102	340	0.033	1,380	0.135						
Pond No. 1 *							346	0.047			346	0.047
Valley Fill No. 2	474	0.082	2520	0.167	2,994	0.249						
Pond No. 2 *							327	0.057			327	0.057
Valley Fill No. 3	1,806	0.195	1852	0.094	3,658	0.289						
Pond No. 3 *							332	0.048			332	0.048
Mine Thru - Taylor Branch									755	0.041	755	0.041
Total	3,320	0.379	6,090	0.366	9,410	0.745	1,005	0.152	755	0.041	1,760	0.193

* Note: Temporary linear feet and acres provided represent the toe of the pond to the back of the pond.

Table B
Open Fork Mining, LLC
Open Fork Surface Mine
Affected Drainage Areas

Disposal Site	Drainage Area at Toe of Fill (acres)
Valley Fill No. 1	123.37
Valley Fill No. 2	85.32
Valley Fill No. 3	95.93





OPEN FORK MINING, LLC
 1051 Main Street Milton, West Virginia 25541

**OPEN FORK SURFACE MINE
 ATTACHMENT A-16
 PROPOSED PERMIT AREA
 LOCATION MAP**

PERMIT NO. S-3016-01
 SCALE: 1" = 1500'

FILE NO. 2004-377-A16B&W

LEGEND

[Cross-hatch pattern]	TOTAL PERMIT AREA
[Dashed line pattern]	DRAINAGE STRUCTURES
[Stippled pattern]	VALLEY FILLS
[Dotted pattern]	ADJACENT PERMITS