

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

| | | |
|----------------------------|---|-----------------|
| In the Matter of |) | PUBLIC |
| |) | |
| LabMD, Inc., a corporation |) | Docket No. 9357 |
| Respondent. |) | |
| |) | |



RESPONDENT LABMD, INC.’S MOTION TO ADMIT RX-543 – RX-548

Pursuant to Additional Provision 16 to this Court’s Scheduling Order, and Commission Rule 3.43 (16 C.F.R. § 3.43), Respondent LabMD, Inc. (“LabMD”) hereby moves to admit RX-543 through RX-548, each of which was first provided to LabMD on or about December 1, 2014. The proffered evidence is probative of and relevant to the veracity of the claims made by Tiversa, Inc. (“Tiversa”) and the Federal Trade Commission (“FTC”) with respect to the 1718 File and other core issues in this case.

I. EVIDENCE FOR ADMISSION.

LabMD moves for admission of the following:

- RX-543, a letter dated December 1, 2014 from Rep. Darrell Issa, Chairman of the U.S. House of Representatives, Committee on Oversight and Government Reform (“OGR”), to FTC Chairwoman Edith Ramirez (“FTC”), for all purposes and as a public record. See Commission Rule 3.43(b); Fed. R. Evid. 803(8); Fed. R. Evid. 902.¹ RX-543 is attached as Exhibit 1.

¹ RX-543 is admissible under multiple prongs of Fed. R. Evid. 803(8) as a record or statement of a public office that sets out OGR’s activities; a record or statement of a public office about a matter observed by OGR; and, a record or statement of a public office setting forth factual findings from a legally authorized investigation. See Fed. R. Evid. 803(8)(A). Complaint Counsel cannot show that the source of information or other circumstances indicate a lack of trustworthiness. See Fed. R. Evid. 803(8)(B). It is also a self-authenticating public record under Fed. R. Evid. 902(5), and Complaint Counsel has already attested to its authenticity. See Exhibit

- RX-544, a one page document titled [REDACTED] dated “4/18/08,” for all purposes and as a public record. *See* Commission Rule 3.43(b); Fed. R. Evid. 803(1), (6). This document should have been previously produced by Tiversa to LabMD and FTC but was not. RX-544 is attached as Exhibit 2.
- RX-545, a two page document titled [REDACTED]
[REDACTED] *See* Commission Rule 3.43(b); Fed. R. Evid. 803(1), (6). This document should have been previously produced by Tiversa to LabMD and FTC in this case but was not. RX-545 is attached as Exhibit 3.
- RX-546, a five page document titled [REDACTED]
[REDACTED] for all purposes and as a public record. *See* Commission Rule 3.43(b); Fed. R. Evid. 803(1), (6). This document should have been previously produced by Tiversa to LabMD and FTC but was not. RX-546 is attached as Exhibit 4.
- RX-547, a two page document purporting to be [REDACTED]
[REDACTED] as a public record and for the limited purpose of impeachment because it contains statements of the 1718 File’s origin that contradict Mr. Boback’s subsequent sworn testimony. *See* Dep. of Robert J. Boback, transcript at pp. 24-25 [REDACTED]
[REDACTED]
[REDACTED]; Boback Nov. 2013 FTC Tr. at 41 [REDACTED]
[REDACTED]
[REDACTED] *Contra* RX-547 [REDACTED]

⁷ (E-mail from Complaint Counsel Vandruff to Chief Administrative Law Judge Chappell dated December 1, 2014).

[REDACTED] See Commission Rule 3.43(b); Fed. R. Evid. 803(1), Fed. R. Evid. 801(d)(1),(d)(3). RX-547 should have been previously produced by Tiversa to LabMD and FTC but was not and ought to be deemed inadmissible for anything other than impeachment as described above. RX-547 is attached as Exhibit 5.

- RX-548, a sixteen page document purporting to be a [REDACTED] [REDACTED] prior to testimony from Mr. Boback in this case, as a public record and for the limited purpose of impeachment because it contains statements regarding the origin and availability of the 1718 File that contradict prior testimony in this case. See Commission Rule 3.43(b); Fed. R. Evid. 402. For example, RX-548 [REDACTED] [REDACTED] [REDACTED] See CX-19 at p. 1. At the same time, RX-548 states that [REDACTED] [REDACTED] RX-548 at p.3. RX-548 should have been previously produced by Tiversa to LabMD and FTC but was not and ought to be deemed inadmissible for anything other than impeachment as described above. RX-548 is attached as Exhibit 6.

II. THE PROFFERED EVIDENCE SHOULD BE ADMITTED.

Commission Rule 3.43(b) provides in relevant part that “[r]elevant, material, and reliable evidence shall be admitted.” Hearsay that is “relevant, material, and bears satisfactory indicia of reliability so that its use is fair” also should be admitted. Commission Rule 3.43(b); *In re Polyvore Int’l, Inc.*, No. 9327, 2010 FTC LEXIS 62, at *6-7 (July 10, 2010) (noting that hearsay evidence may be received in FTC proceedings).

RX-543 through RX-548 should be admitted because these documents are directly relevant and probative of core issues in this case, are not duplicative of prior testimony or evidence already admitted and their admission does not cause hardship to the FTC or delay the proceedings since the trial in this matter is ongoing and the case remains open. Moreover, LabMD would be significantly prejudiced were the Court to exclude this evidence, especially the previously undisclosed documents Tiversa withheld.

After five years of investigation and litigation, it is now well-established that FTC and its experts relied, unquestioningly, on Tiversa's claim that 1718 File was first downloaded from an IP address in San Diego, California, and that Tiversa's alleged discovery of the 1718 File on peer-to-peer networks triggered the investigation and enforcement action against LabMD. *See* CX-703, Deposition of Robert Boback, at p. 53 [REDACTED]

[REDACTED] *See also, e.g.,* CX-740, Expert Report of Raquel Hill at pp. 1, 15, 17, Appx. B 1, Appx. B 3 (Mar. 18, 2014); CX-741, Expert Report of James Van Dyke at pp. 2, 4, 7, 8 (Mar. 18, 2014); Van Dyke, Tr. Trans. at 667:14 – 669:6 (May 23, 2014); Van Dyke Dep. at pp. 107:17–25 – 108:4 (April 14, 2014); CX-742, Expert Report of Rick Kam at pp. 6, 9, 18, 19 (Mar. 18, 2014); Kam, Tr. Trans. at 542:5-9, 544:15 – 545:10 (May 22, 2014); CX-738, Rebuttal Expert Report of Clay Shields at pp. 3, 25 (April 11, 2014).

However, the evidence is that FTC took no steps to verify Tiversa's claims or confirm its veracity, and that FTC ignored LabMD's repeated protests that the 1718 File had been taken in violation of Georgia law. *See* Compl. Counsel Mot. for Leave to Issue Subpoenas for Rebuttal Evidence at p. 4 (improperly and after the close of its case-in-chief, requesting information regarding "*how, when and where Tiversa found the 1718 File on P2P networks*") (emphasis

added); Order Den. Compl. Counsel's Mot. for Leave to Issue Subpoenas for Rebuttal Evid. at p. 2 ("Complaint Counsel's assertion that further discovery into 'how, when, and where' Tiversa found the 1718 file on P2P networks...is questionable at best [since] Complaint Counsel elicited substantial evidence on this issue...at the trial deposition of Mr. Boback"); *see also* Resp't Mot. for Sanctions (August 14, 2014) at pp. 5-8 (demonstrating the FTC protected the opacity of its Tiversa relationship and knew Tiversa had a financial interest in the FTC's investigation of LabMD yet did not conduct any investigation of Tiversa's claims).² In fact, the testimony shows that [REDACTED]

[REDACTED] *See* CX-703, Deposition of Robert Boback at pp. 142-143.

Yet, Tiversa cannot get its story straight. According to OGR:

[REDACTED]

² If FTC had merely exercised minimal due diligence, it would have discovered the inconsistencies in Boback's testimony long before the seventh day of trial. *See* VanDruff statement, Tr. Trans. at 1227:7-10

[REDACTED]

Having been publicly chastised for sloppy work on this case weeks before by a federal judge, FTC was certainly on notice that something was amiss. Hearing Trans., *LabMD v. FTC*, 1:14-cv-810-WSD, 80:18-81:7 (May 7, 2014).

See RX-543 at pp. 4-5 (citations omitted)(emphasis in original). Even so, FTC continues to protect Tiversa through a provisional *in camera* designation of otherwise probative and embarrassing public documents and to pursue LabMD.³

The proffered evidence is relevant and probative because it shows that Tiversa violated Georgia law and downloaded the 1718 File from LabMD [REDACTED] [REDACTED] See O.G.C.A. § 16-9-93(a). It also is relevant and probative because this evidence proves that FTC's blind reliance on Tiversa was terribly unfounded. Compare [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thus, with even minimal due diligence FTC would have discovered that Tiversa, not LabMD, was the proper target of enforcement authorities.

³ For example, FTC knew, or should have known, that in November, 2012, Tiversa falsely represented to the United States Court of Appeals for the Eleventh Circuit that it downloaded the 1718 File “without knowledge of the file’s location” and that it did not “know where LabMD and its servers (if it even had servers) were located when it downloaded the 1,718 File.” Brief of Appellee Tiversa, Inc., *LabMD, Inc. v. Tiversa, Inc., et al.*, No. 12-14504. 15, 29 (11th Cir. Nov. 16, 2012).

III. RX-543 THROUGH RX-548 SHOULD BE ADMITTED AS PUBLIC DOCUMENTS.

RX-543 through RX-548 should be admitted as public documents for FTC has failed to carry the heavy burden for *in camera* treatment. *In re Hood & Sons, Inc.*, No. 7709, 1961 FTC LEXIS 368, at *5-6 (Mar. 4, 1961)(the burden for seeking protected status for a document is a heavy one for there is a “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons”).

First, OGR considers RX-543 through RX-548 to be public documents. See Exhibit 8 (Email from Jennifer Barblan, OGR Committee to Reed Rubinstein, Resp’t Counsel, dated December 22, 2014)(stating Tiversa, not OGR, stamped RX-544 through RX-548 as “Confidential- For Committee and Staff Use Only” and clarifying that “[t]his is not a Committee marking, and *the Committee does not consider the documents or the accompanying letter to be confidential*”)(emphasis added).

Second, Complaint Counsel provided this purportedly “confidential” evidence to non-party Tiversa, which, by itself, arguably waives Complaint Counsel’s *in camera* request. See Exhibit 7 (copying Jarrod Shaw, counsel for Tiversa). Commission Rule 3.45 provides:

Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. ***Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto***, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

Commission Rule 3.45 (emphasis added).

Third, RX-543 through RX-548 harm FTC’s case and sink Tiversa’s veracity.⁴ Yet strangely, on December 16, 2014, the Commission Secretary advised OGR that RX-543 through

⁴ In requesting that RX-543 through RX-548 remain *in camera* because “[t]he exhibits are stamped Confidential- For Committee and Staff Use Only” Complaint Counsel, at best, failed to learn or confirm the true nature of this marking. OGR did not authorize or direct FTC to claim *in*

RX-548 would not be shared with the Commission because the case against LabMD is “still in administrative adjudication.” Exhibit 9 (Letter from Commission Secretary to Chairman Issa, Dec. 16, 2014). None of the other OGR letters in this case, and certainly not the letter FTC obtained from Sen. Jay Rockefeller attacking OGR, *see* Exhibit 10, were treated this way.

Congress generally does not work in secret and OGR has confirmed that RX-543 through RX-548 are no exception to this rule. Therefore, Complaint Counsel’s request for *in camera* treatment of should be denied and RX-543 through RX-548 should be admitted as public documents.

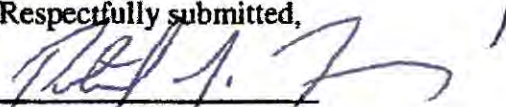
camera status. Instead, this was something Complaint Counsel did on its own for Tiversa’s benefit. Ironically, if a third party were to file a Freedom of Information Act request for the OGR letter and supporting documents, then FTC would be required to consult with OGR as per Executive Order No. 12,600, *see*: <http://www.justice.gov/oip/blog/foia-update-oip-guidance-referral-and-consultation-procedures>. The result of such consultation, in turn, would be public disclosure. Complaint Counsel’s position here is simply untenable.

V. CONCLUSION.

For the reasons set forth above, LabMD's Motion should be granted.

Dated: December 23, 2014.

Respectfully submitted,


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Counsel for Respondent, LabMD, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

In the Matter of)
)
)
LabMD, Inc.,)
a corporation.)
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)
_____)

DOCKET NO. 9357

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S
MOTION TO ADMIT RX-543 through RX-548**

Upon consideration of Respondent's Motion to Admit RX-543 through RX-548, and in consideration of the entire Record in this case,

IT IS HEREBY ORDERED that Respondent Counsel's Motion to Admit RX-543 through RX-548 be and the same is hereby GRANTED; and

Exhibits RX-543 through RX-548 shall be admitted into evidence as a public document.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

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)
LabMD, Inc.,)
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)
_____)

DOCKET NO. 9357

STATEMENT REGARDING MEET AND CONFER

LabMD, Inc. respectfully submits this Statement, pursuant to Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion To Admit, on December 4, 2014, counsel for LabMD (Prashant K. Khetan) conferred with Complaint Counsel (Laura Riposo VanDruff) in a good faith effort to resolve by agreement the issues raised by the motion. Complaint Counsel advised that it did not consent to the admission of RX-543 through RX-548 and intends to oppose this motion.

Dated: December 23, 2014.

Respectfully submitted,

/s/ Prashant K. Khetan
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Email: reed.rubinstein@dinsmore.com
Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and caused to be hand-delivered a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff
Megan Cox
Ryan Mehm
John Krebs
Jarad Brown
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

Dated: December 23, 2014

By: /s/ Hallee K. Morgan

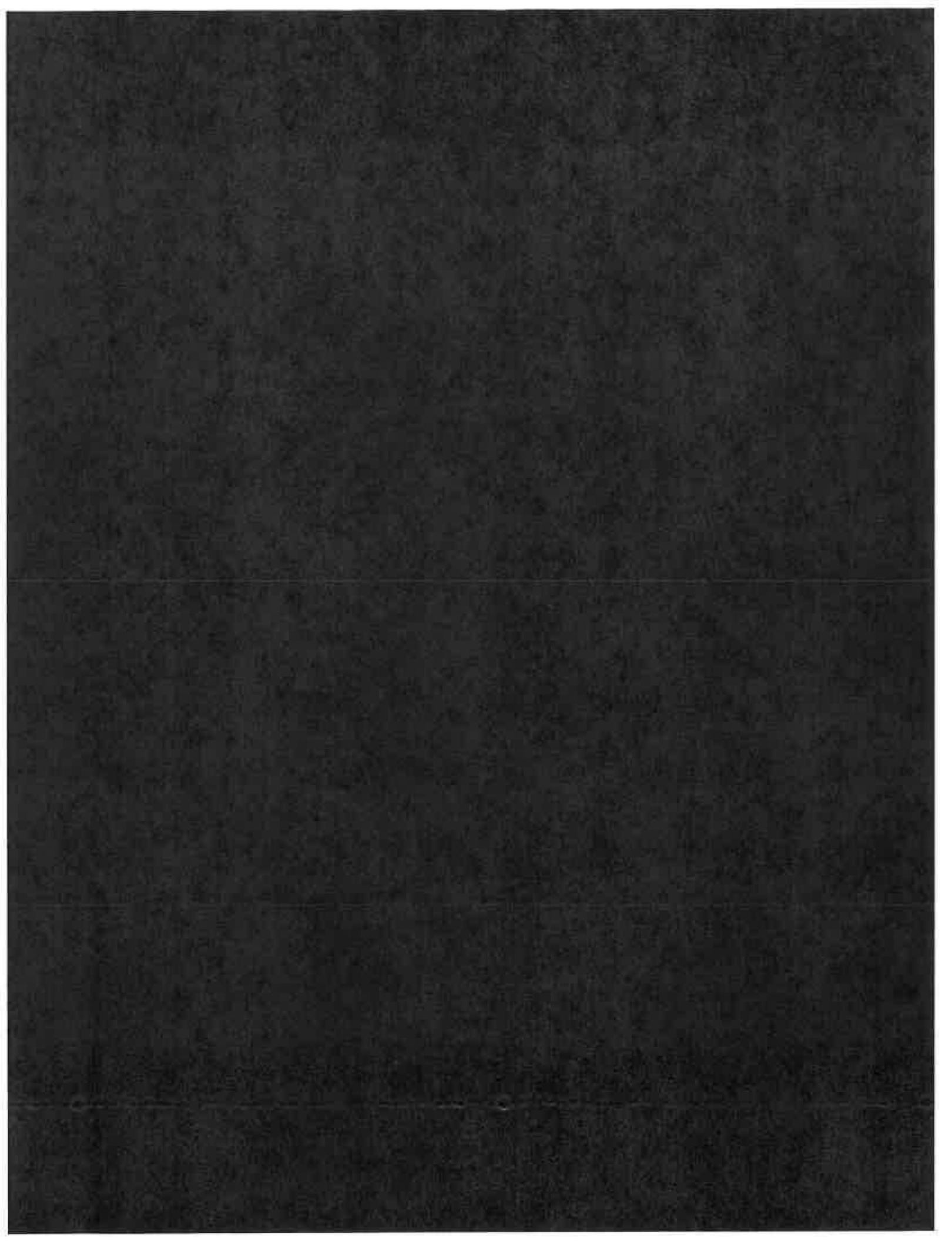
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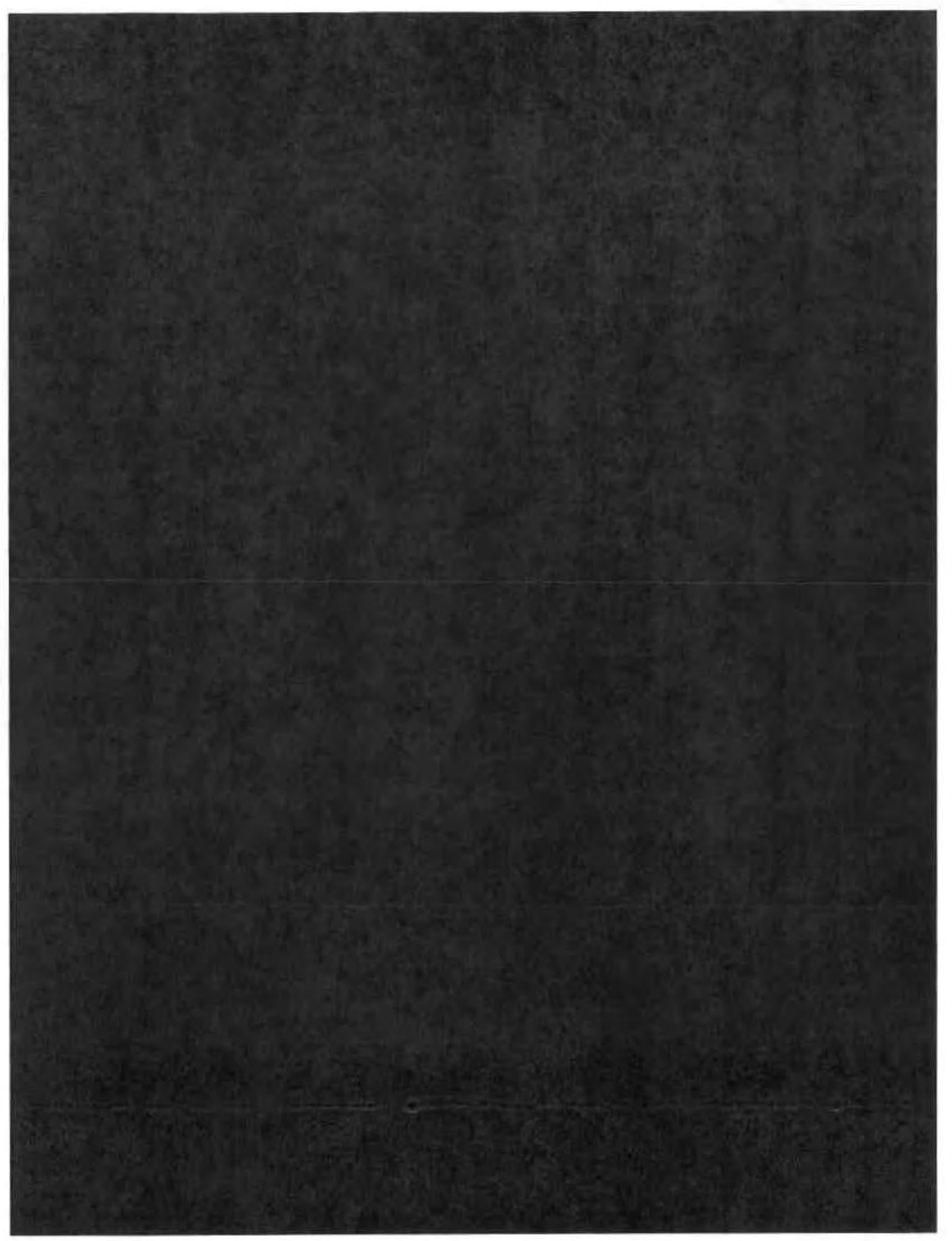
I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

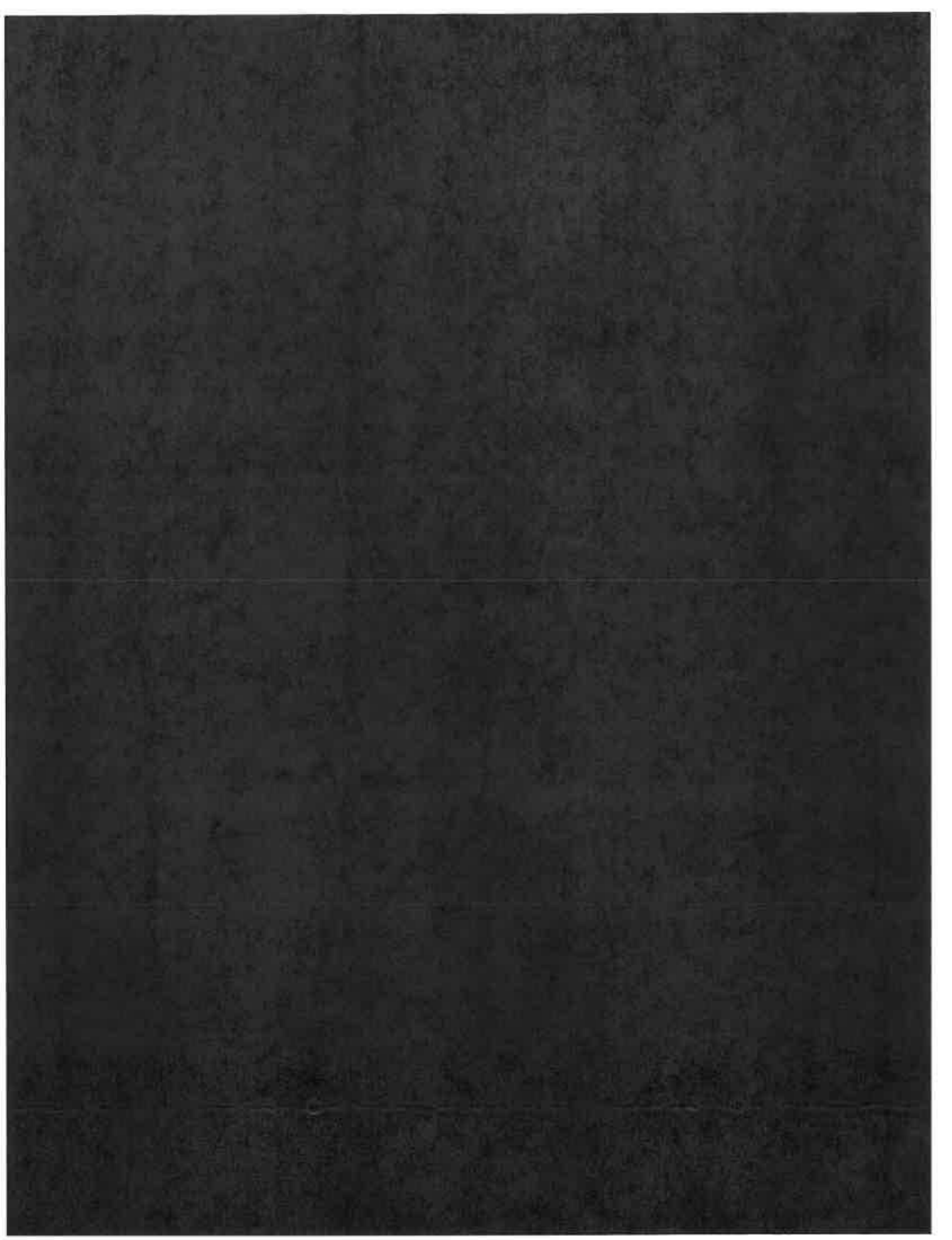
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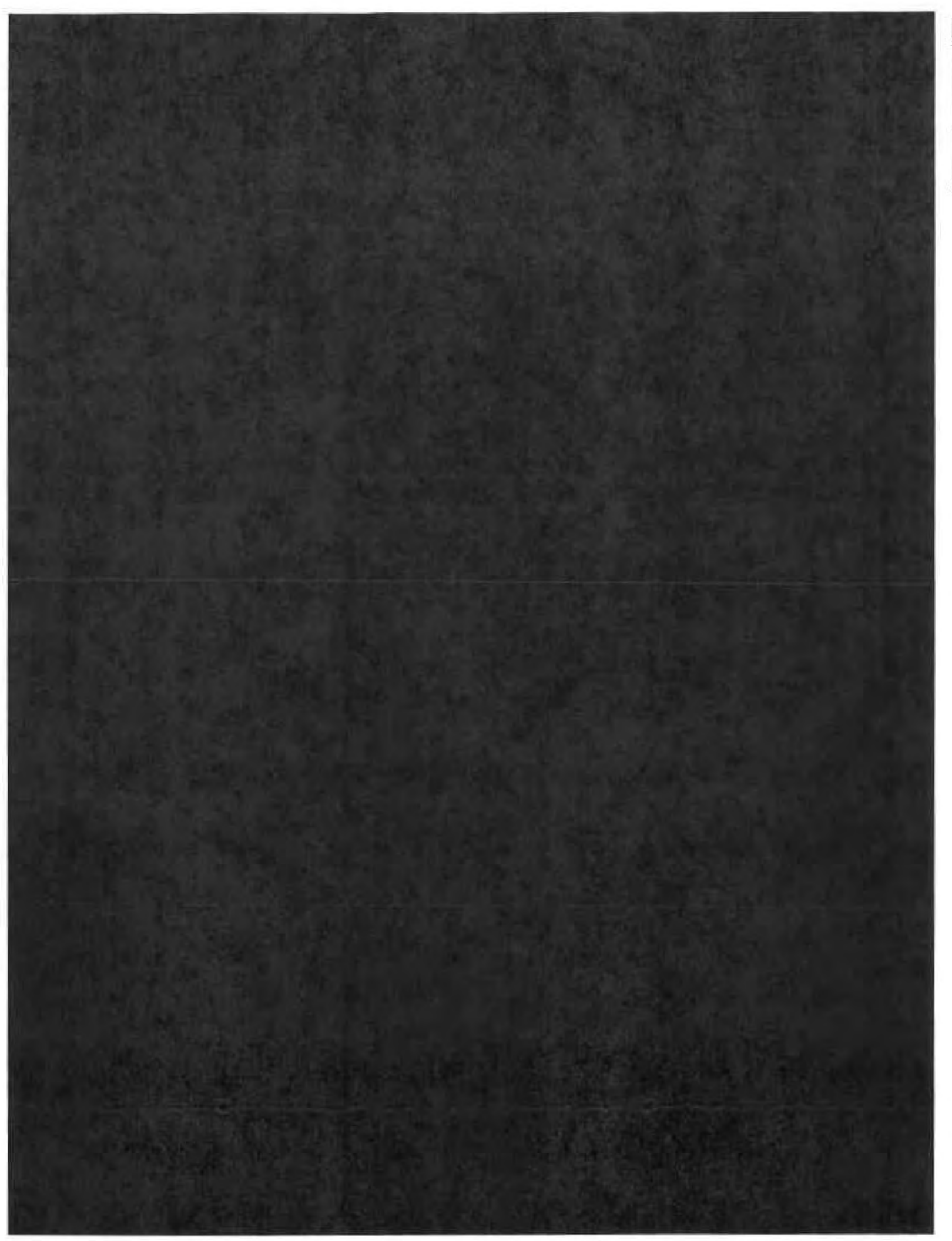
By: /s/ Hallee K. Morgan

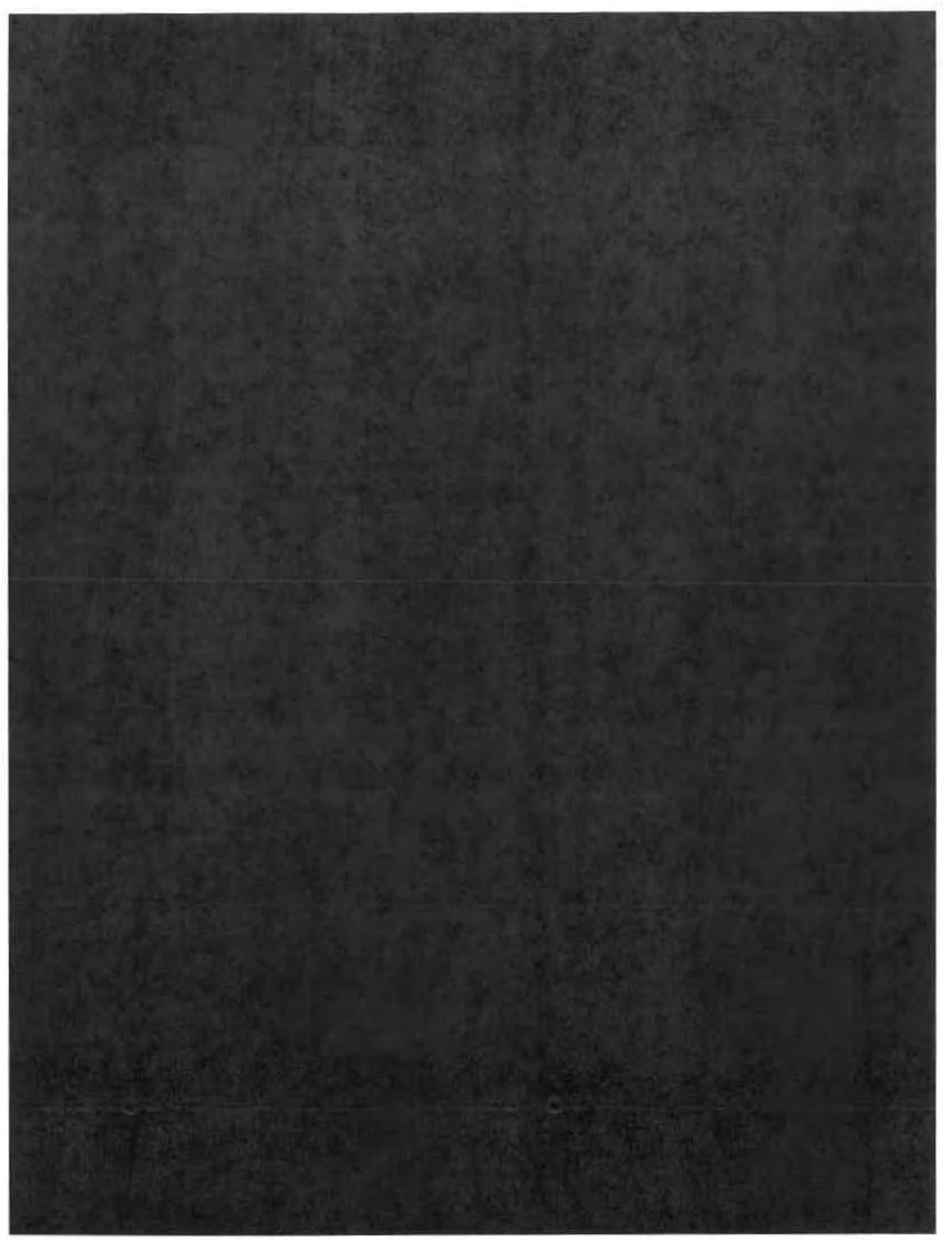
Exhibit 1

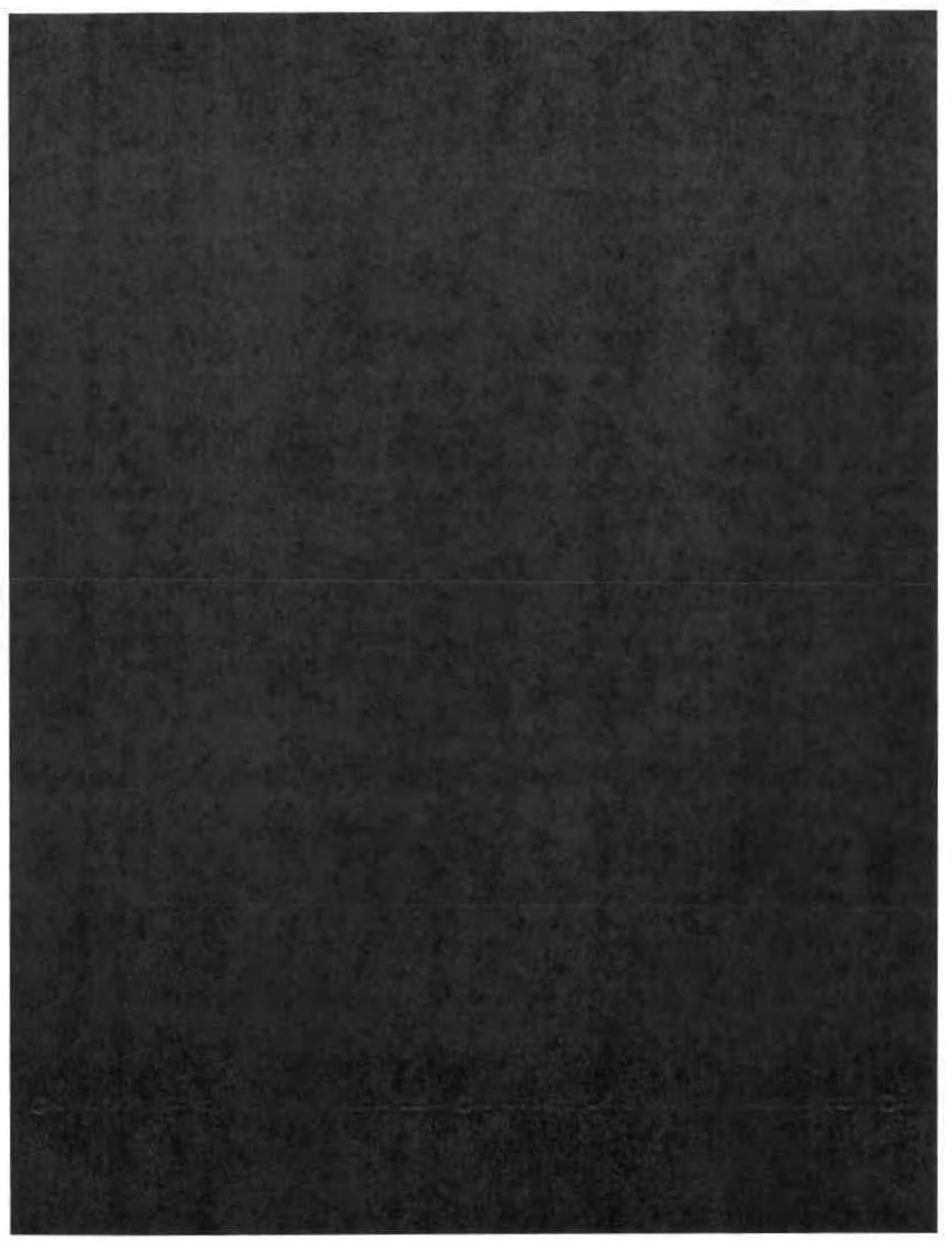


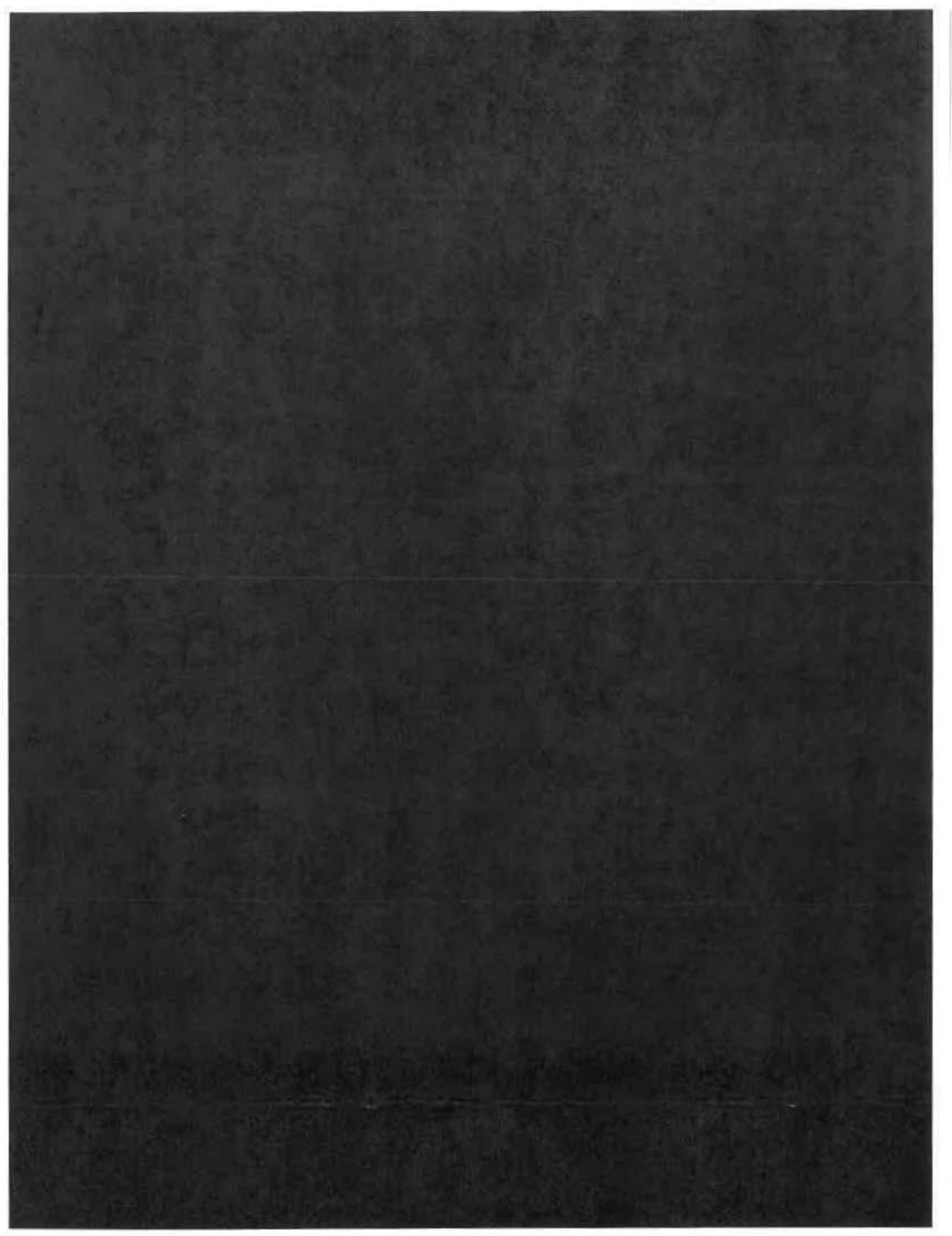












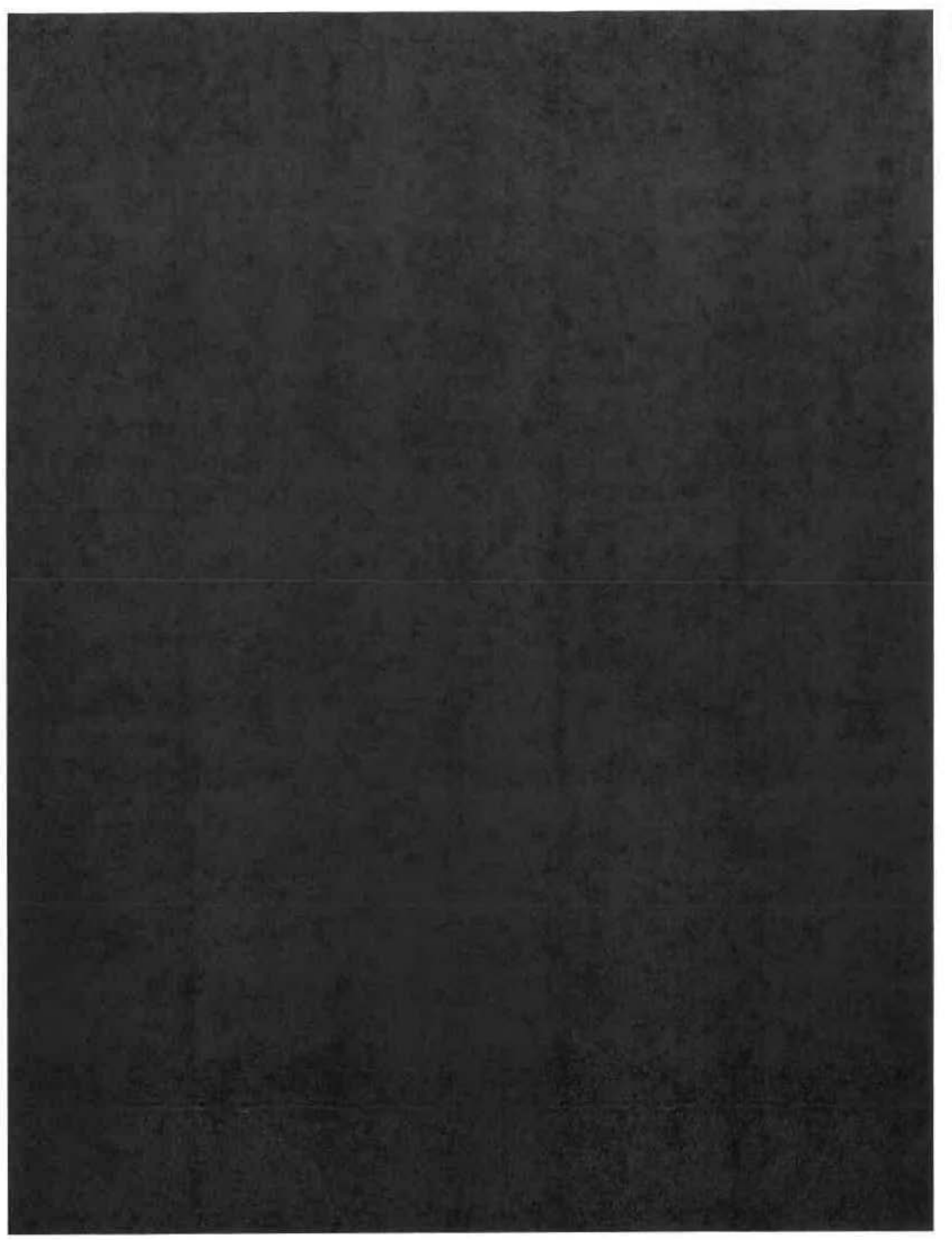


Exhibit 2

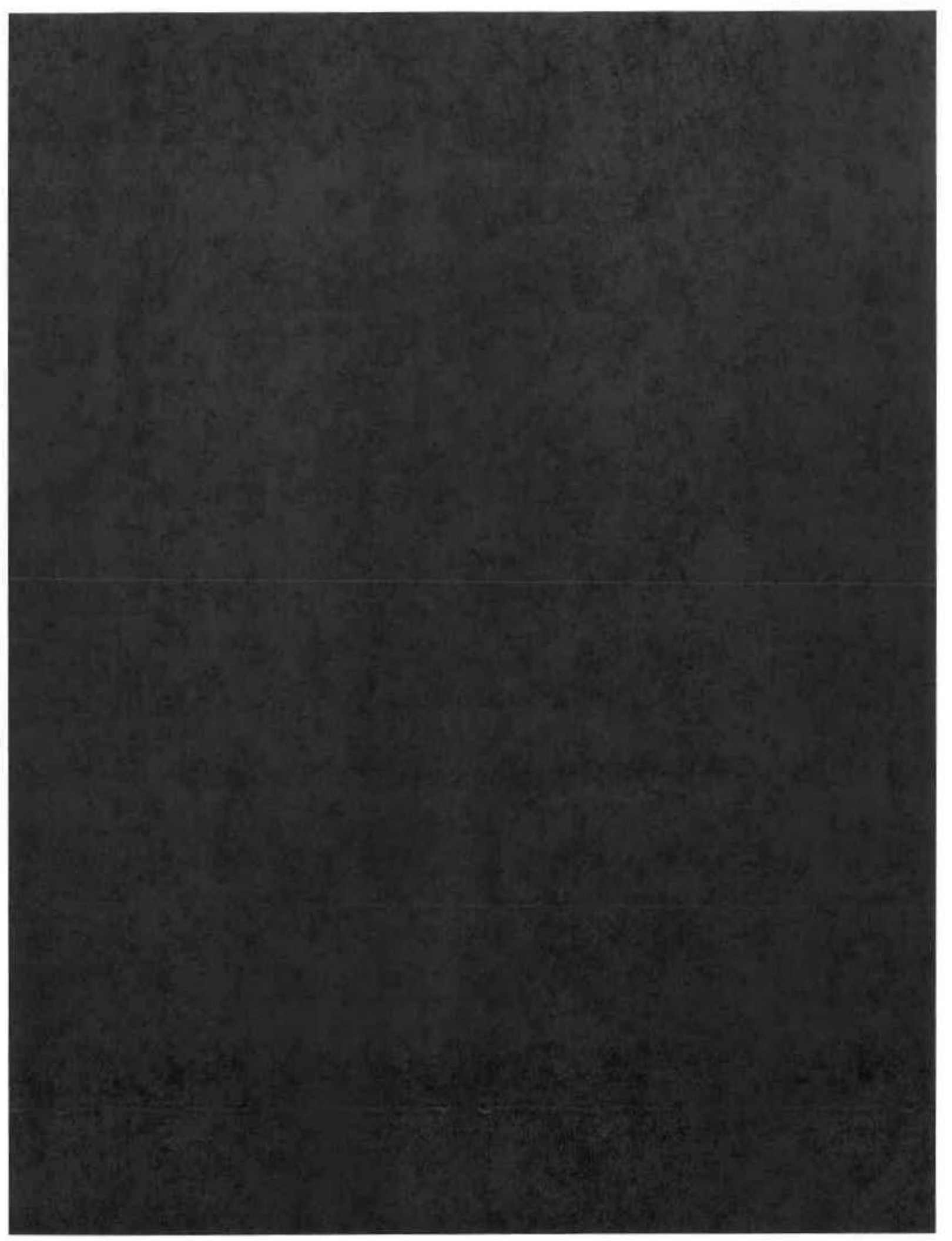
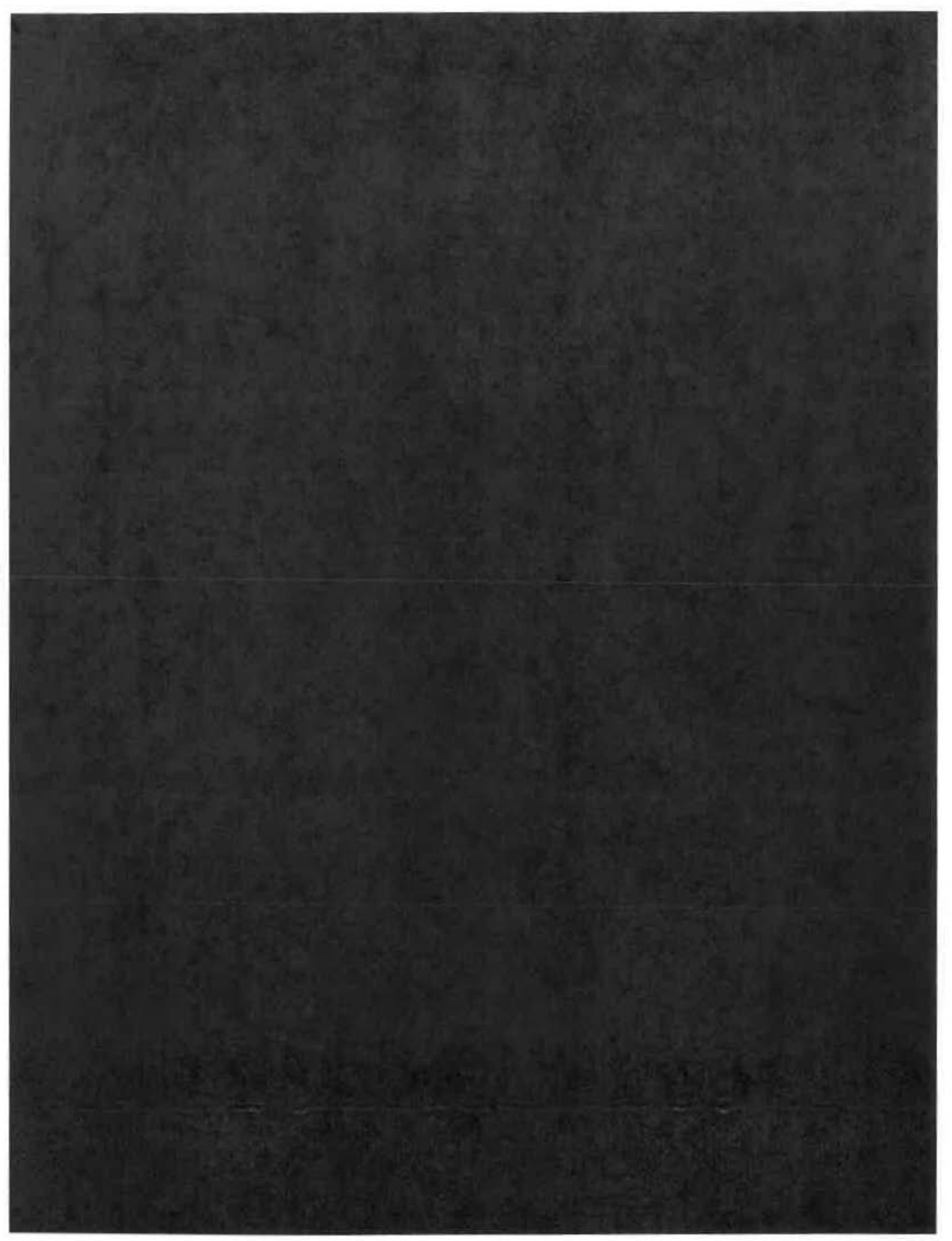


Exhibit 3



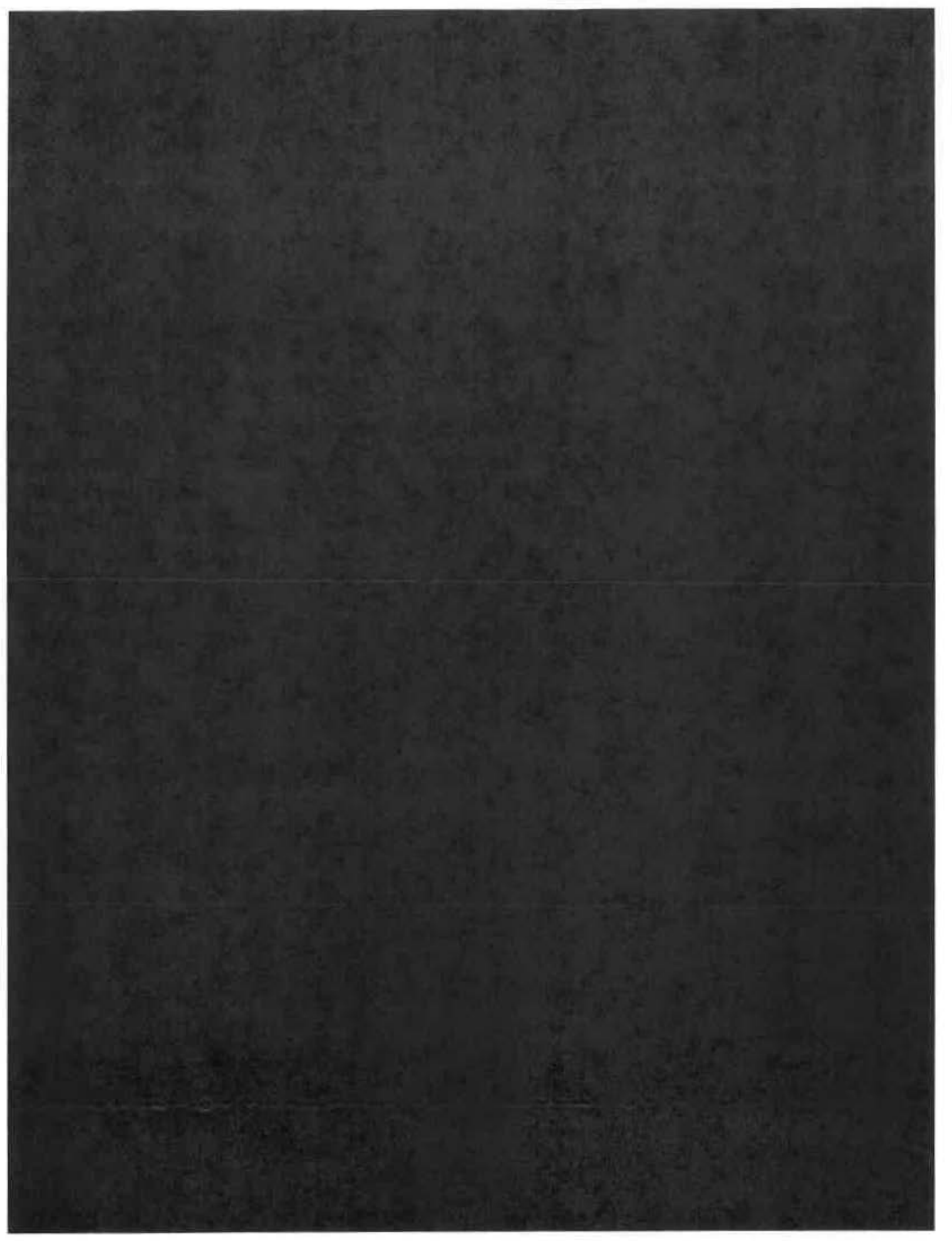
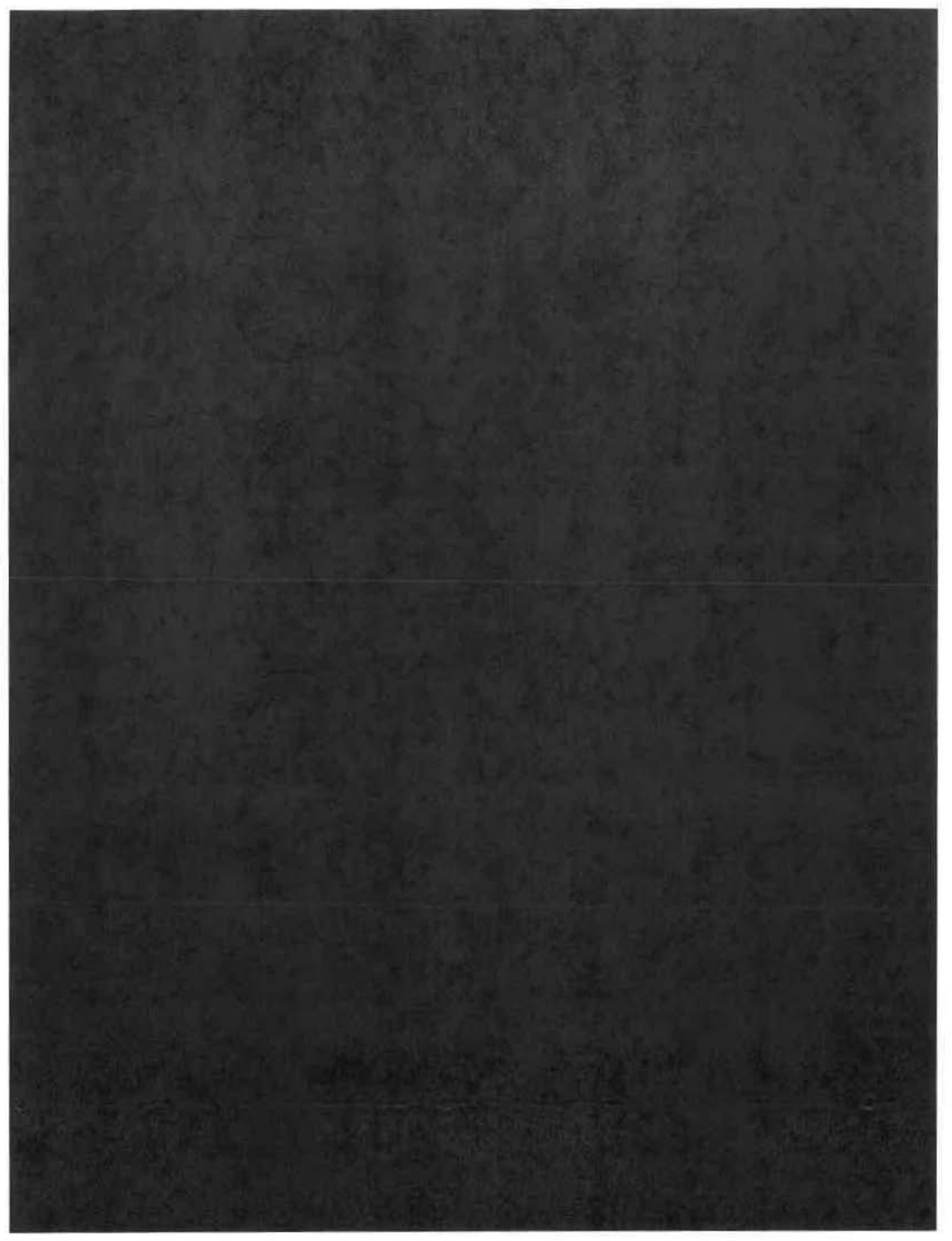
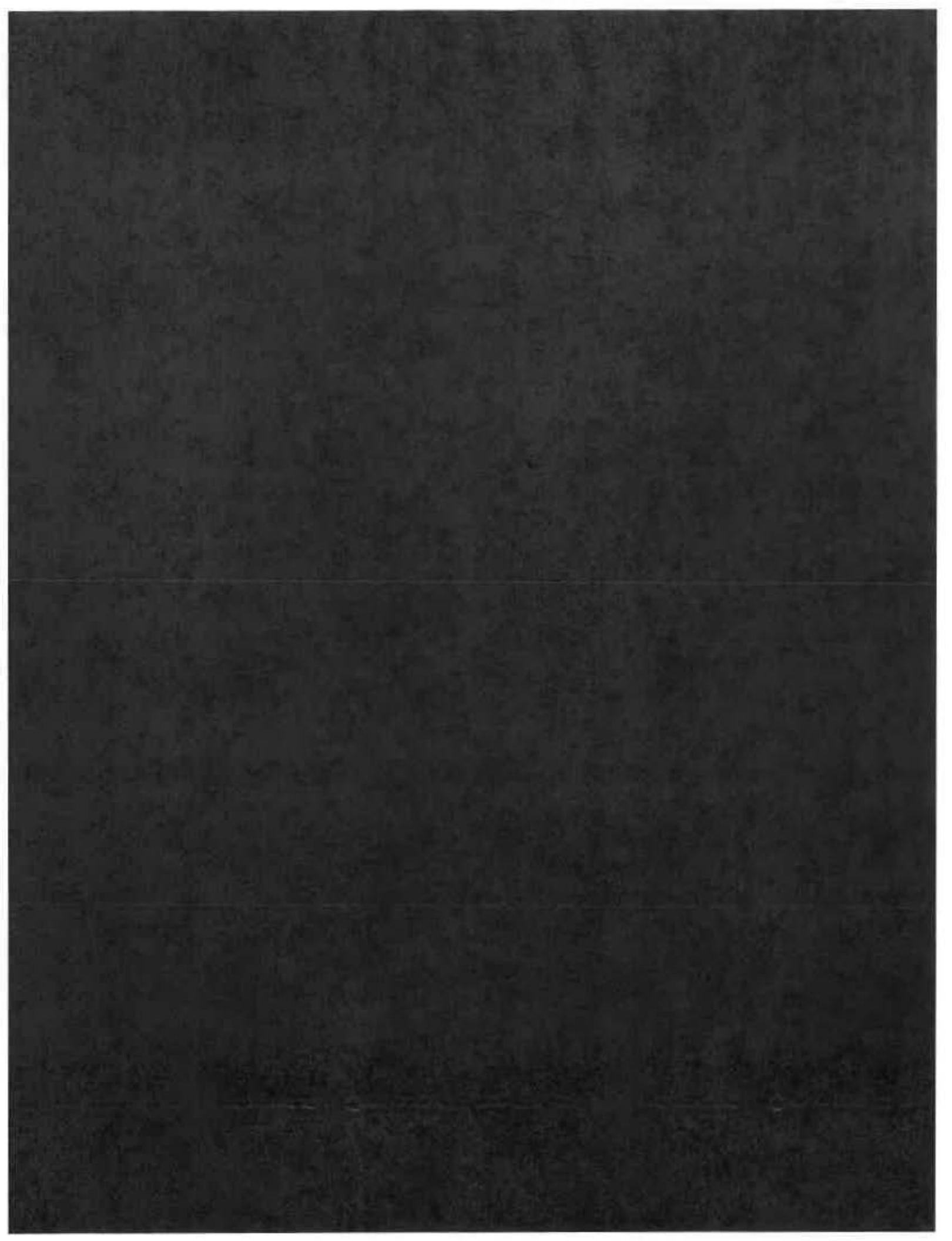
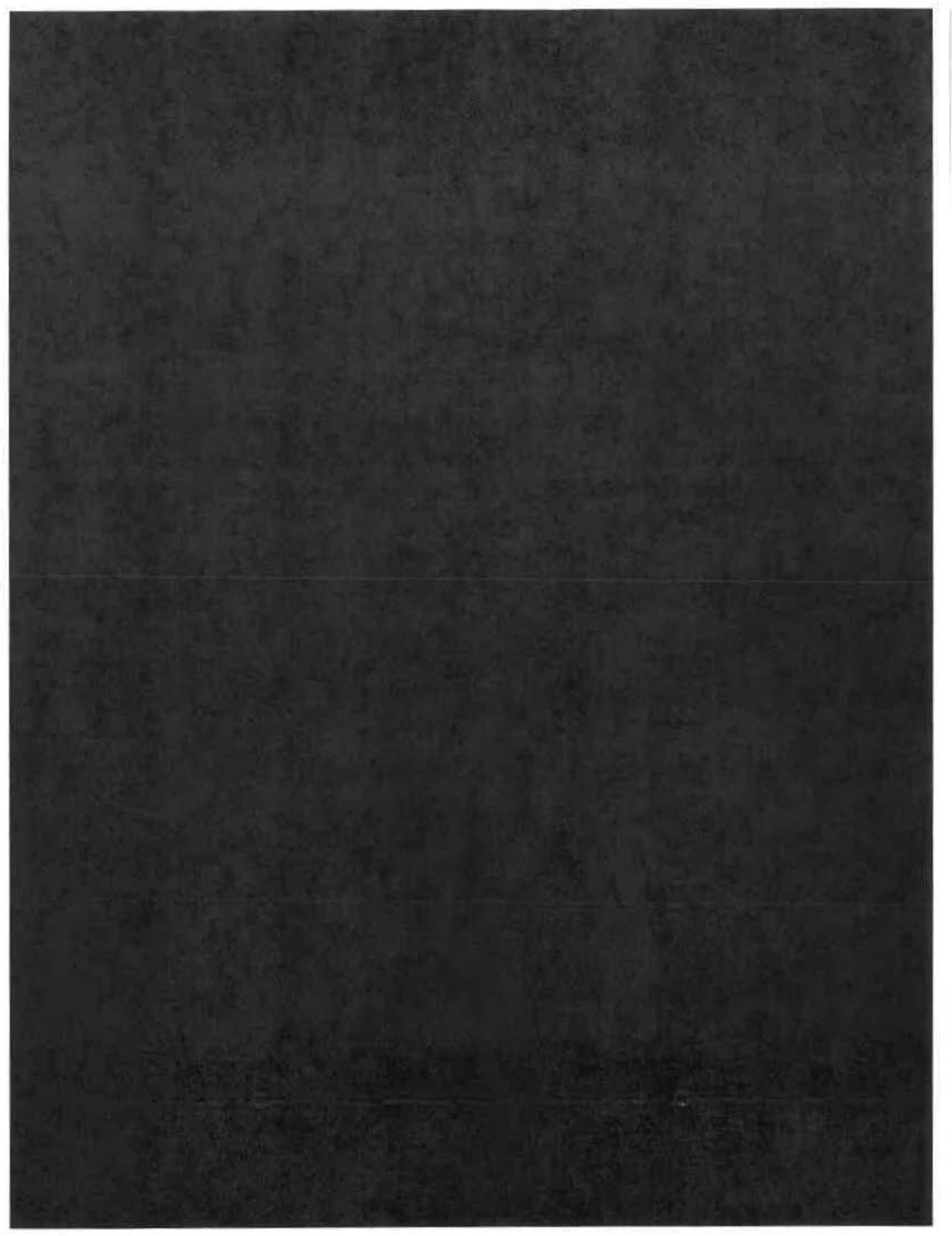
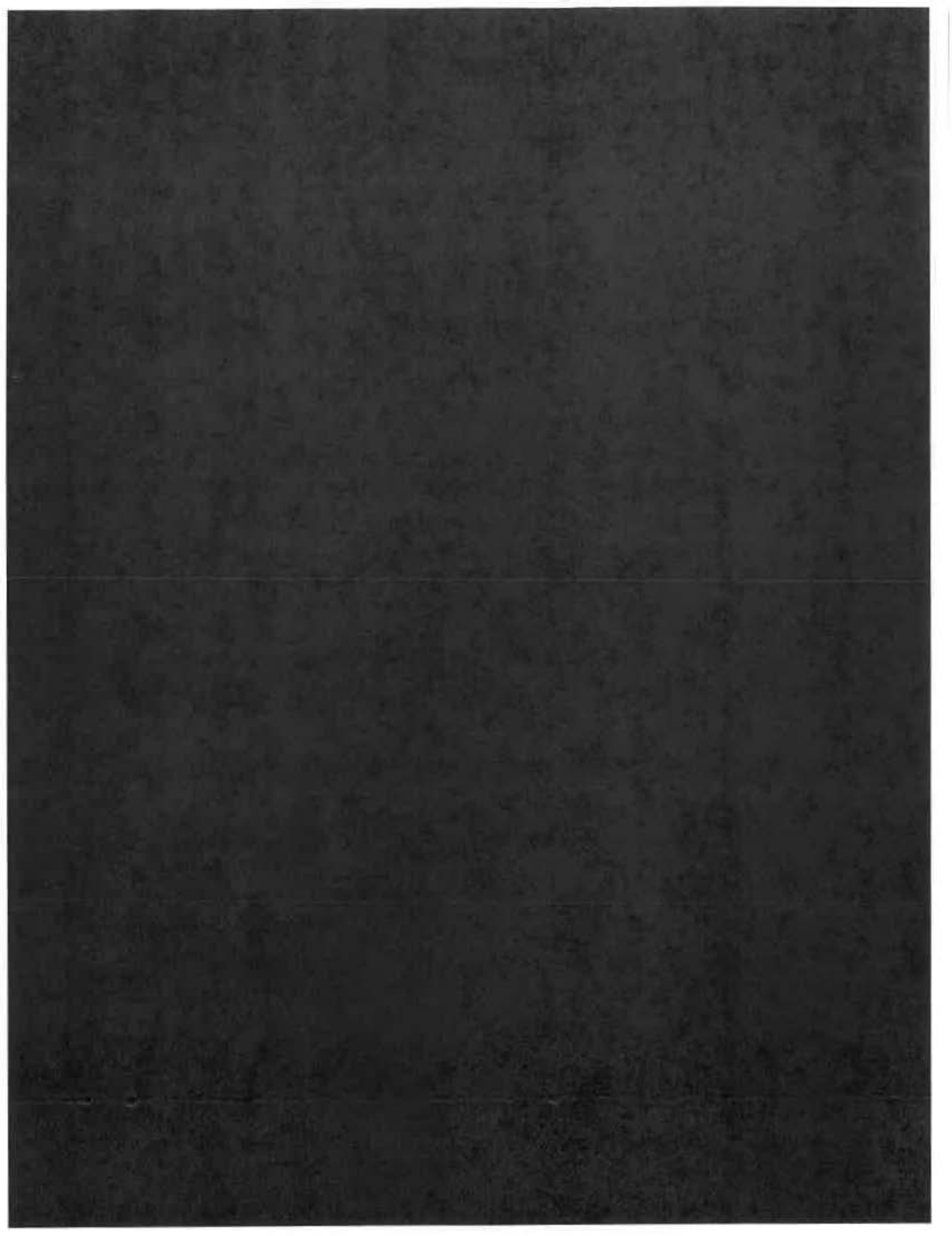


Exhibit 4









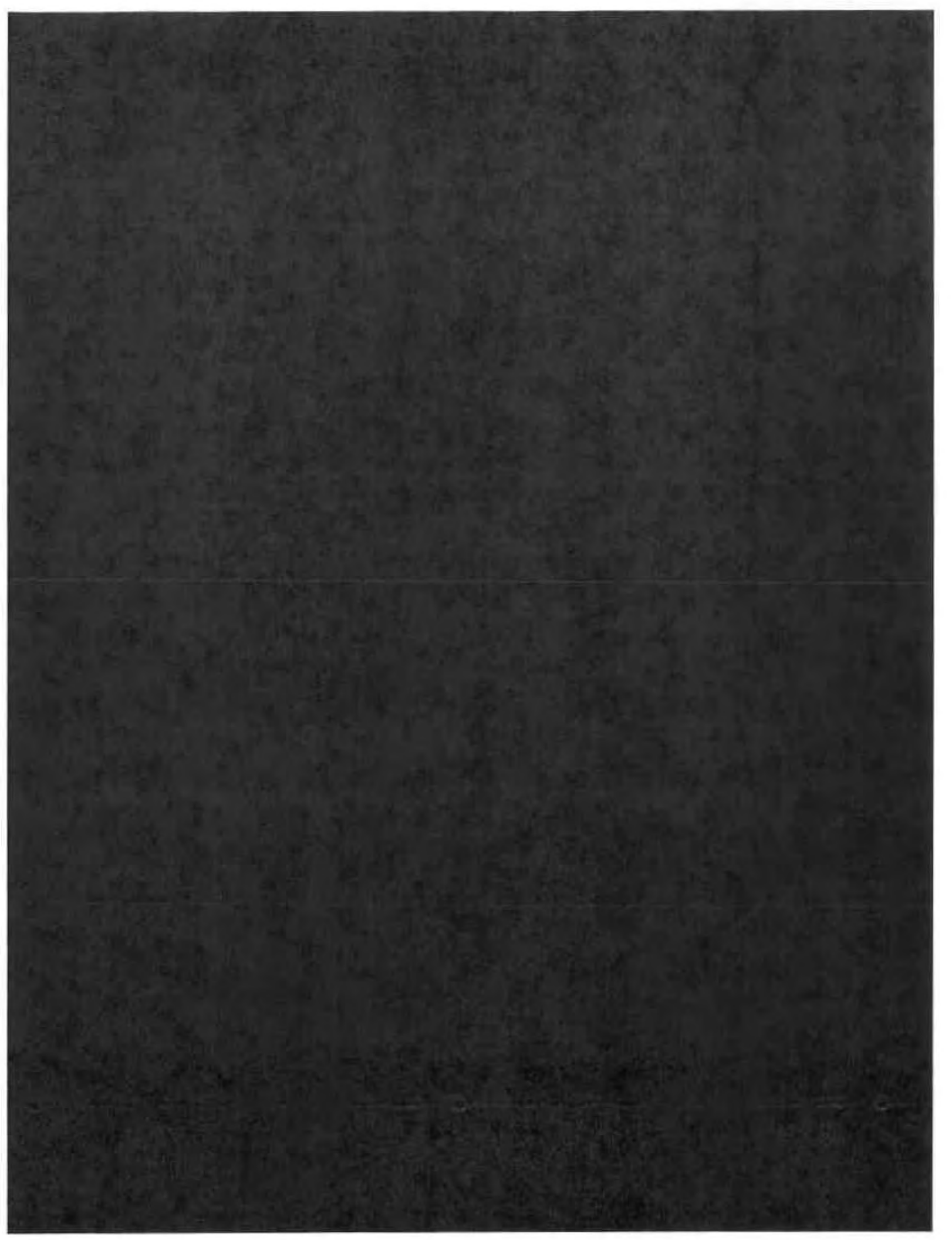
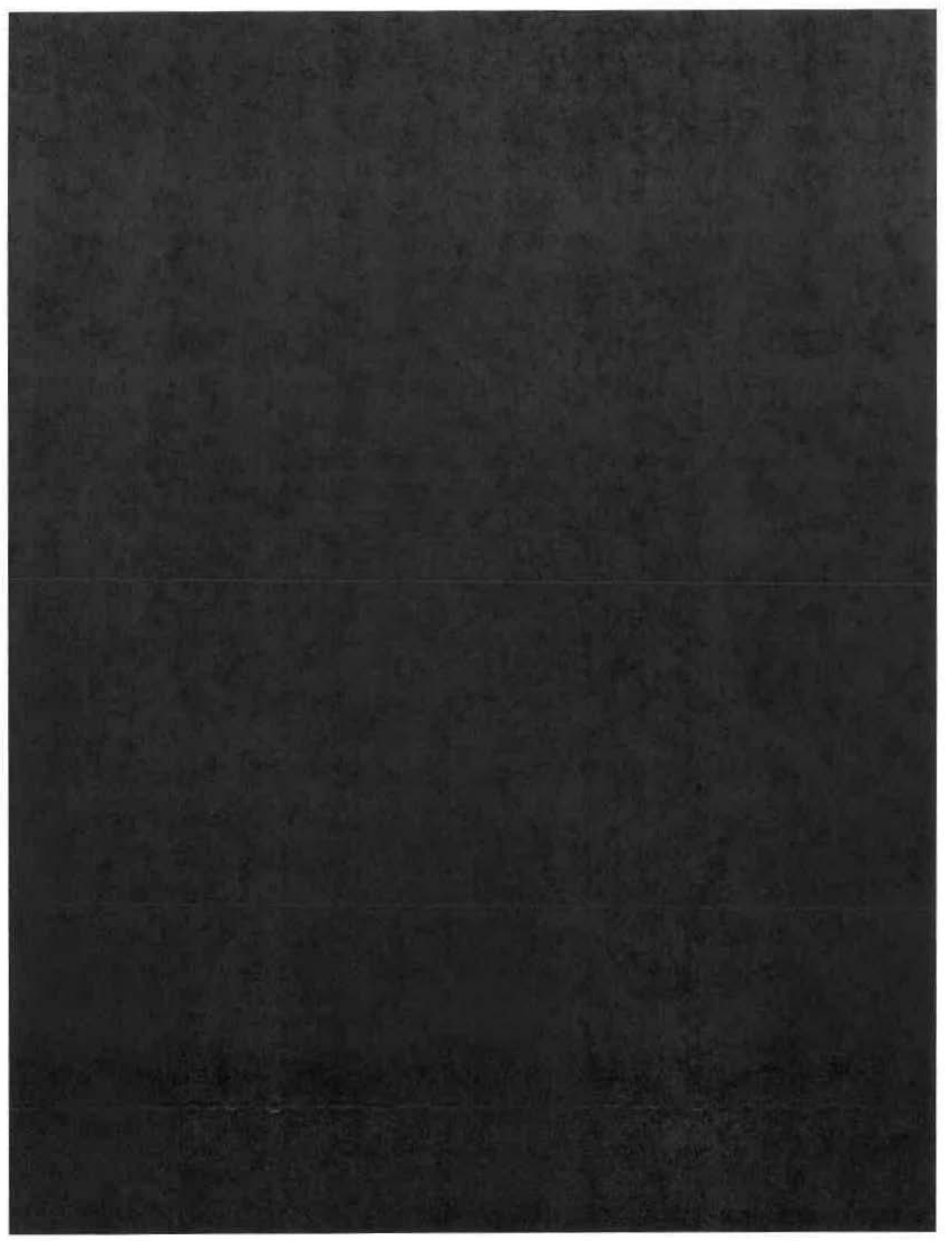


Exhibit 5



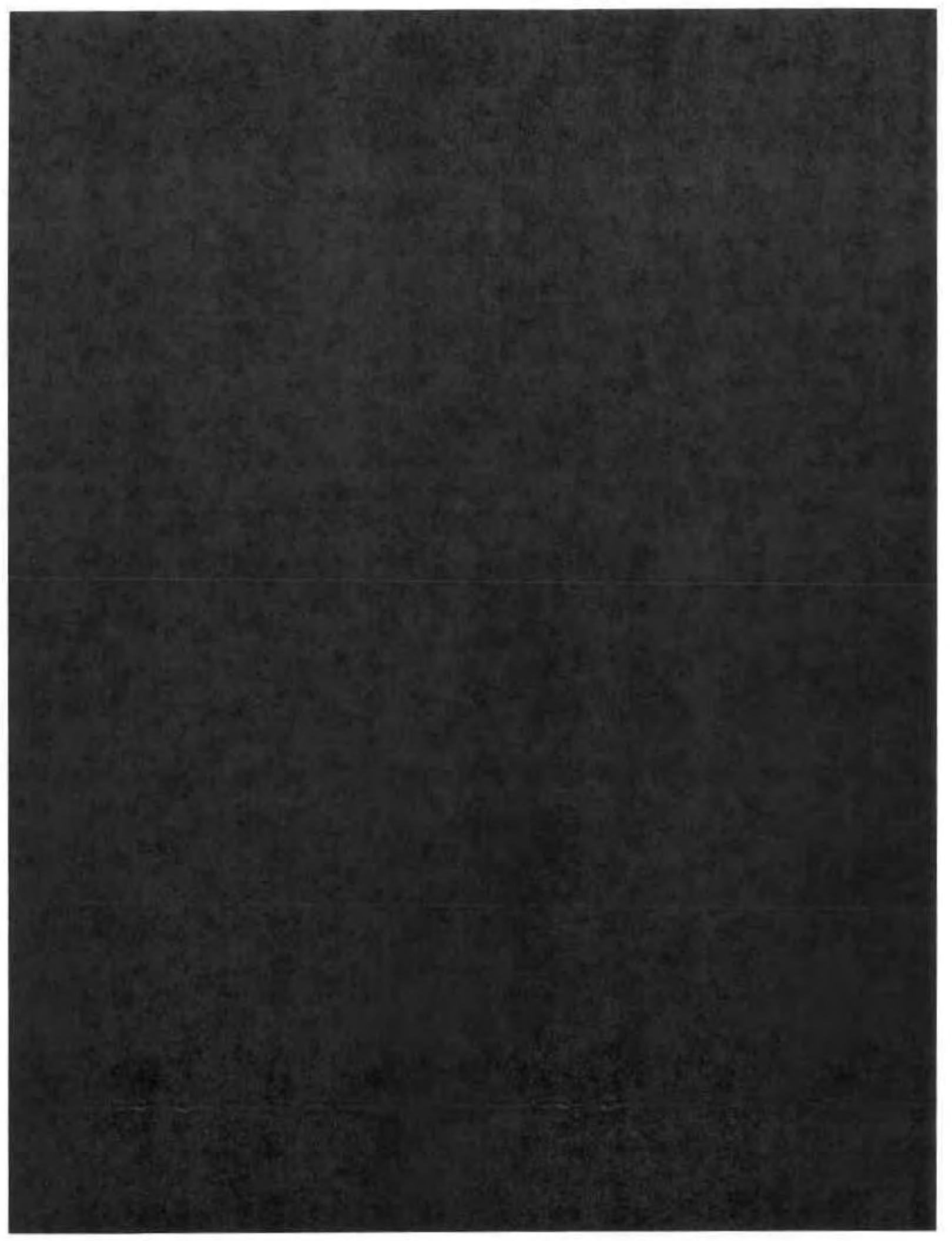
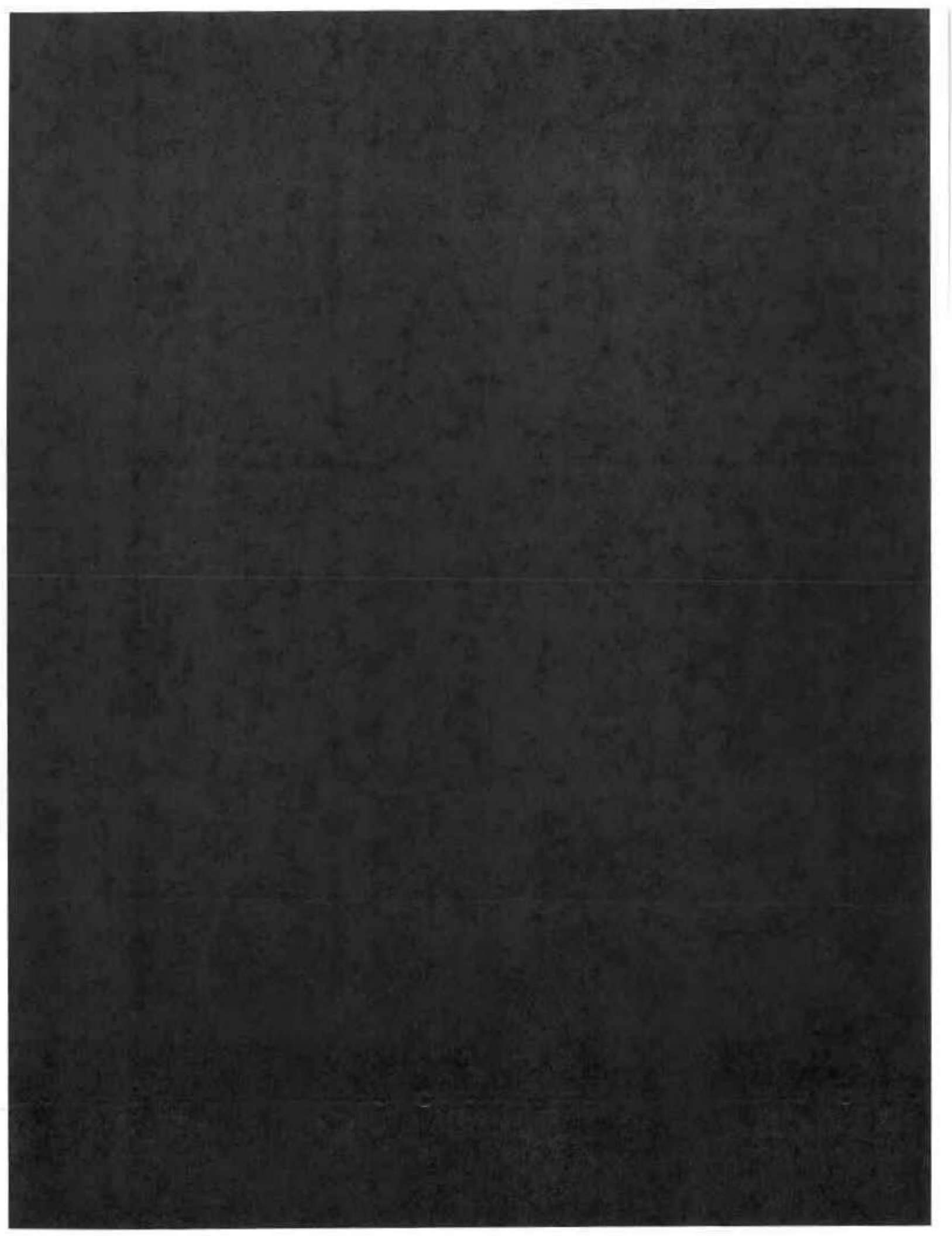
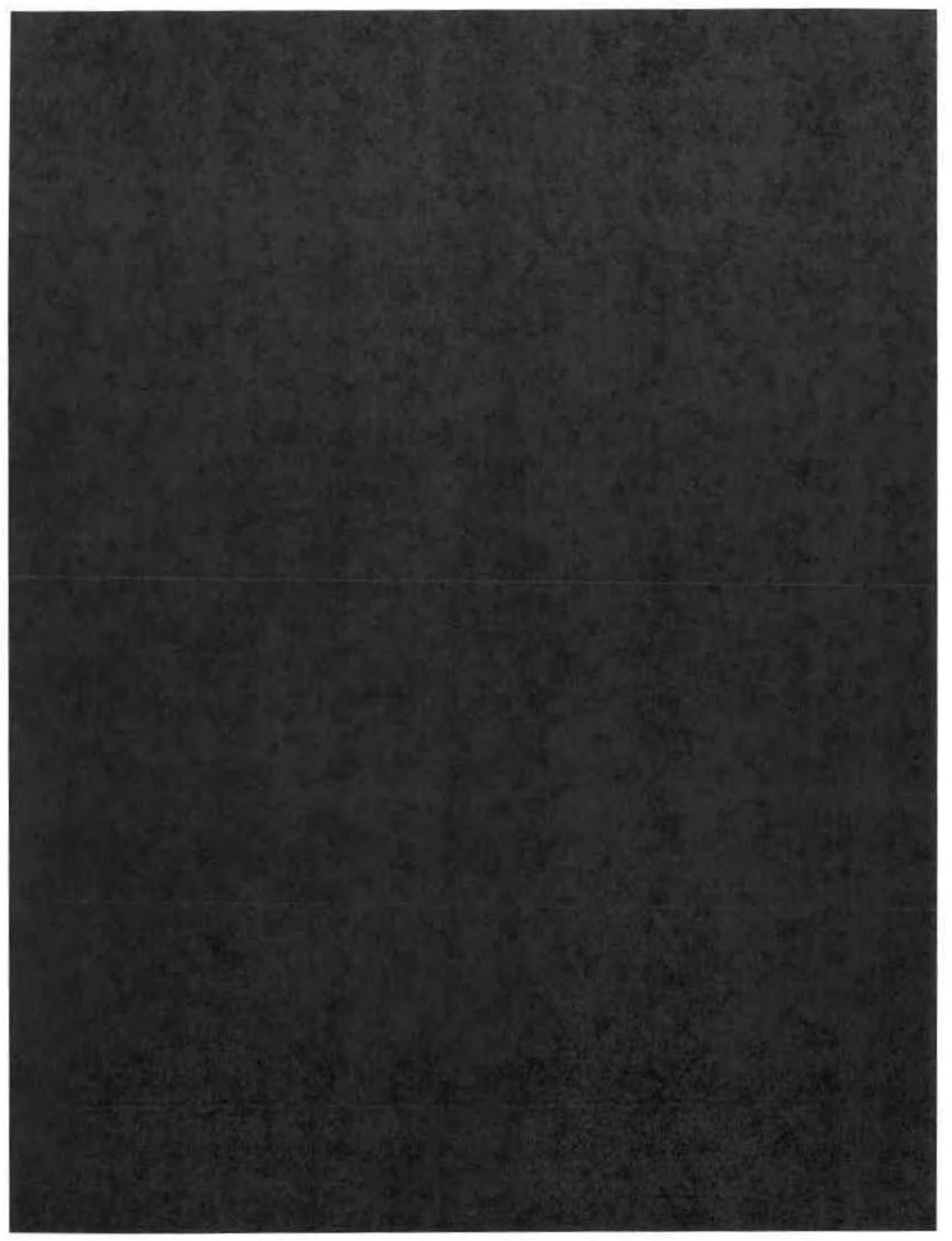
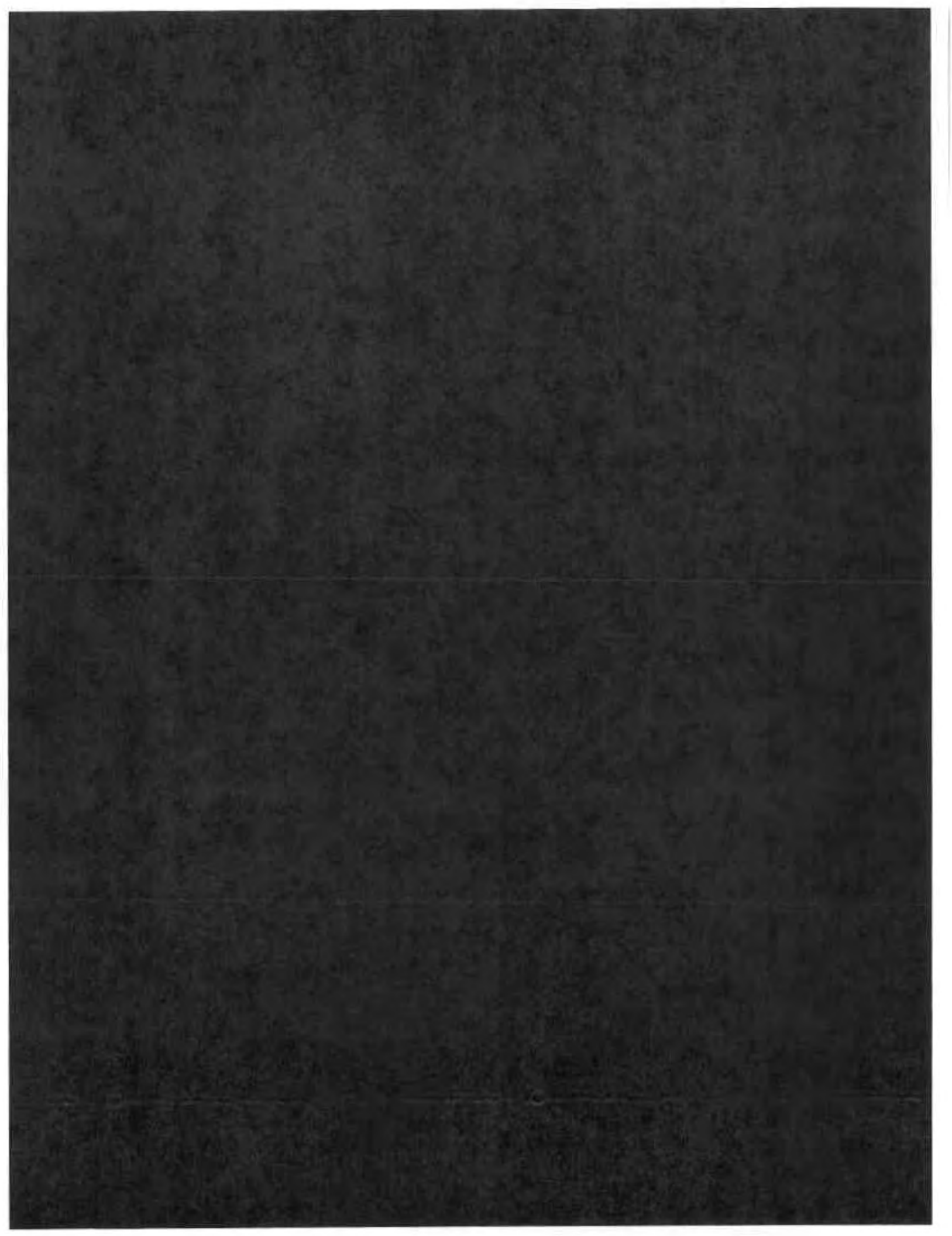
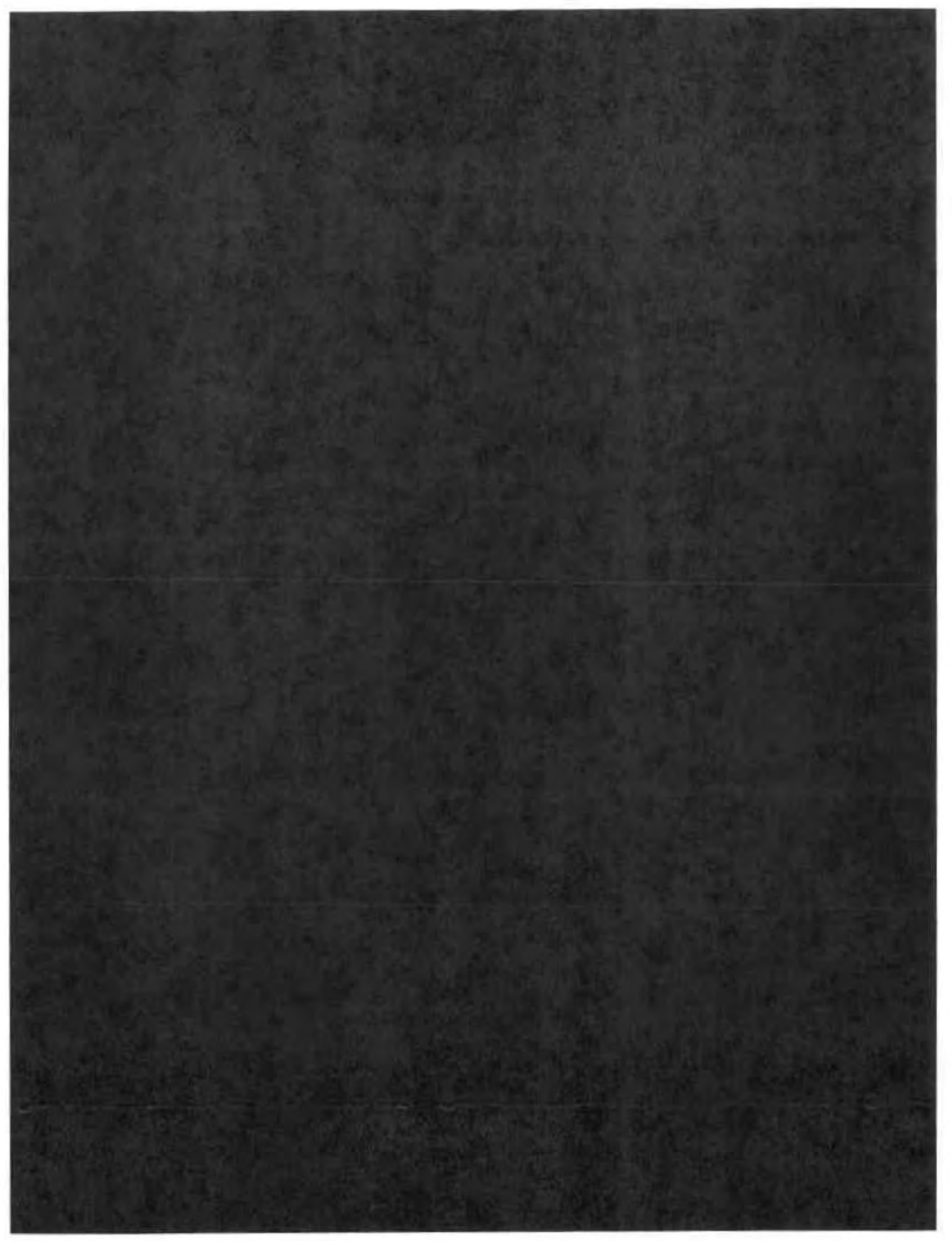


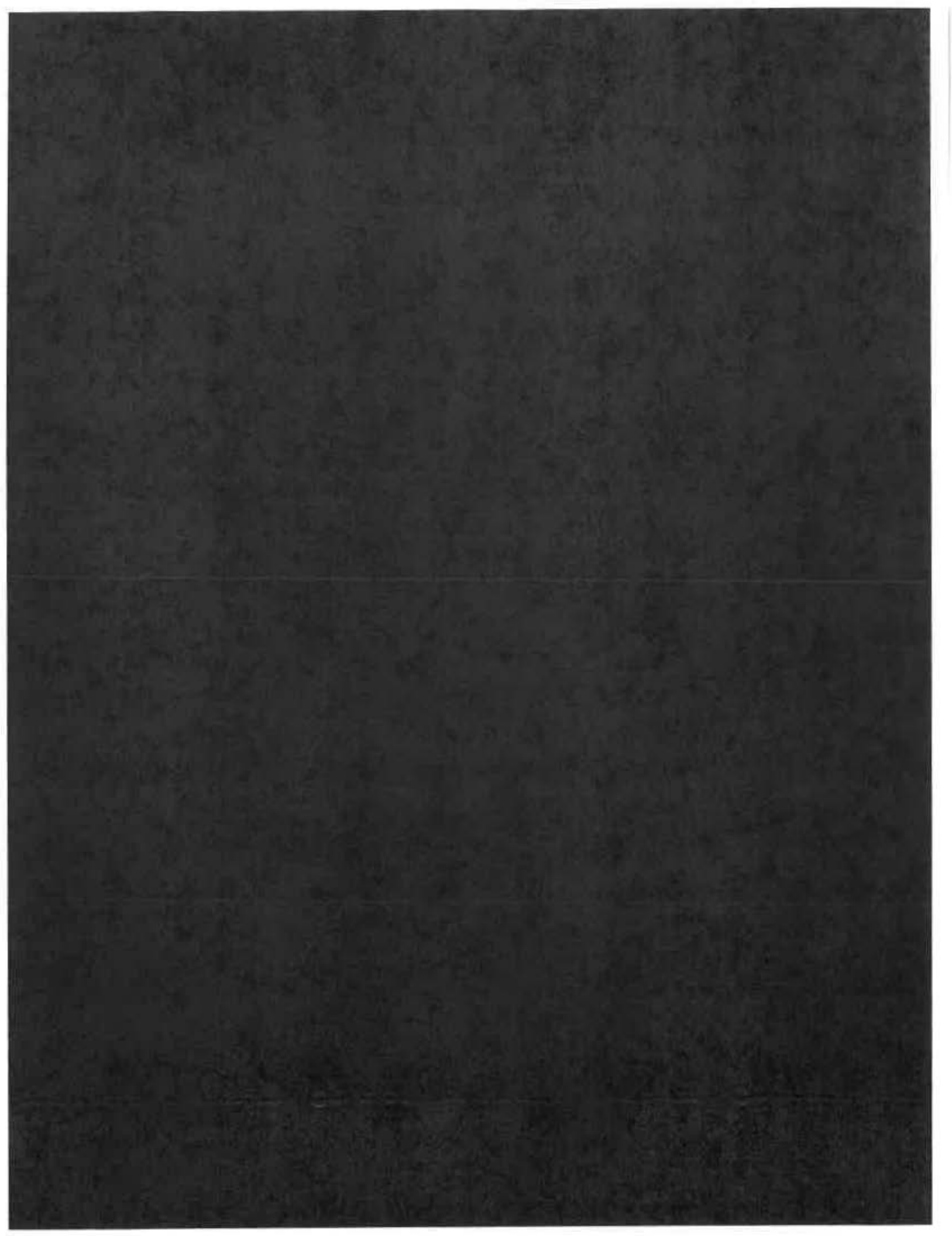
Exhibit 6

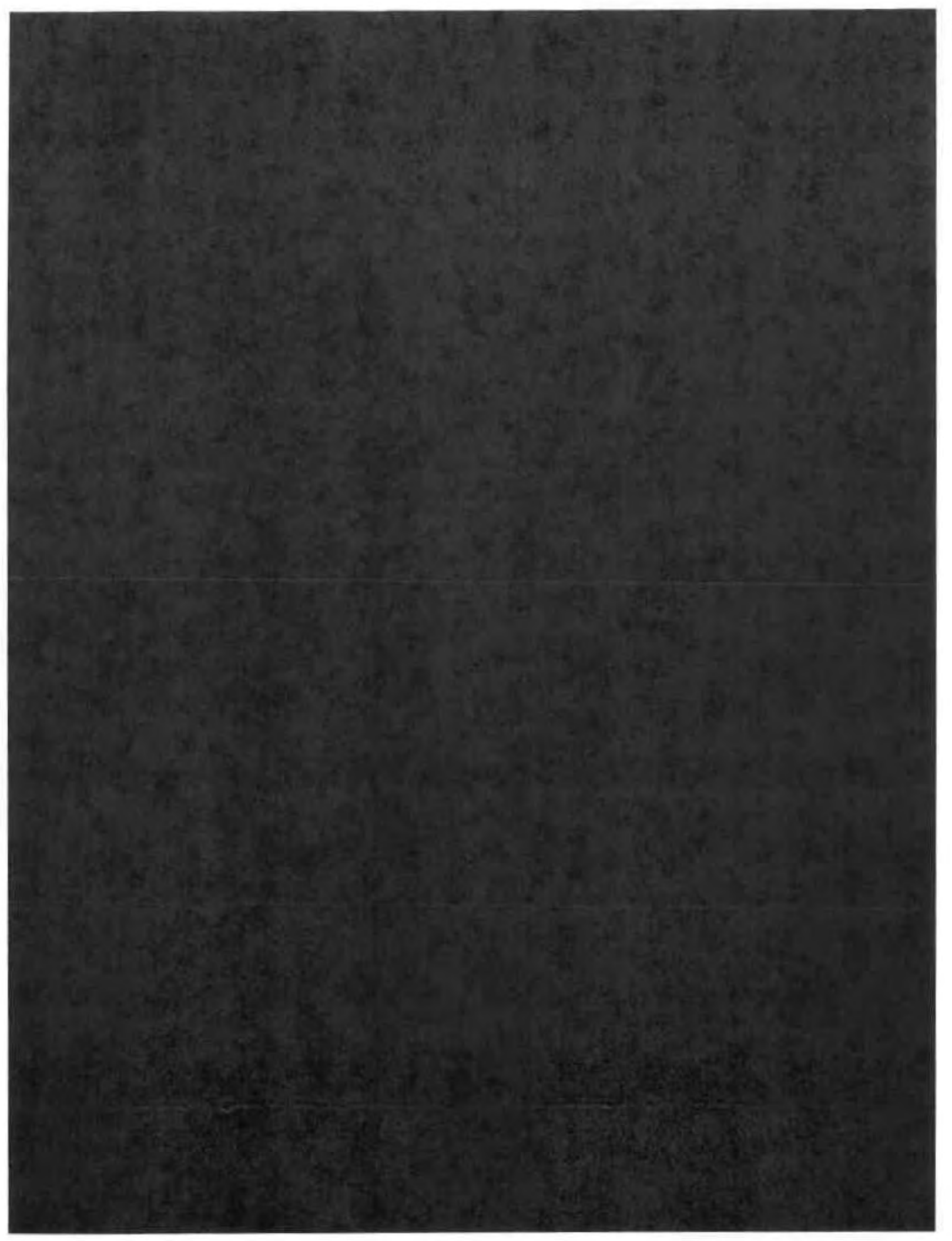


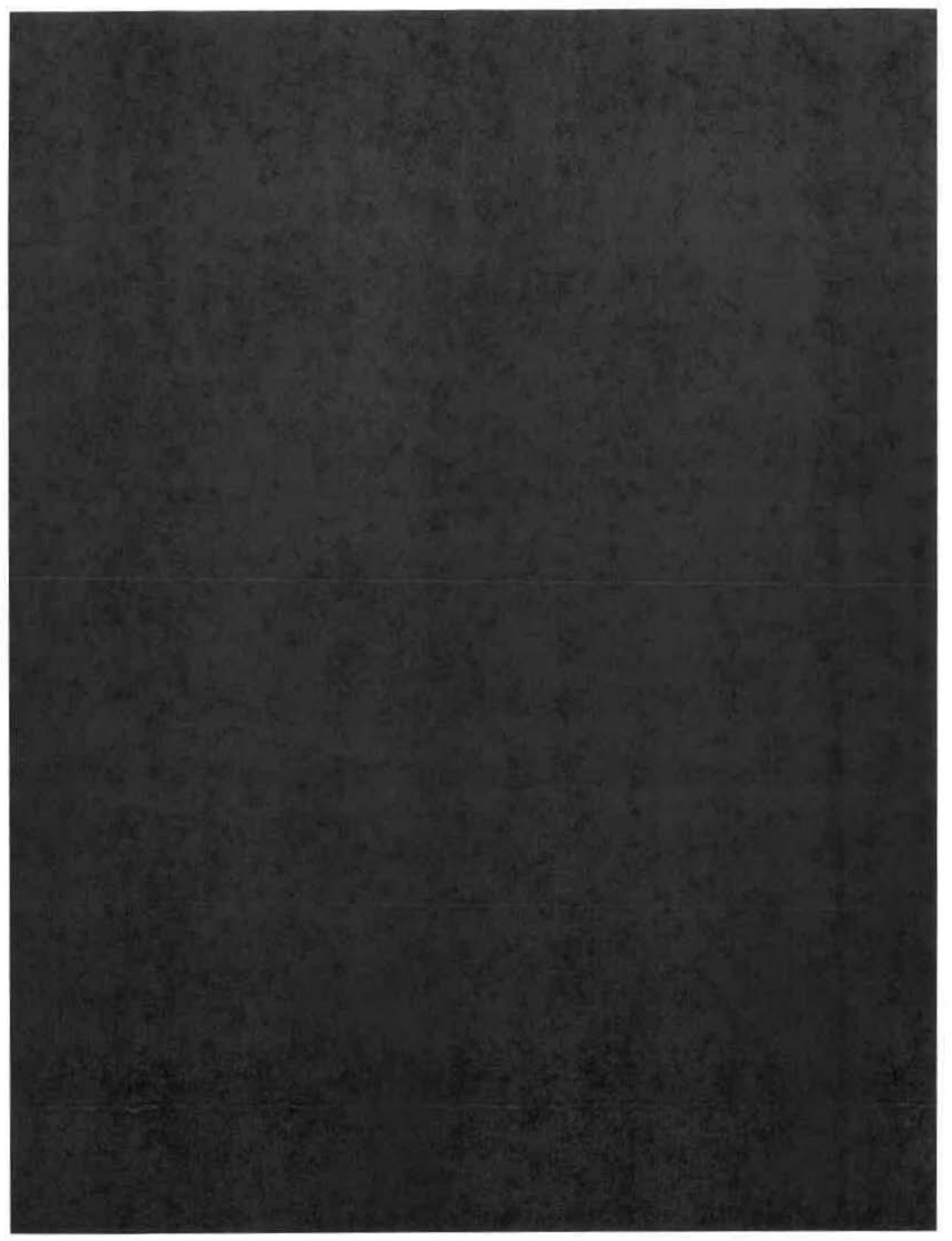


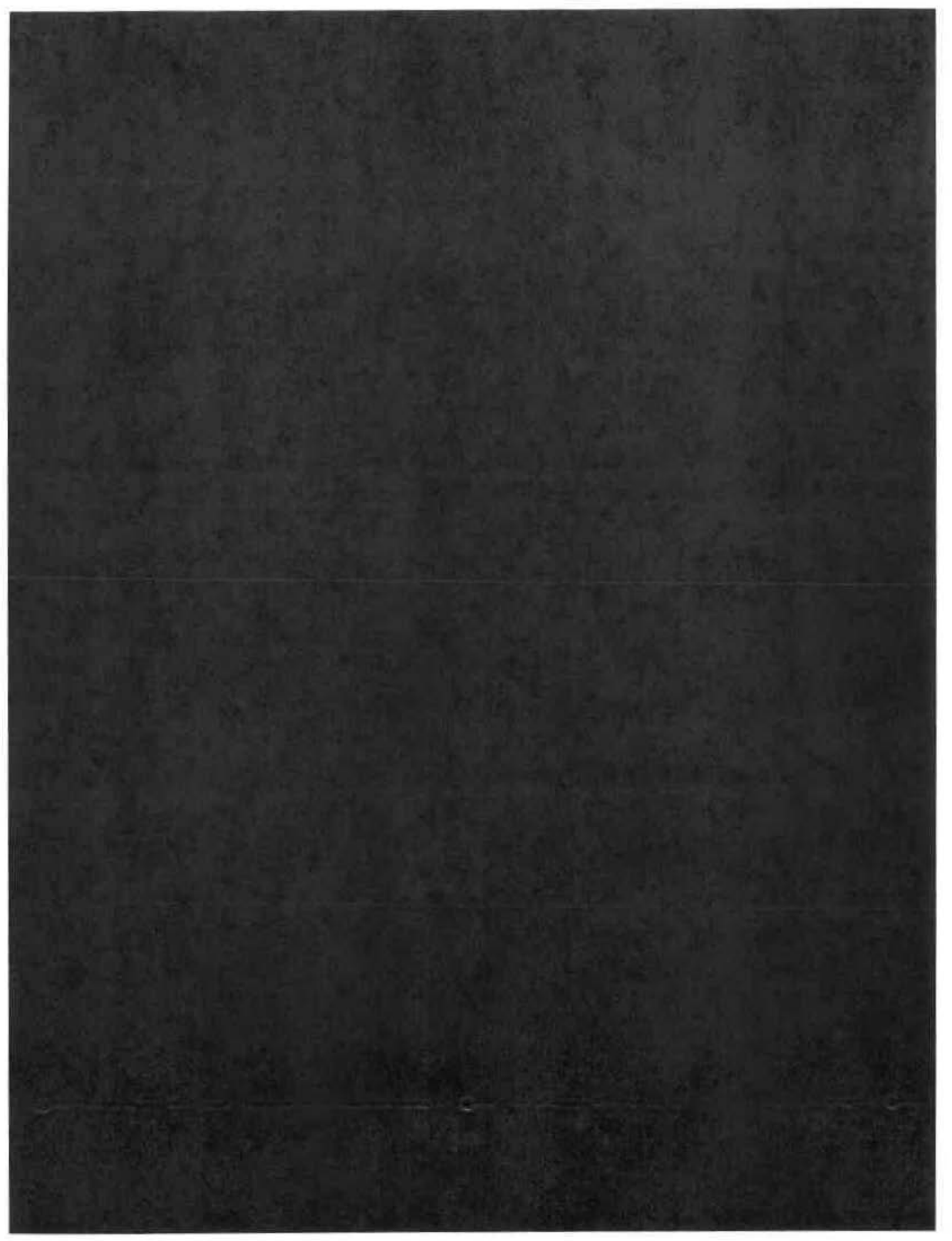


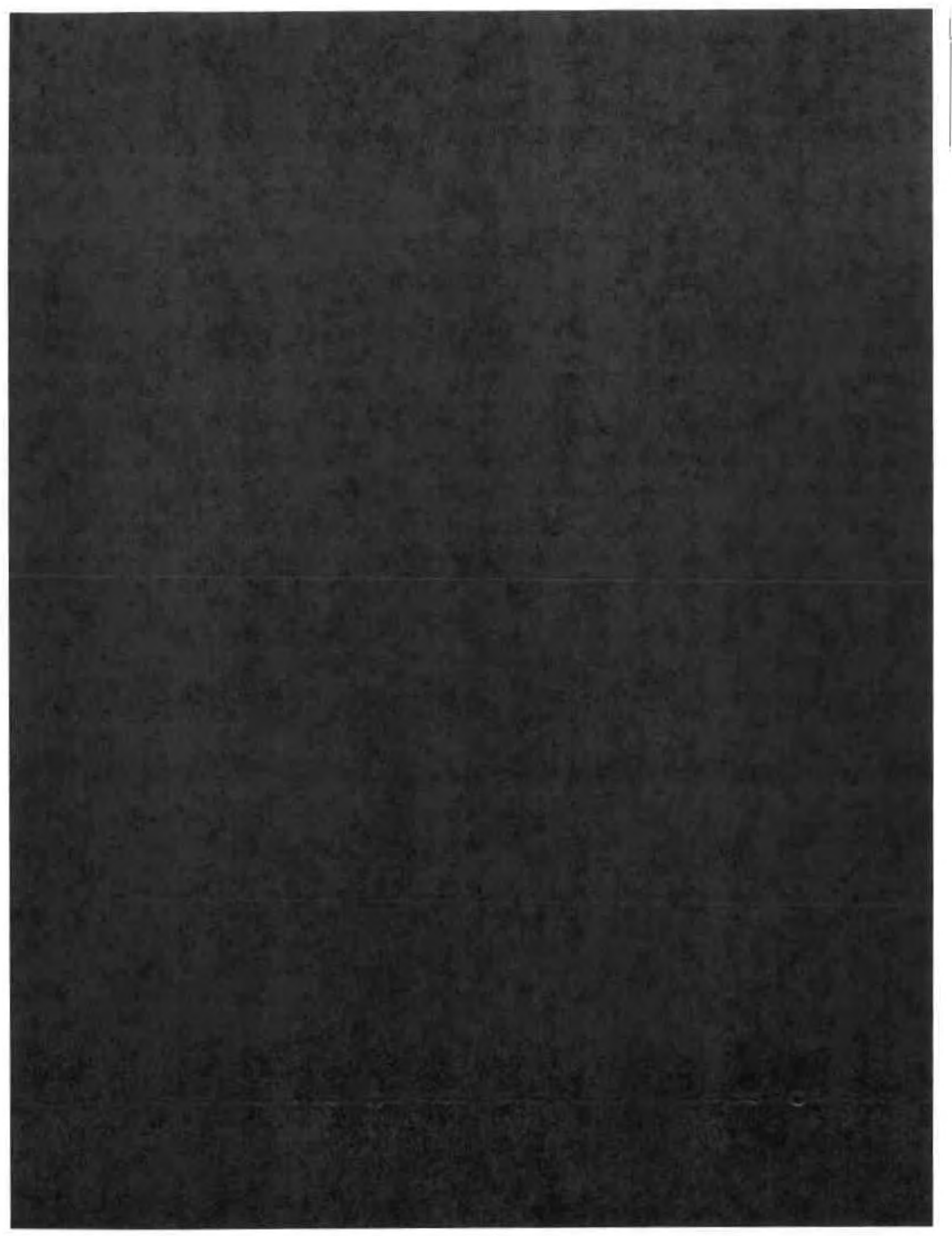


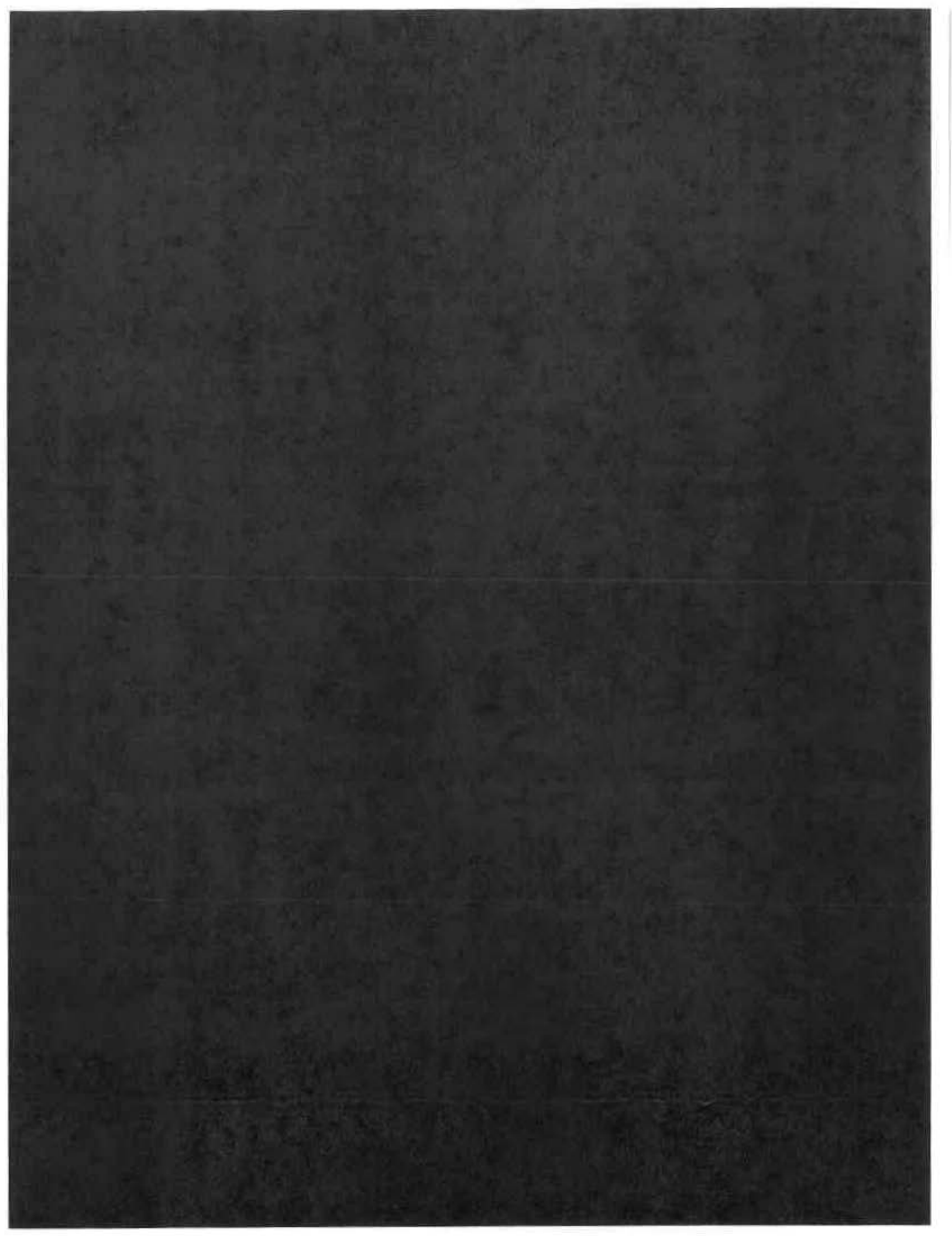


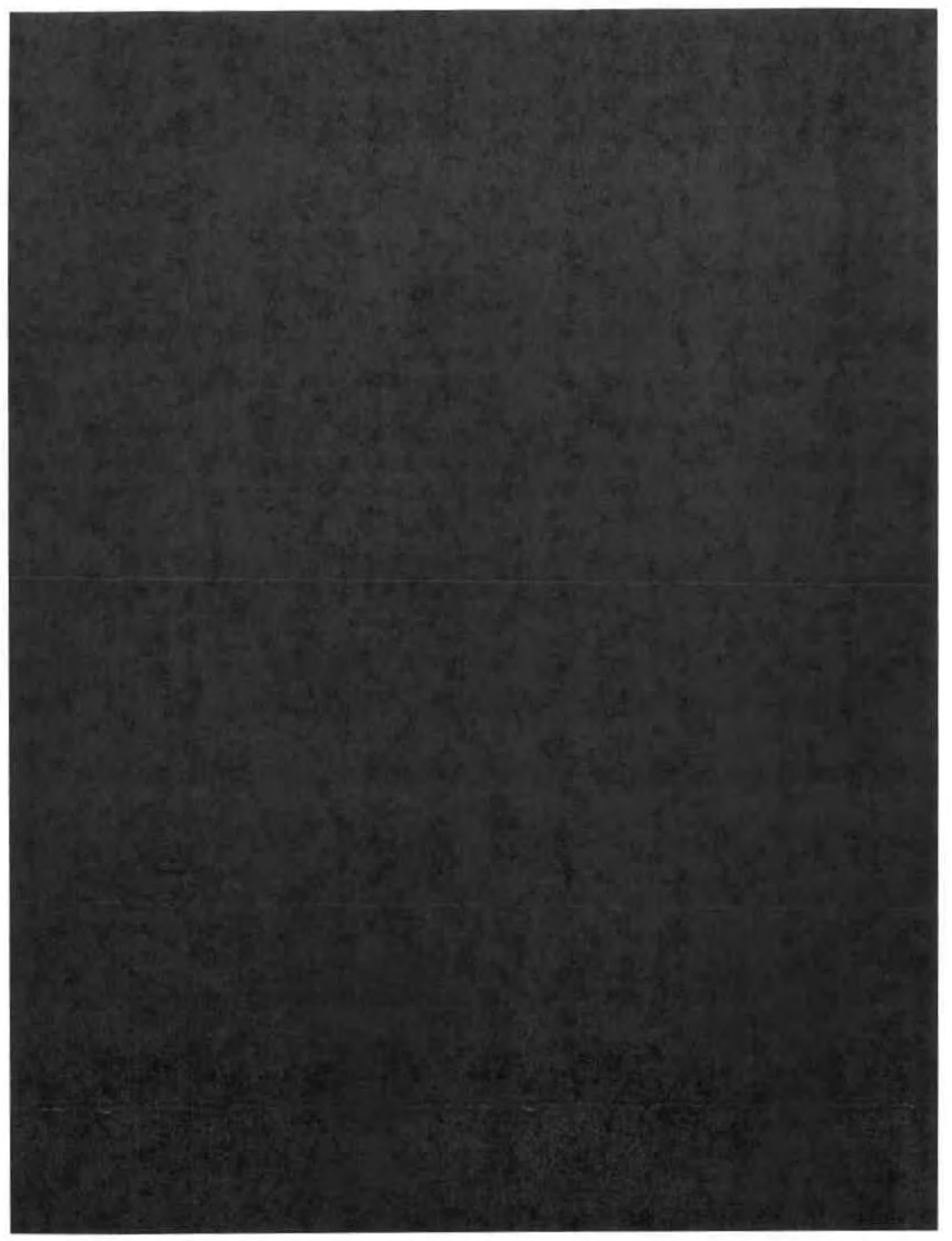


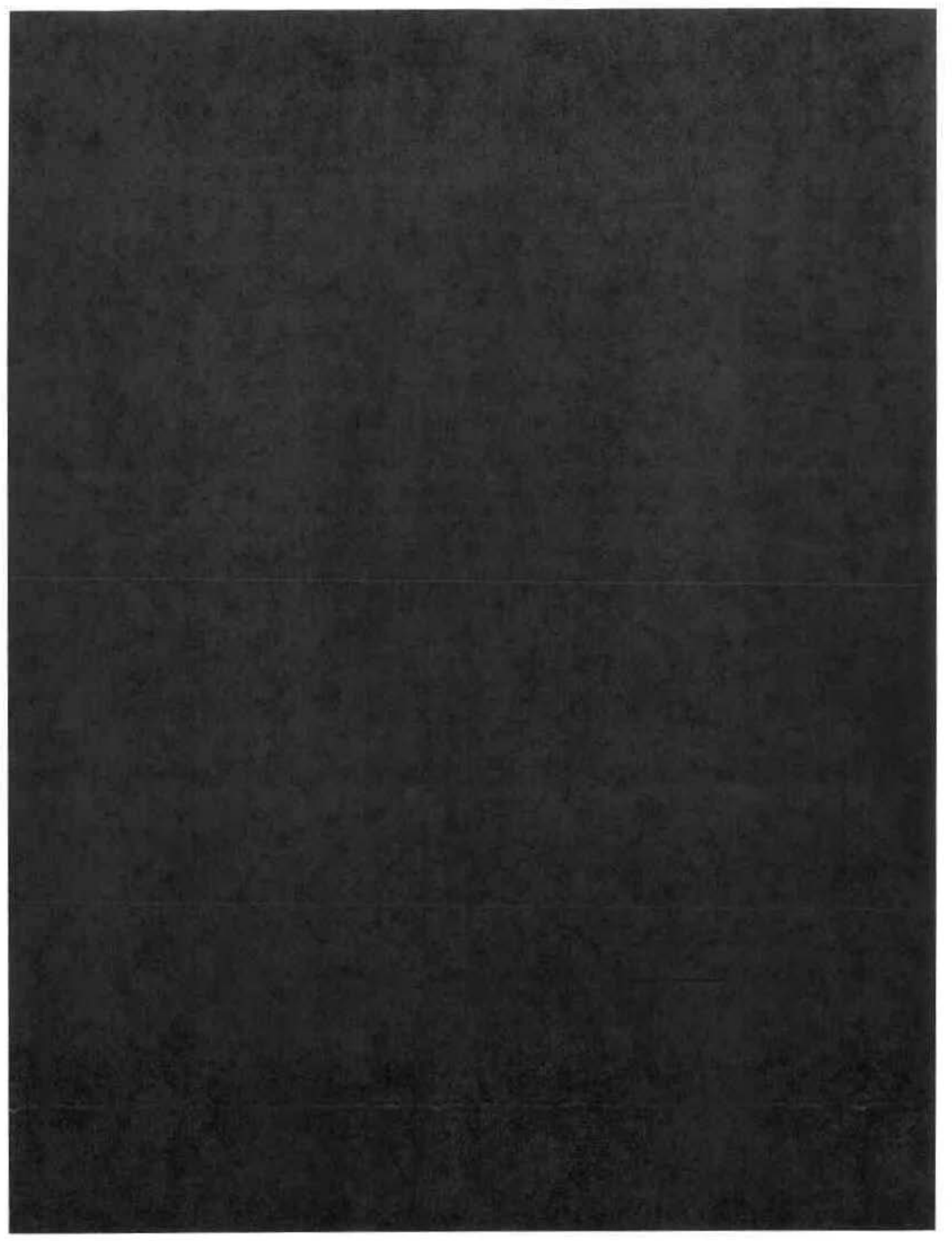


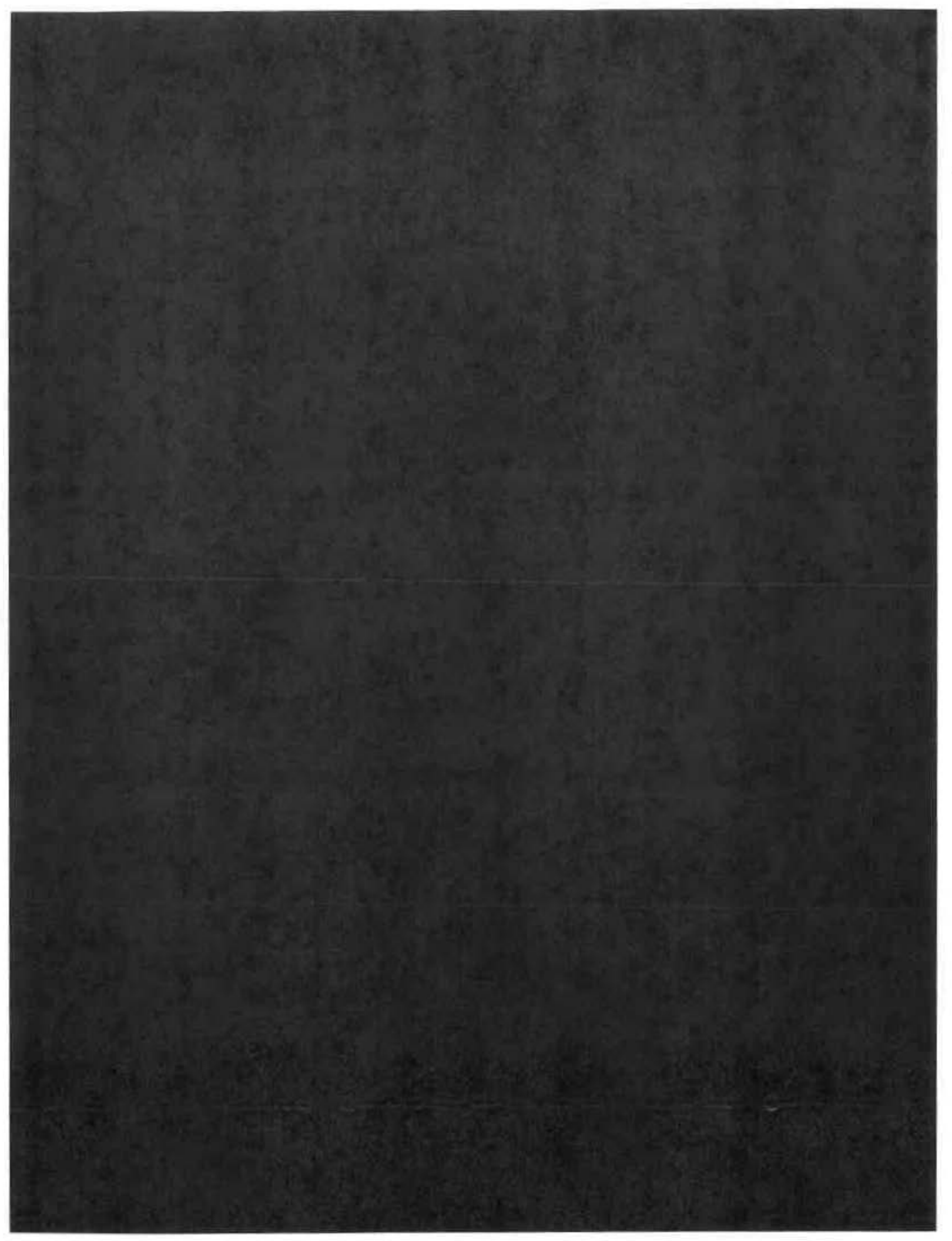


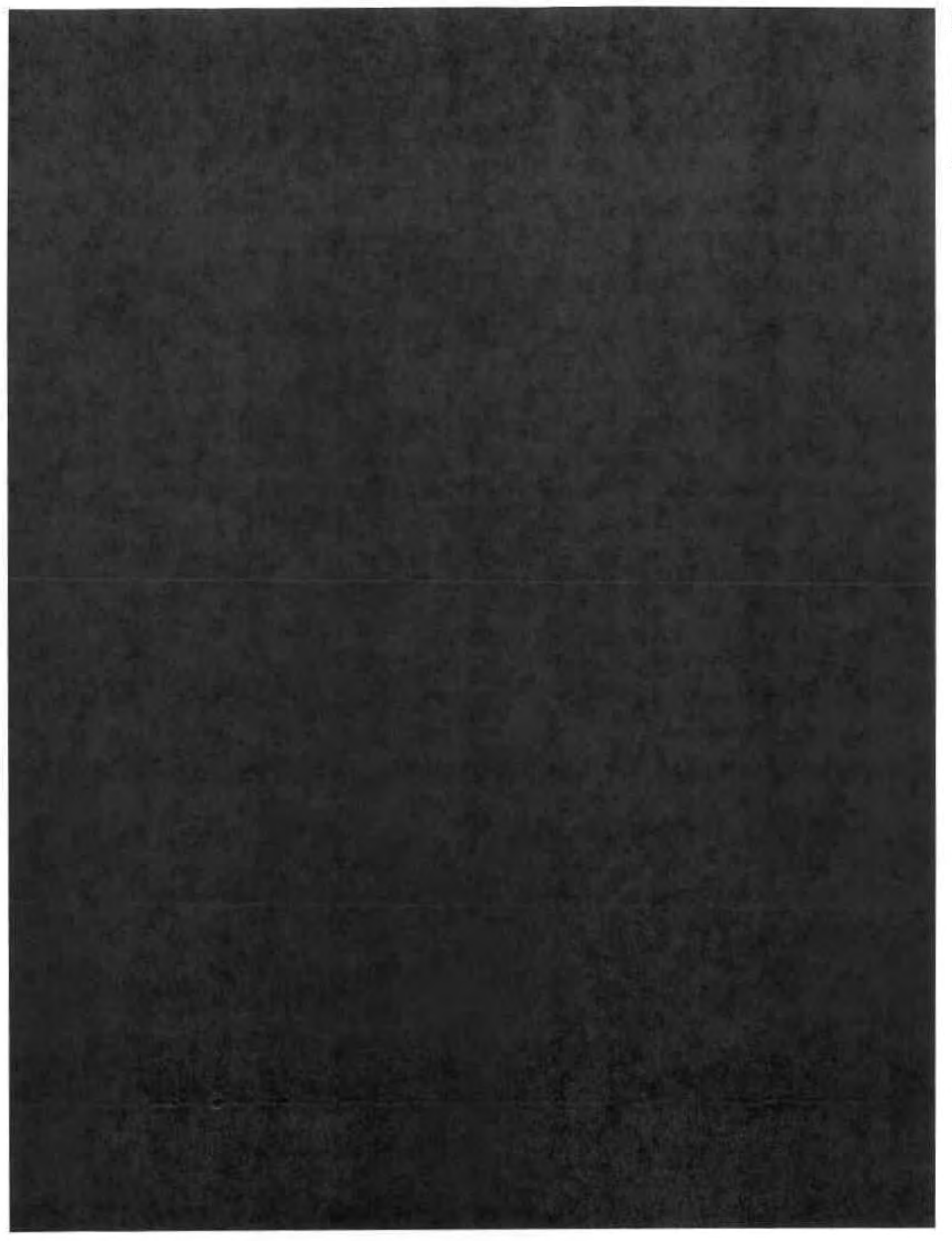












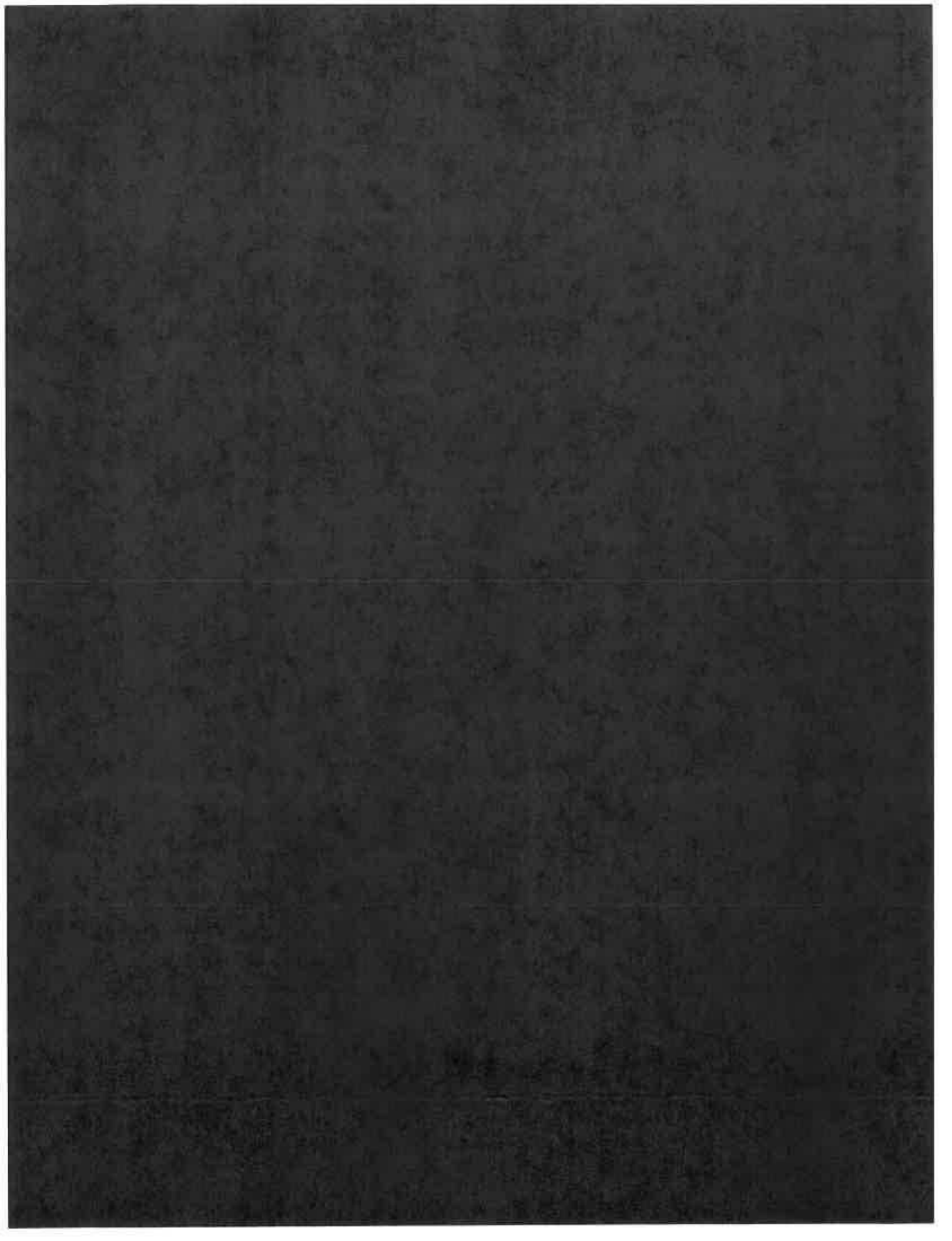


Exhibit 7

[REDACTED]

From: VanDruff, Laura Riposo [mailto:lvandruff@ftc.gov]
Sent: Tuesday, December 02, 2014 4:33 PM
To: OALJ
Cc: reed.rubinstein@dinsmore.com; William A. Sherman II (william.sherman@dinsmore.com); Prashant Khetan; Jarrod D. Shaw (jshaw@reedsmith.com)
Subject: FTC Docket No. 9357 -- letter from Chairman Darrell Issa

Dear Chief Administrative Law Judge Chappell:

Earlier this afternoon, staff of the House Committee on Oversight and Government Relations authorized Commission staff to share the attached letter (with exhibits) with the Court and with counsel for Tiversa.

The exhibits are stamped "Confidential – For Committee and Staff Use Only." Accordingly, we respectfully request that the Court grant this letter and its exhibits provisional *in camera* treatment. In addition, I have copied counsel for Tiversa on this email so that Tiversa may evaluate whether it wishes to request the protections of Rule 3.45.

Respectfully Submitted,

Laura Riposo VanDruff
Complaint Counsel

Laura Riposo VanDruff
Federal Trade Commission
Division of Privacy and Identity Protection
600 Pennsylvania Avenue, N.W., C.C-8232
Washington, DC 20580
[202.326.2999](tel:202.326.2999) (direct)
[202.326.3393](tel:202.326.3393) (facsimile)
lvandruff@ftc.gov

Exhibit 8

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: Barblan, Jennifer [Redacted]
Sent: Monday, December 22, 2014 5:37 PM
To: Rubinstein, Reed
Cc: Grimm, Tyler
Subject: Letter from Chairman Issa


Reed –

I hope you're doing well. We wanted to make sure you were aware of a recent letter Chairman Issa sent to the FTC. The letter includes several documents produced to the Committee by Tiversa that we believe were not produced to the FTC, despite their responsiveness to the September 2013 subpoena. Tiversa stamped the documents as "Confidential – For Committee and Staff Use Only." This is not a Committee marking, and the Committee does not consider the documents or the accompanying letter to be confidential.

Please don't hesitate to reach out if you have any questions.

Best,
Jen and Tyler

Jennifer Barblan
Committee on Oversight and Government Reform
Rep. Darrell E. Issa, Chairman



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Exhibit 9



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Secretary

December 16, 2014

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Issa:

Please know that because the matter of LabMD, Inc is still in administrative adjudication, your letter of December 1, 2014 has not been shared with the Chairwoman or the Commissioners. However, Chairwoman Ramirez has asked me to write and thank you on her behalf. Please also know, that after advising your Committee staff, the FTC's Complaint Counsel shared your letter with the Administrative Law Judge in the LabMD, Inc. matter, and with counsel for LabMD and Tiversa. Thank you again for sharing your findings.

Sincerely,

A handwritten signature in blue ink that reads "Donald S. Clark".

Donald S. Clark
Secretary of the Commission

Exhibit 10

BARBARA BLUMBERG, CALIFORNIA
 BOB NELSON, ALABAMA
 MARY MANDERLYN, WASHINGTON
 MARK PAYTON, ARKANSAS
 CLAYTON CASSELL, MISSOURI
 AMY KLOBUCHAR, MINNESOTA
 MACK BENNETT, ALASKA
 HENRY CRAWFORD, CONNECTICUT
 SHARON BLOOM, IOWA
 EDWARD MARKEY, MASSACHUSETTS
 CHRISTOPHER MURPHY, OREGON
 JONNY ROBERTS, MONTANA

JOHN THUNE, SOUTH DAKOTA
 ROBERT WIGGERS, MISSOURI
 ROY BLUNT, MISSOURI
 MARCO RUBIO, FLORIDA
 KELLY AYOTTE, NEW HAMPSHIRE
 BEN RAYBURN, TEXAS
 DANIELS, INDIANA
 TIM SCOTT, SOUTH CAROLINA
 BILLY LITMAS, ALABAMA
 DAN FEINBERG, CALIFORNIA
 GUY HORTON, WISCONSIN

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
 AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEB SITE: <http://commerce.senate.gov>

July 23, 2014

The Honorable Darrell E. Issa
 Chairman
 U.S. House Committee on Oversight and Government Reform
 2157 Rayburn House Office Building
 Washington, D.C. 20515

Chairman Issa,
 Dear Chairman Issa:

I am troubled by the impropriety of your ongoing interference with an administrative trial regarding allegations that the medical testing company LabMD, Inc. (LabMD) violated the security and privacy of almost 10,000 consumers. The trial is the result of an enforcement action brought by the Federal Trade Commission (FTC) against LabMD for lax data-security practices after discovering that consumers' sensitive personal and health information was available through a "peer-to-peer" sharing application and was being used by criminals to commit identity theft. Your interference in this legal matter is apparently going to be the subject of an upcoming hearing on July 24 in the House Committee on Oversight and Government Reform.

You purport to be concerned about allegations that a third-party company provided untruthful testimony to the FTC with regard to the LabMD breach. This allegation would be more properly raised by LabMD's defense counsel to the administrative law judge presiding over this trial. The trial process provides defense counsel with ample opportunity to impugn the veracity or integrity of a witness or evidence. It is not the job of Congress to serve as an advocate for one particular side and attempt to sway a judge who makes determinations of fact based on evidence formally presented under well-established rules and procedures.

Instead of allowing the parties in this trial to present evidence and to argue their positions before an independent fact finder, you are instead using heavy-handed, bullying tactics to undermine due process and to inappropriately assist the defendant, LabMD. As a result of your interference – including a June 11, 2014, letter to Chairwoman Edith Ramirez stating that your Committee may "immunize certain future testimony under 18 U.S.C. § 6005" – the administrative law judge presiding over this case has suspended the trial indefinitely. This delay is completely unnecessary; it needlessly forestalls resolution of this important consumer-protection case.

While Congress obviously has an important role in government oversight, I believe you have overstepped your bounds in this instance. It is not appropriate for Congress to intervene in the midst of a trial and to adversely affect its proceedings, as you have done. The inappropriate

The Honorable Darrell E. Issa
July 23, 2014
Page 2 of 3

timing and nature of your investigation are buttressed by the revelation that LabMD is being represented by a former member of your Committee staff. This raises the question of whether LabMD directly sought your help and intervention in the legal process rather than take the risk of losing on the merits at trial.

Another apparent purpose of your hearing is to express skepticism about the FTC's long-standing and well-established legal authority under Section 5 of the FTC Act to bring an action against companies like LabMD for negligent data-security practices. This skepticism is unfounded, and your public position was recently rejected by a federal judge in the FTC's data security case against Wyndham Corporation. Over the past 13 years, the Commission has initiated dozens of administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and that resulted in improper disclosures of personal information collected from consumers.

Indeed, Congress has mandated that the FTC effectively use its authority to protect consumers from "unfair or deceptive acts or practices in or affecting interstate commerce" – the very issues at the heart of the LabMD case. The legislative history of the FTC Act confirms that Congress intended to delegate broad authority "to the [C]ommission to determine what practices were unfair," rather than "enumerating the particular practices to which [the term 'unfair'] was intended to apply... There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." Against this backdrop, one must conclude that your upcoming hearing and current investigation are nothing more or less than an effort to weaken one of our nation's most important consumer-protection laws, a law that has protected generations of American consumers from scams and rip-offs.

Lastly, it is worth noting that due to Congress's repeated failure to pass strong data-security and breach notification legislation, the FTC stands as the primary federal entity protecting American consumers from harmful data breaches. Recent high-profile, large-scale data breaches -- most notably at Target -- have once again raised public awareness about the need for companies to adequately secure consumer information. Because Congress remains incapable of passing meaningful data-security legislation that provides American consumers with strong protections, we must continue to rely on the FTC and its organic authority under the FTC Act to bring enforcement actions against companies that break the law. Rather than continuing to pursue your current course of interference, I would urge you to instead work to pass meaningful data-security legislation. I would welcome your assistance.

As Chairman of the Senate Committee on Commerce, Science, and Transportation, I regard the FTC as the premier consumer-protection agency in the nation. The Commission consistently seeks to carry out its mission of protecting consumers and competition, and the agency and its employees serve as an important watchdog for corporate wrongdoing. If the Commission acted improperly or otherwise relied on faulty testimony or evidence in its case against LabMD, a judge would be the proper arbiter of such an allegation at trial, not Members

The Honorable Darrell E. Issa
July 23, 2014
Page 3 of 3

of Congress. I urge you to reconsider your actions and to allow for the American legal system and the rule of law – not political theater – to resolve this case.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Rockefeller IV". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John D. Rockefeller IV
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member