

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FILED

JUL 10 2018

SUPREME COURT
WESTERN DISTRICT

IN RE:

No. [REDACTED]

THE FORTIETH STATEWIDE
INVESTIGATING GRAND JURY

[REDACTED]

RECEIVED

JUL 10 2018

SUPREME COURT
WESTERN DISTRICT

PETITIONER'S BRIEF

[REDACTED], by

and through his undersigned attorney and pursuant to this Honorable Court's July 6th *per curiam* order, respectfully submits this brief in support of this appeal.

Introduction

Grand Jury Report No. 1 concludes [REDACTED] is a sexual abuser of children without the opportunity for him to be heard, the chance to defend himself before a fair and impartial tribunal having jurisdiction over the case, the right to cross-examine witnesses, the right to test the evidence against him, the right to present affirmative evidence, or any other required aspect of due process. This heinous characterization is false and wholly unsupported by the record below, and [REDACTED] asserts his actual and complete innocence to the allegations. Moreover, the process employed below to reach this determination -- which threatens to destroy [REDACTED]'s personal and professional reputation

and deprive him of his ability to continue his chosen profession -- was accompanied by inadequate notice and no opportunity for a hearing, in violation of his fundamental rights to his good reputation and due process of law under Article I Sections 1, 9, and 11 of the Pennsylvania Constitution. Therefore, [REDACTED] respectfully requests that the lower court's order be reversed as to him.

This brief is structured to comply with Pa.R.A.P. 2111. However, a separate "Merits Brief Setting Forth Common Legal Arguments of Clergy Petitioners in Opposition to Premature Release of Unredacted Grand Jury Report No. 1" has been filed which globally addresses issues of law and argument common to multiple individual clergy petitioners (hereinafter the "Petitioners' Common Brief"). Where the Petitioners' Common Brief fully addresses the issues, such as in the argument, summary of argument, and standard of review sections, this brief incorporates the Petitioners' Common Brief by reference and does not repeat the discussion or argument herein.

I. Statement of Jurisdiction

This Court has appellate jurisdiction over this matter pursuant to 42 Pa.C.S. § 722(5) and Pa.R.A.P. 3331(a)(3). the Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury (the

“Supervising Judge”) certified this matter for immediate appeal pursuant to 42 Pa.C.S. § 702(b) and Pa.R.A.P. 312.

II. Orders in Question

On June 6, 2018, the Supervising Judge entered an order denying Petitioner’s motion for a pre-deprivation hearing “for the reasons contained in the Court’s Opinion concerning pre-deprivation [*sic*] hearings filed June 5, 2018.” The June 6th Order is attached as Exhibit H. The incorporated June 5th Order and Opinion states in part:

“The request to certify this matter for immediate appeal is **GRANTED** as the Court is of the opinion that this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Opinion and Order may materially advance the ultimate termination of this matter.

The June 5th Order and Opinion is attached as Exhibit I.

III. Statement of Scope of Review and Standard of Review

Petitioner incorporates by reference the discussion and argument regarding the scope of review and the standard of review set forth in the Petitioners’ Common Brief.

IV. Statement of the Question Involved

Whether the Supervising Judge violated Petitioner's fundamental rights to his good reputation and due process of law under Article I Sections 1, 9, and 11 of the Pennsylvania Constitution by denying him a pre-deprivation hearing?¹

V. Statement of the Case

[REDACTED]

[REDACTED]

[REDACTED].

The 40th Statewide Investigating Grand Jury was originally empaneled for an 18-month term. *See* Order, at ¶ 7, *In Re: Application of Bruce R. Beemer, First Deputy Attorney General of the Commonwealth of Pennsylvania, Requesting an Order Directing that an Additional Multicounty Investigating Grand Jury Having Statewide Jurisdiction be Convened*, No. 2 WM 2016 (Pa. Jan. 14, 2016) (order initially authorizing 40th SIGJ for 18-month term). At some point, the Grand Jury's original term was extended for an additional 6 months, for a total of 24 months, which is the statutory maximum term for an investigating grand jury. *See* 42 Pa.C.S. § 4546(b). The Grand Jury began its first investigation, under Notice 1, on April 21,

¹ This is the only question raised by [REDACTED] below. However, other similarly situated individuals filed motions below challenging whether the findings in the Grand Jury Report were supported by a preponderance of the evidence. [REDACTED] submits that a finding in favor of those petitioners on that issue should apply equally to him and the other individuals named in the Report.

2016. Accordingly, the 24-month term of the 40th Statewide Investigating Grand Jury expired on April 20, 2018.

On May 4, 2018, [REDACTED] received the following letter from Senior Deputy Attorney General Daniel J. Dye regarding the 40th Statewide Investigating Grand Jury, Report No. 1:

[REDACTED]

[REDACTED]

See Exhibit A.

Attached to the letter from Mr. Dye was the following Order and Notice entered by Supervising Judge Norman A. Krumenacker, III:

[REDACTED]

[REDACTED]

[REDACTED]

See Exhibit B.

Attached to the Order and Notice were 2 pages, pages 390 and 391, of a summary regarding [REDACTED] which includes wholly unsubstantiated and disputed allegations of a single incident of alleged molestation [REDACTED]

[REDACTED] See Exhibit C.

Pages 390 and 391 of the Report contain the "Profile" of [REDACTED]. The "Profile" concludes without qualification that [REDACTED] [REDACTED]. See Exhibit C at 391.

The summary did not contain sufficient information in order to permit [REDACTED] to prepare an adequate and meaningful response; the summary did not identify the accuser; the summary did not describe what if any actual testimony the accuser gave; the summary did not identify whether there is any supporting evidence for the allegations; the summary did not include details regarding the Diocese investigation resulting in the allegations being deemed unsubstantiated;² the summary did not indicate whether there were other references

² The Diocese separately produced to the Grand Jury a formal finding fully exonerating [REDACTED] of the allegations; this finding, however, was not referenced anywhere in the Report.

in the Report to exculpatory or favorable information regarding [REDACTED] and the summary did not explain the context within the Report for the allegations.

Accordingly, on May 17, 2018, [REDACTED] filed a Motion for Disclosure with the Supervising Judge respectfully requesting that the OAG furnish him with all passages in the Report (and any attachments thereto) having anything to do with the allegations against him.

On May 21, 2018, the Supervising Judge held a hearing on [REDACTED] Motion for Disclosure. At the hearing, the attorney for the Commonwealth and undersigned counsel jointly requested that the Supervising Judge rescind his May 2, 2018 Order and Notice. The Supervising Judge granted the parties' joint request.

On May 22, 2018, the Supervising Judge entered an Amended Order directing additional disclosure of materials to [REDACTED] and others. The May 22, 2018, Amended Order required that [REDACTED] submit any response to the excerpts on or before June 21, 2018. A copy of the May 22, 2018, Amended Order is attached as Exhibit D. On June 1, 2018, the Supervising Judge entered an order dismissing the Motion for Disclosure as moot. A copy of the June 1, 2018, Order is attached as Exhibit E.

On or about May 31, 2018, undersigned counsel received the May 22, 2018, order and previously undisclosed excerpts of Grand Jury Report No. 1, consisting of an "Introduction" section with pages numbered 1-12 (attached hereto as Exhibit F) and a "Roman Catholic Diocese of Pittsburgh" section with pages numbered 207-250 (attached hereto as Exhibit G).

The Introduction section of Grand Jury Report No. 1 is explicit in its conclusion that [REDACTED] is a sexual abuser of children, even going so far as to note that names of clergy were left out of the Report if the Grand Jury did not so conclude. For example, the Introduction section makes the following statements about the "Offenders" (including [REDACTED] listed in the Profile section of the report:

- [REDACTED]
[italics in original, bold and underline added] *see* Exhibit F at 1.
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [emphasis added], *see* Exhibit F at 1.

- [REDACTED]
[REDACTED] [Emphasis added],
see Exhibit F at 2.

- [REDACTED]
[REDACTED] *See*
Exhibit F at 7.

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *See* Exhibit F at 11.

The “Roman Catholic Diocese of Pittsburgh” section of the Report is also explicit in labeling [REDACTED] and others as sexual abusers of children.

Under subheading “IV,” titled “Findings of the Grand Jury,” the Report states: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *See* Exhibit G at 209.

Subheading “V” of the Report is titled “Offenders Identified by the Grand Jury,” and lists over 90 individuals, including [REDACTED] See Exhibit G at 210-214.³

On June 5, 2018, [REDACTED] served via overnight mail a Motion for Pre-Deprivation Evidentiary Hearing respectfully requesting that the court grant him an evidentiary hearing prior to the release of Grand Jury Report No. 1. On June 6, 2018, Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury, entered an Order denying the Motion for Pre-Deprivation Evidentiary Hearing, see Exhibit H, incorporating by reference an order and opinion he had previously entered on June 5, 2018. See Exhibit I.

[REDACTED] was never put on notice that he was the subject of a Grand Jury investigation for conduct described in the Report prior to the expiration of the Grand Jury, nor was he afforded the privilege of appearing before the Grand Jury to explain his actions.

[REDACTED] has not been afforded any type of hearing in order to challenge the findings by the lower court classifying him as sexual abuser of children.

³ Exhibits F and G clearly refer to [REDACTED] by name, in a highly negative light, yet neither excerpt was provided to [REDACTED] pursuant to the May 2, 2018 order; the OAG disclosed these highly negative references to [REDACTED] only *after* we filed his motion for disclosure. No explanation for this failure has been tendered by the Commonwealth.

While [REDACTED] has been invited to submit a sealed response to the sparse information contained in the summary, there is no way for the now-expired Grand Jury to consider his response and no indication whether his response will be incorporated in the relevant portions of the Report or even attached to the report as an exhibit. See 42 Pa.C.S. § 4552(e).

Moreover, there is no explanation in the summary that [REDACTED] was provided as to how the information in that summary proves that he is a sexual abuser of children by a preponderance of the evidence. See 42 Pa.C.S. § 4552(b). There is nothing in the summary or the court's order explaining the legal standards (if any) used by the Grand Jury and/or the court in concluding he is a sexual abuser of children. See 18 Pa.C.S. § 4303(a) (regarding endangerment of the welfare of a child); 18 Pa.C.S. § 6312 (relating to sexual abuse of children); 23 Pa.C.S. § 6303 (relating to definitions of "child" and "sexual abuse or exploitation"); *Commonwealth v. Lynn*, 114 A.3d 796, 826 (Pa. 2015) (citing *Commonwealth v. Halye*, 719 A.2d 763, 765 (Pa. Super. 1998)) (regarding endangerment of the welfare of a child).

Finally, there is nothing in the summary or the court's order addressing the requirements of Act 168 of 2014, upon which the Sexual Misconduct/Abuse Disclosure Form is predicated. 24 P.S. § 1-111.1.

The placement of [REDACTED] in such a heinous category of individuals -- an action that is certain to threaten his personal and professional reputation (and perhaps his physical safety) and compromise his ability to continue his chosen profession -- without sufficient notice or opportunity for a hearing deprives him of his fundamental right to his good reputation without due process of law in violation of Article I Sections 1, 9, and 11 of the Pennsylvania Constitution. In summary, [REDACTED] is facing the annihilation of this reputation and career without any due process at all.

VI. Summary of Argument

Petitioner incorporates by reference the summary of argument set forth in the Petitioners' Common Brief.

VII. Argument

Petitioner incorporates by reference the arguments set forth in the Petitioners' Common Brief.

VIII. Conclusion Stating the Precise Relief Sought

Petitioner requests that this Court bar the release of Grand Jury Report No. 1 unless and until either (1) all references to [REDACTED] including pages 390 and 391 of the Report and any other direct or indirect identification of him, are fully redacted, or (2) [REDACTED] is afforded a full and fair evidentiary hearing with the OAG bearing the burden of proof, the opportunity for him to be heard, the chance to defend himself before a fair and impartial tribunal, the right to cross-examine witnesses, the right to test the evidence against him, and the right to present affirmative evidence.

Respectfully submitted,

**THE LAW OFFICES OF
STEPHEN S. STALLINGS, ESQ.**

By: /s/Stephen S. Stallings
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Fax: (412) 322-7773

Date: July 10, 2018

CERTIFICATE OF SERVICE

I, Stephen S. Stallings, Esquire, hereby certify that unredacted and redacted copies of the foregoing Petitioner's Brief were served on July 10, 2018, via overnight mail upon:

The Honorable Norman A. Krumenacker, III
Supervising Judge, 40th Statewide Investigating Grand Jury
Cambria County Court of Common Pleas
Cambria County Courthouse
200 South Center Street
Ebensburg, PA 15931

Daniel J. Dye
Senior Deputy Attorney General
Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120

**THE LAW OFFICES OF
STEPHEN S. STALLINGS, ESQ.**

/s/Stephen S. Stallings

Stephen S. Stallings, Esquire
Attorney No. 205131

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Fax: (412) 322-7773

EXHIBIT A

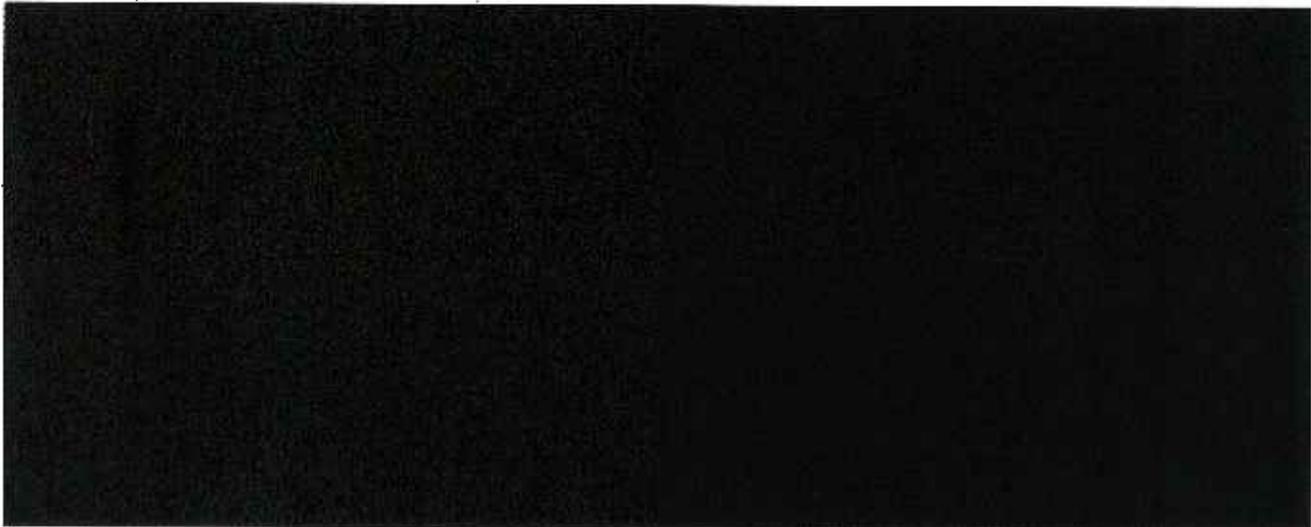


COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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(717) 783-6273 (desk)
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May 4, 2018



Regards,

A handwritten signature in black ink, appearing to read "D. J. Dye".

DANIEL J. DYE
Senior Deputy Attorney General
Criminal Law Division
Criminal Prosecutions Section

CC: File; OAG CPS; OAG BCI
The Honorable Norman A. Krumenacker, III

A

EXHIBIT B

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA



B

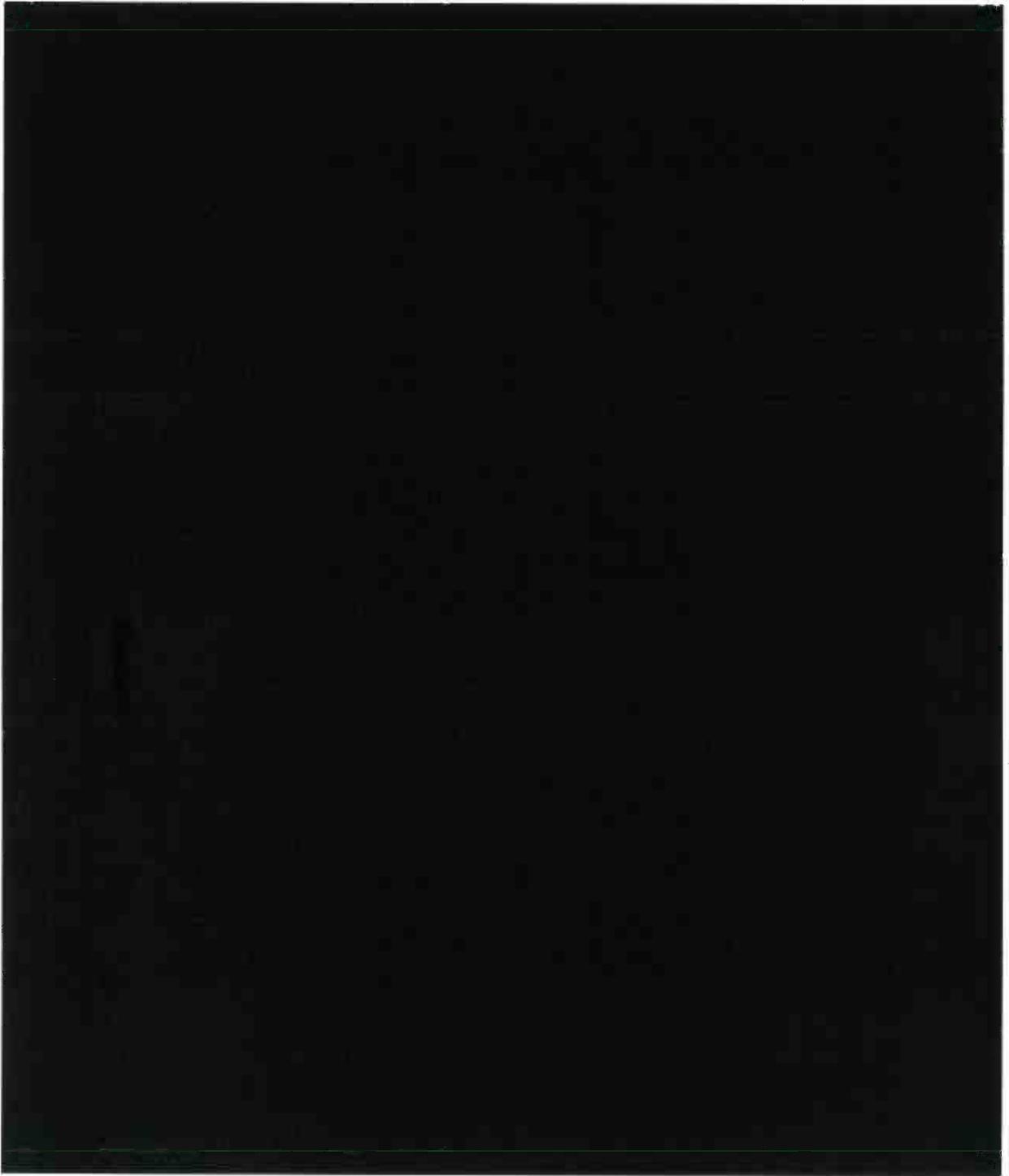
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C



EXHIBIT D



D





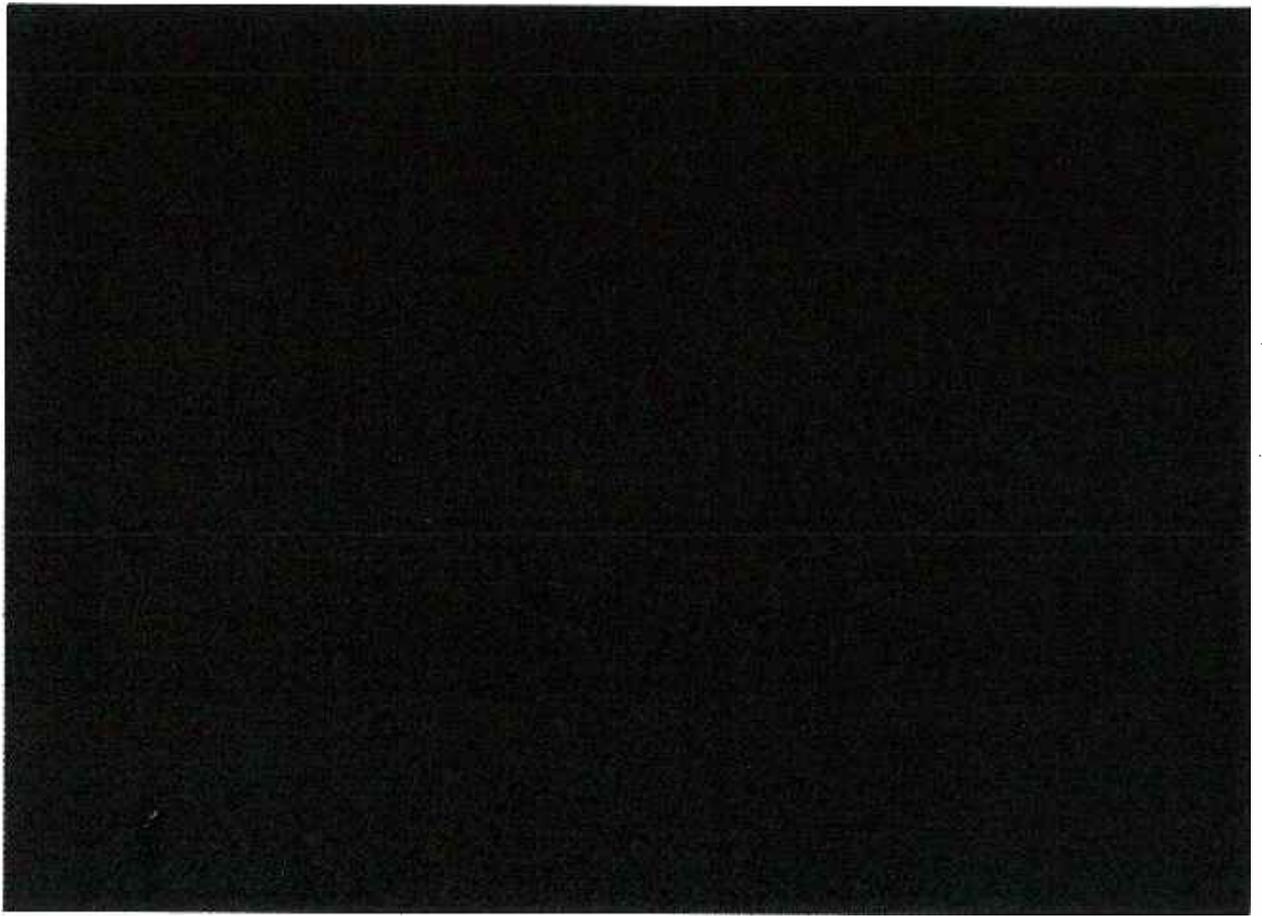
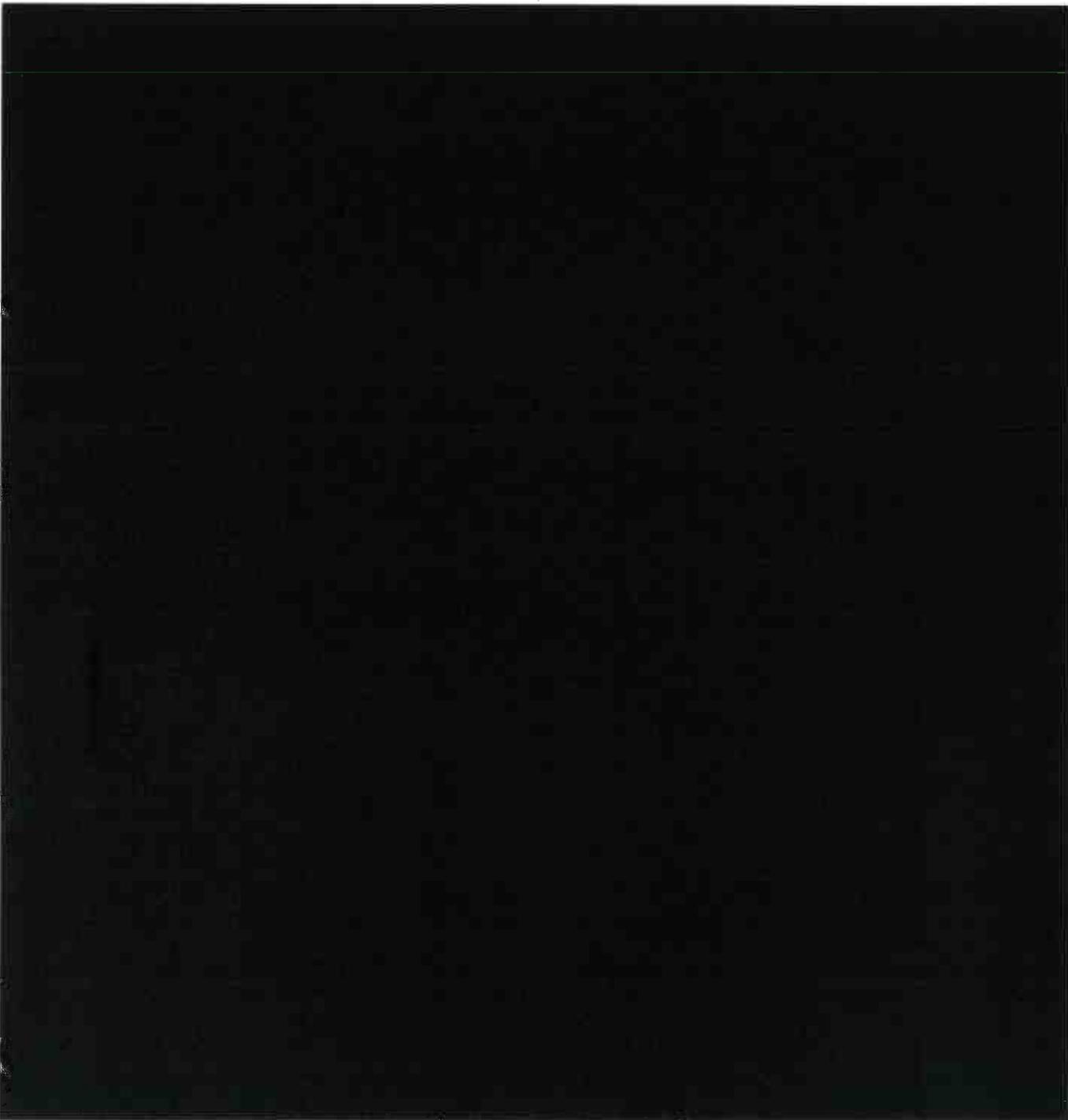
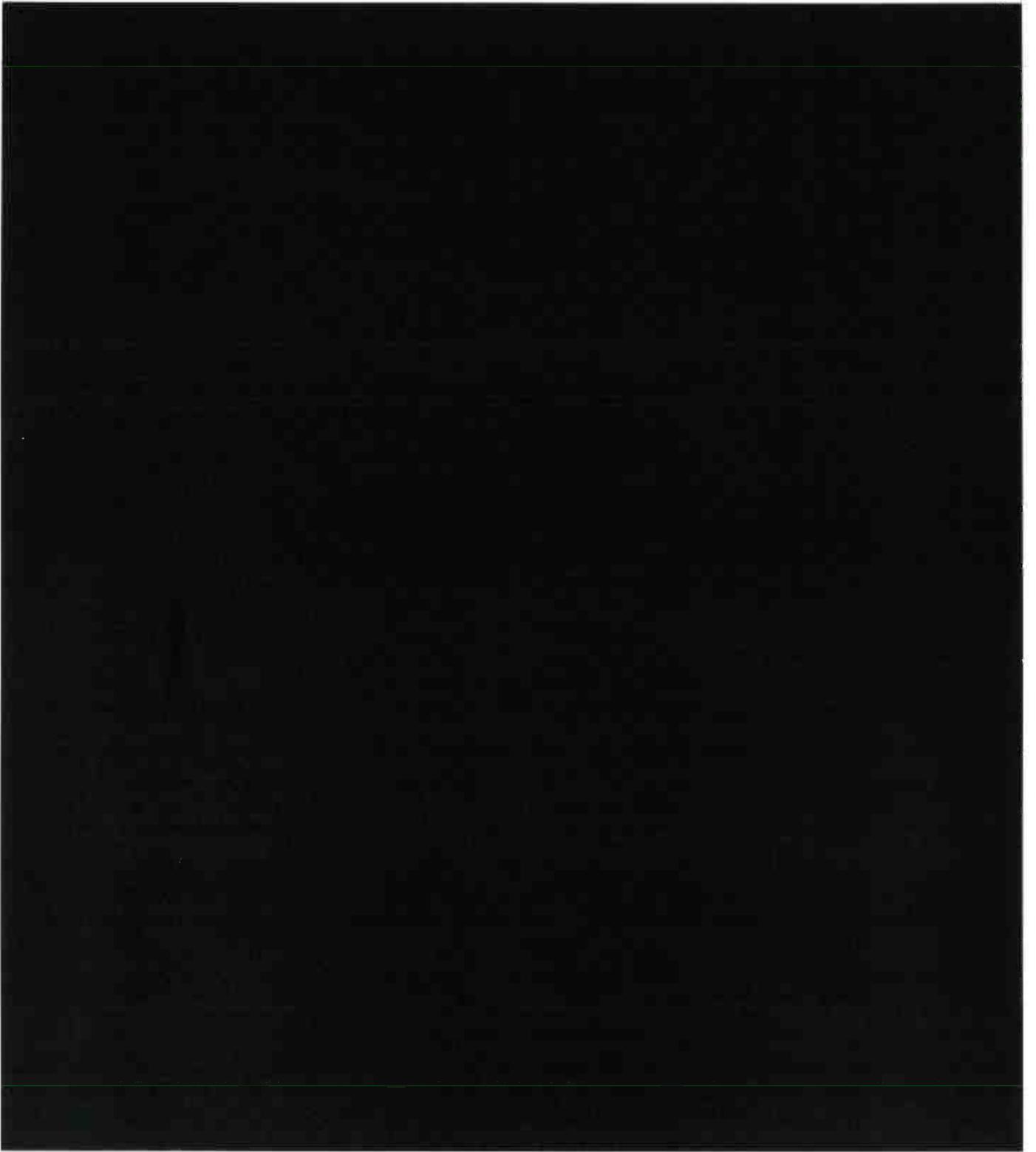


EXHIBIT E



E



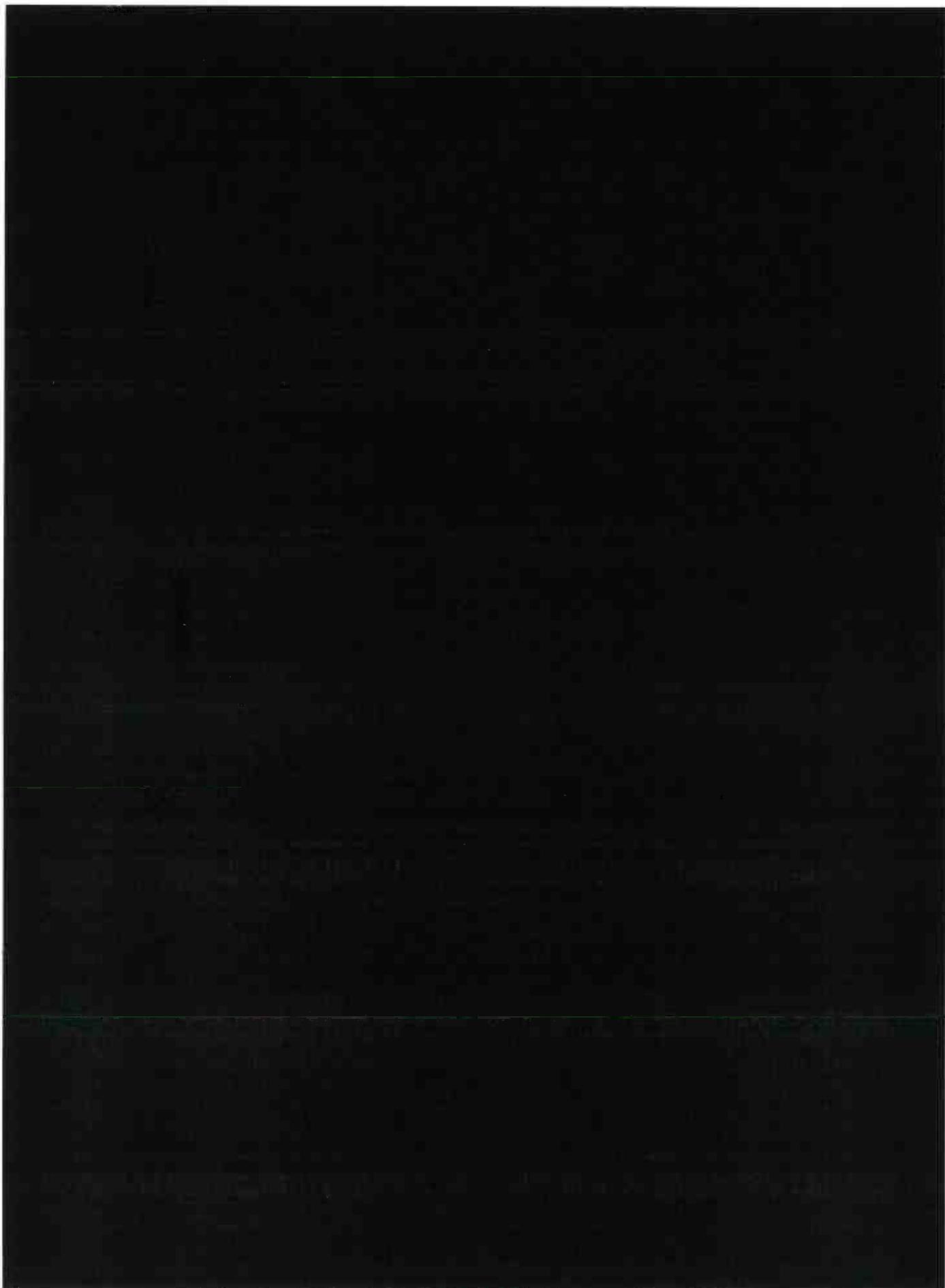
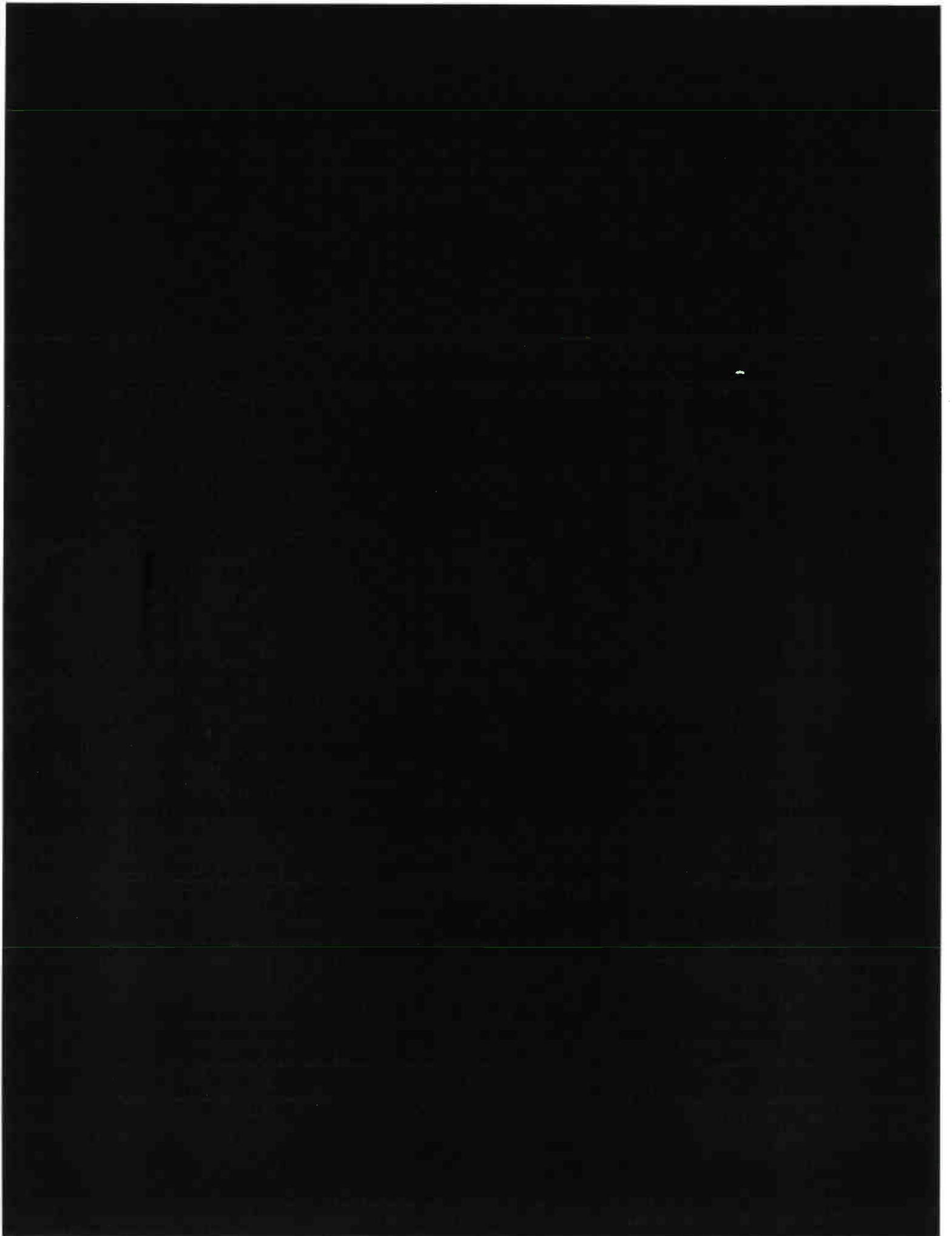
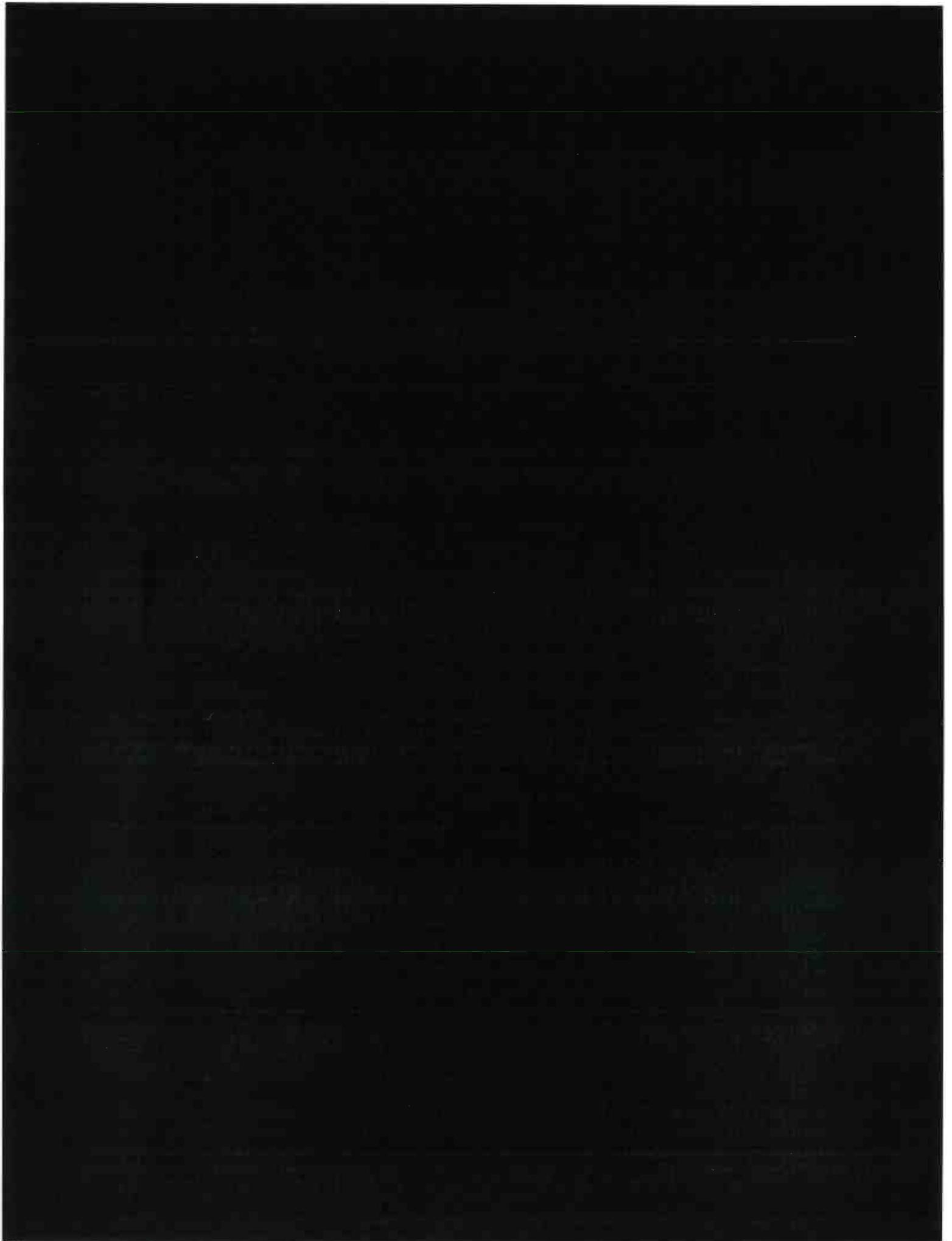
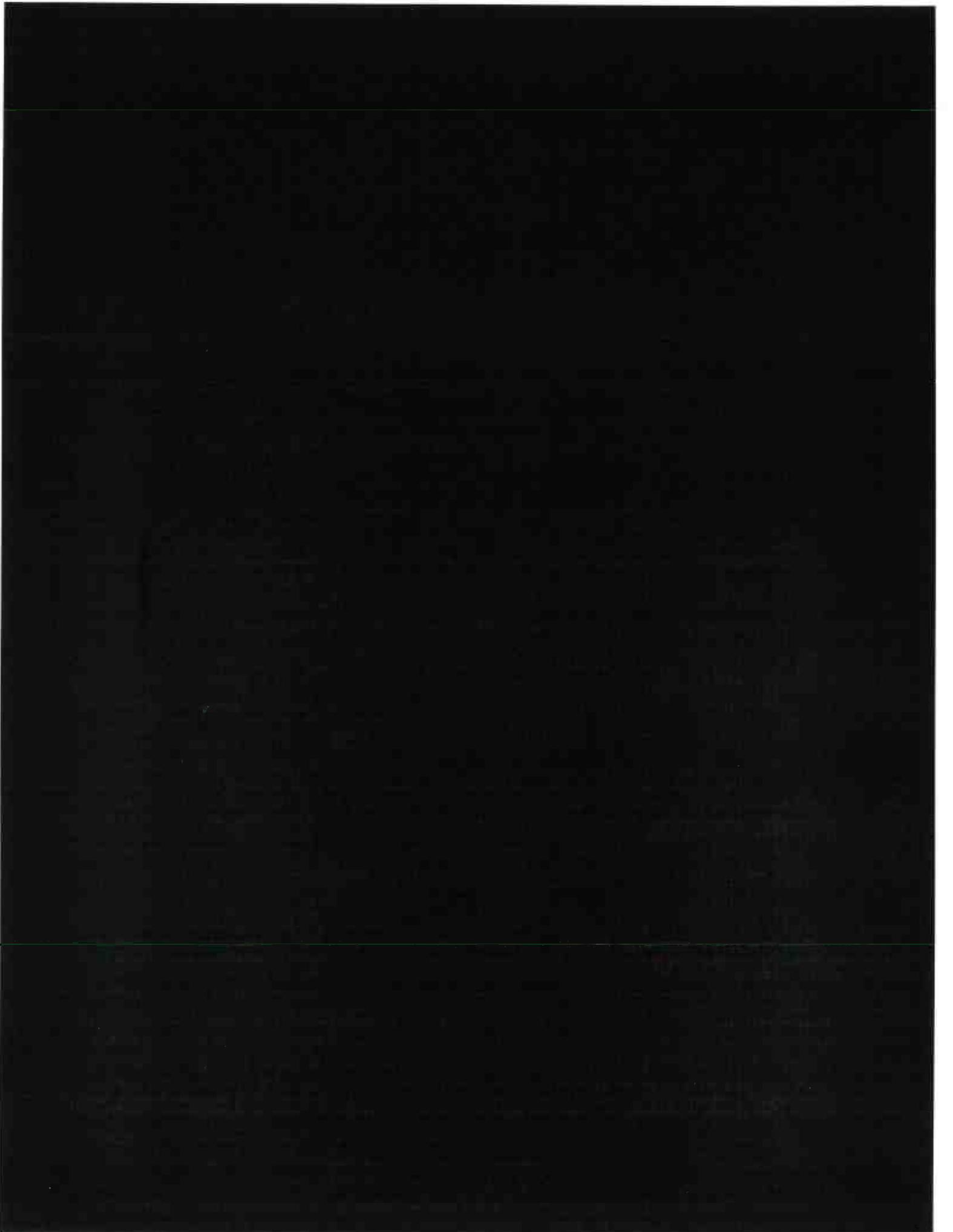
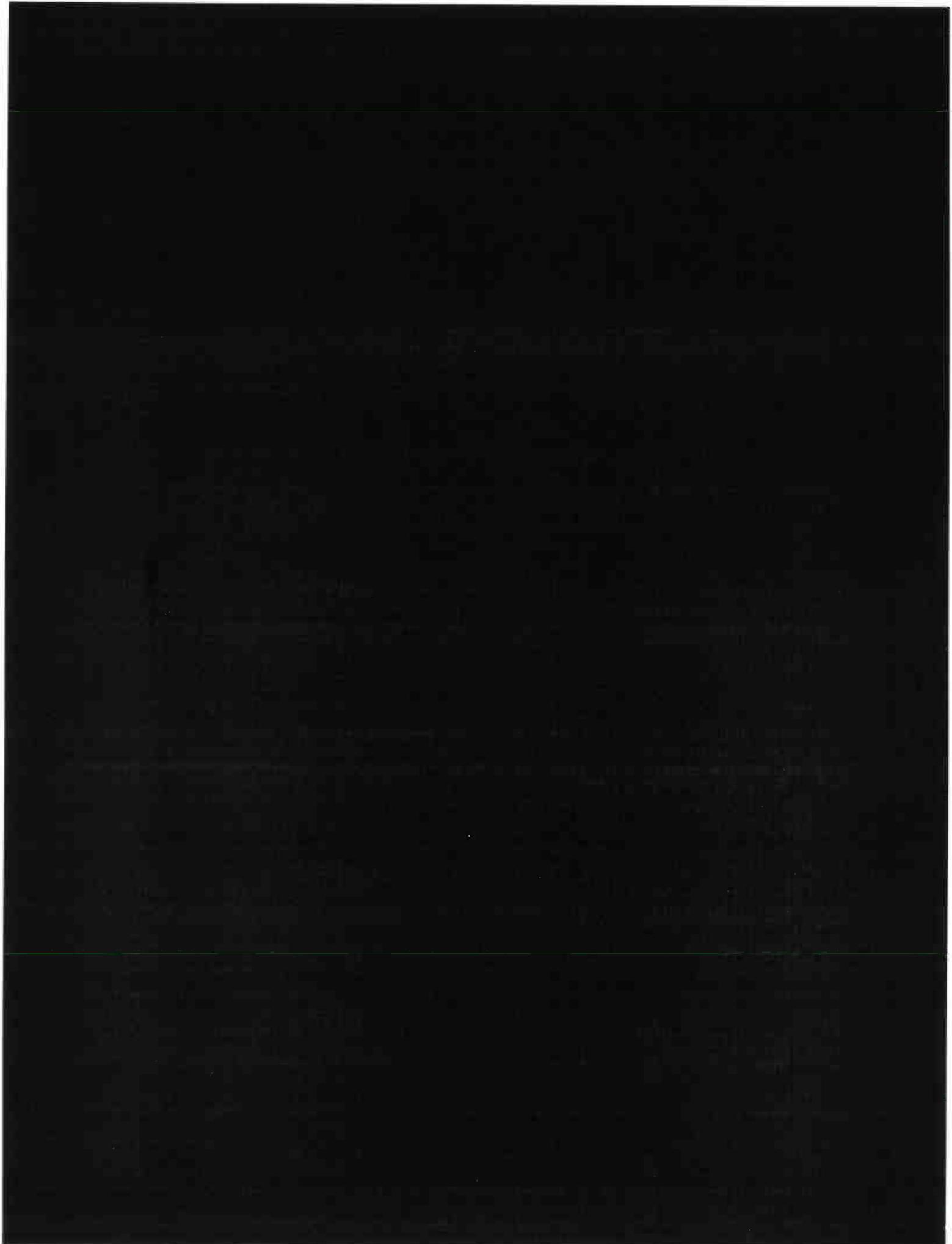


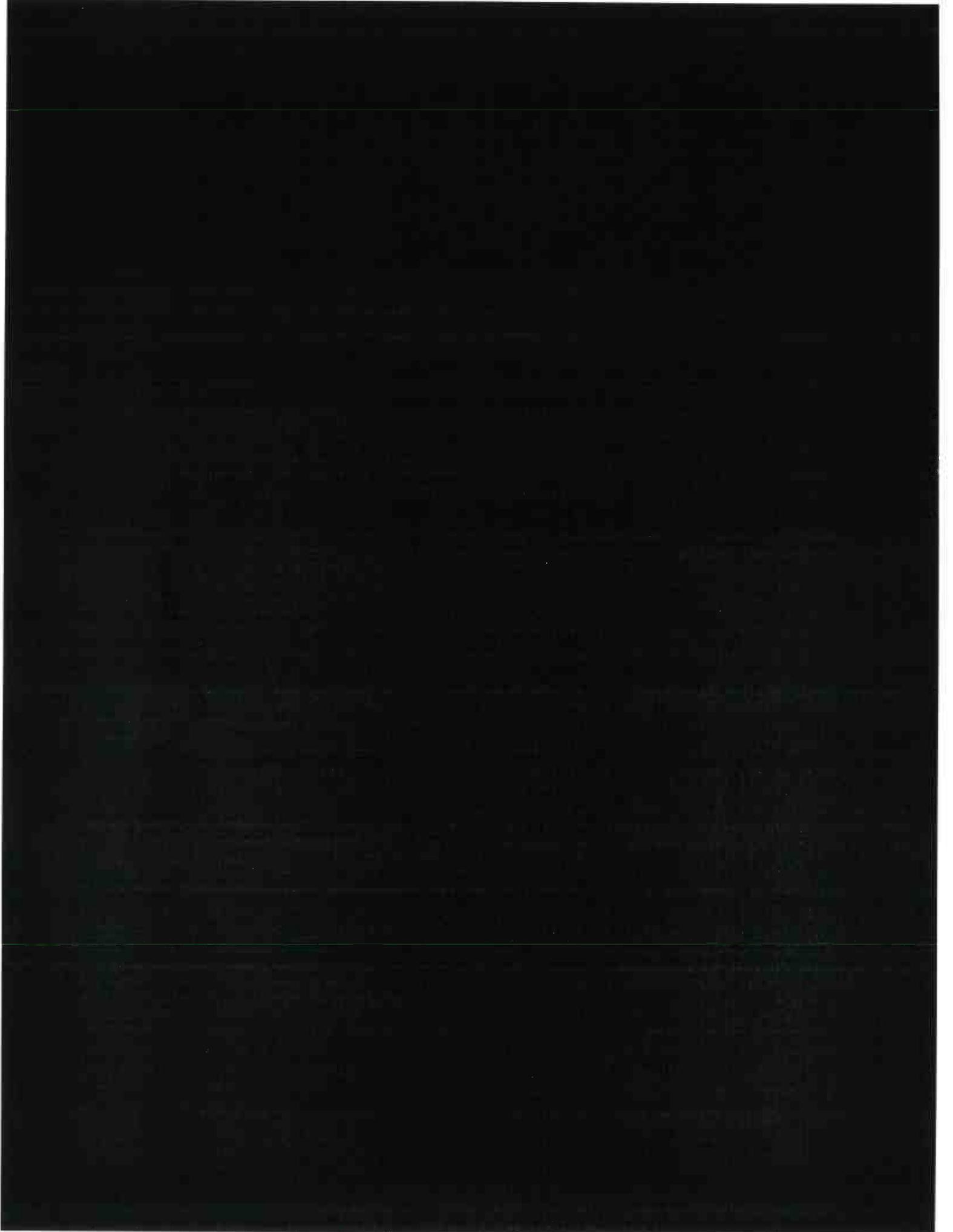
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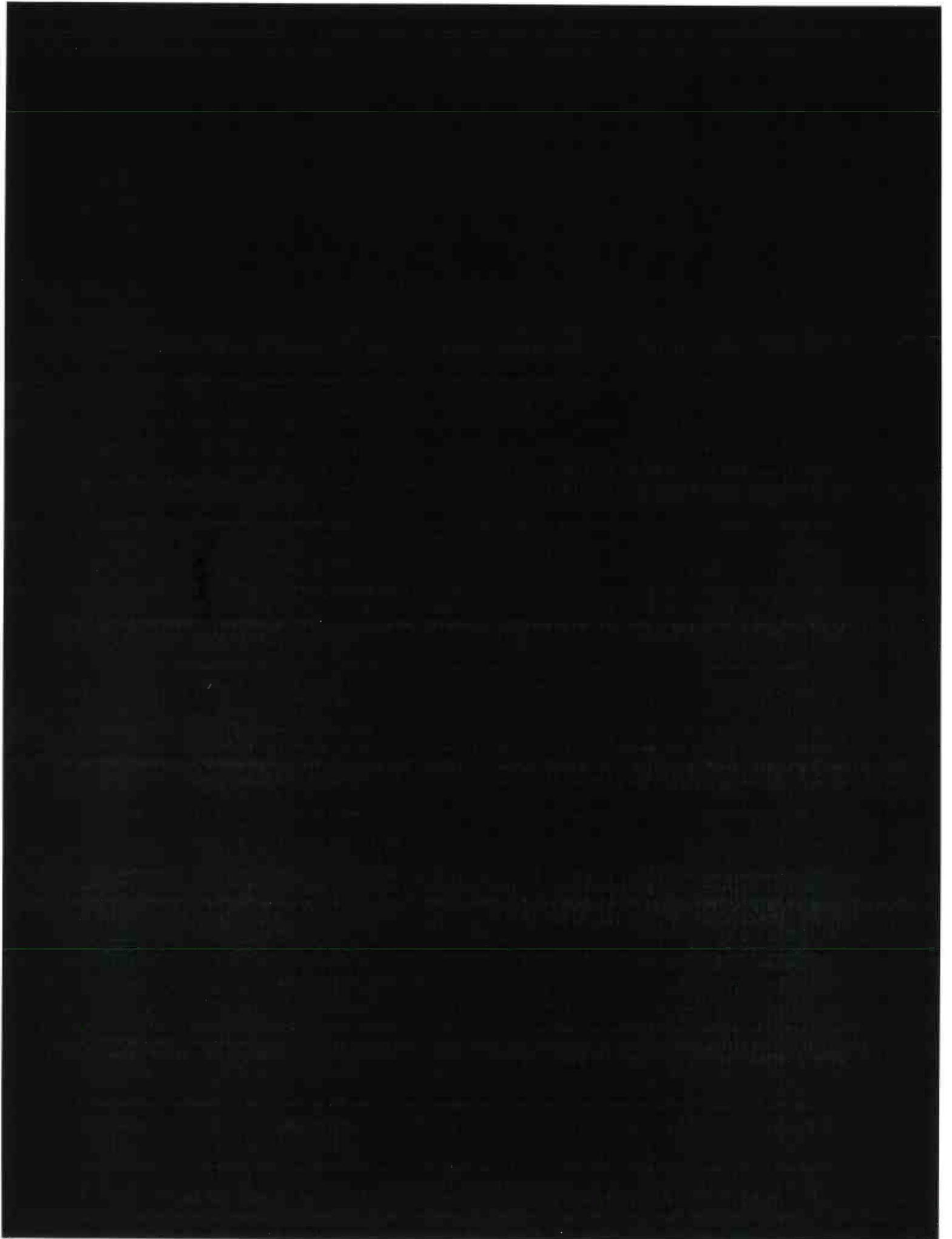


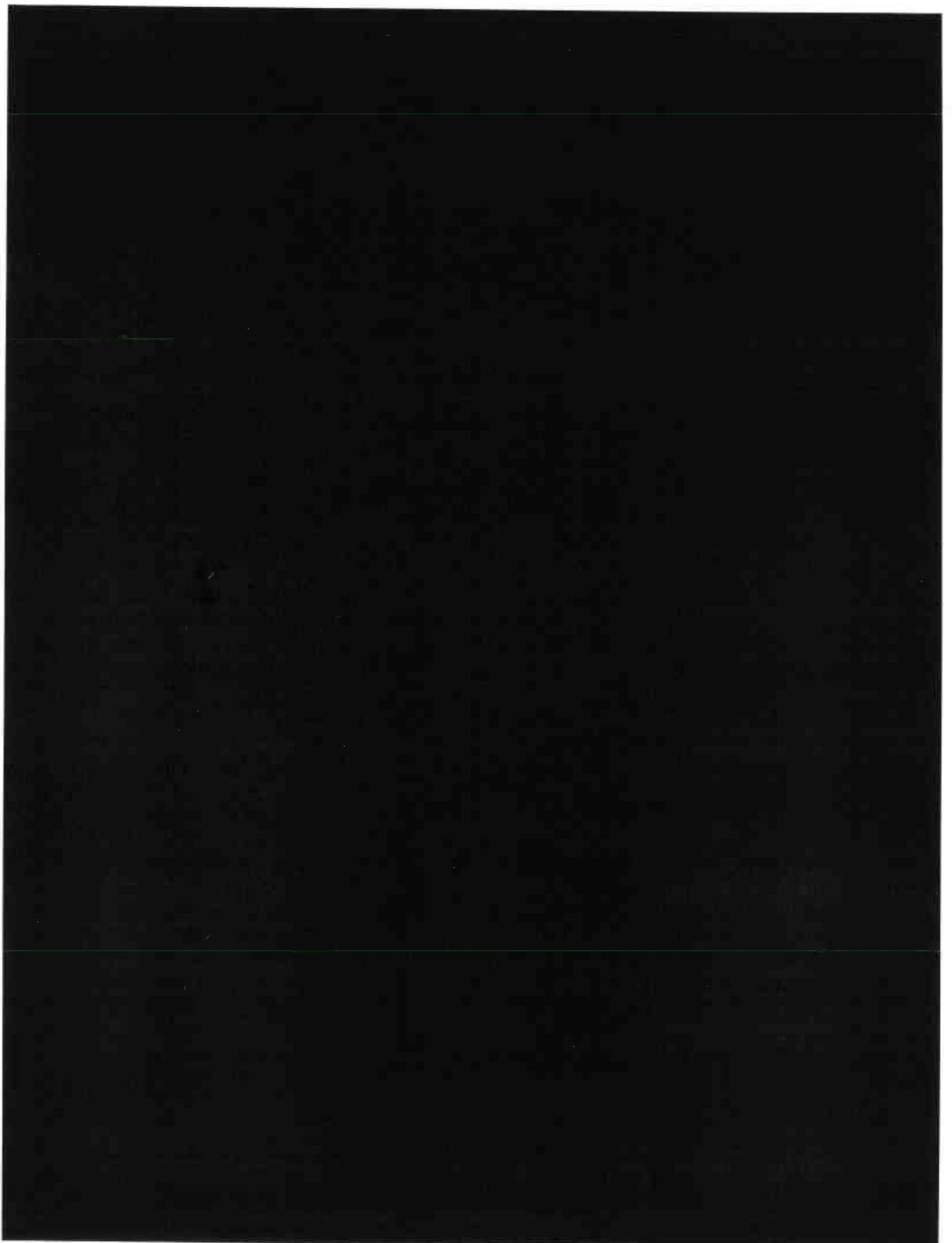


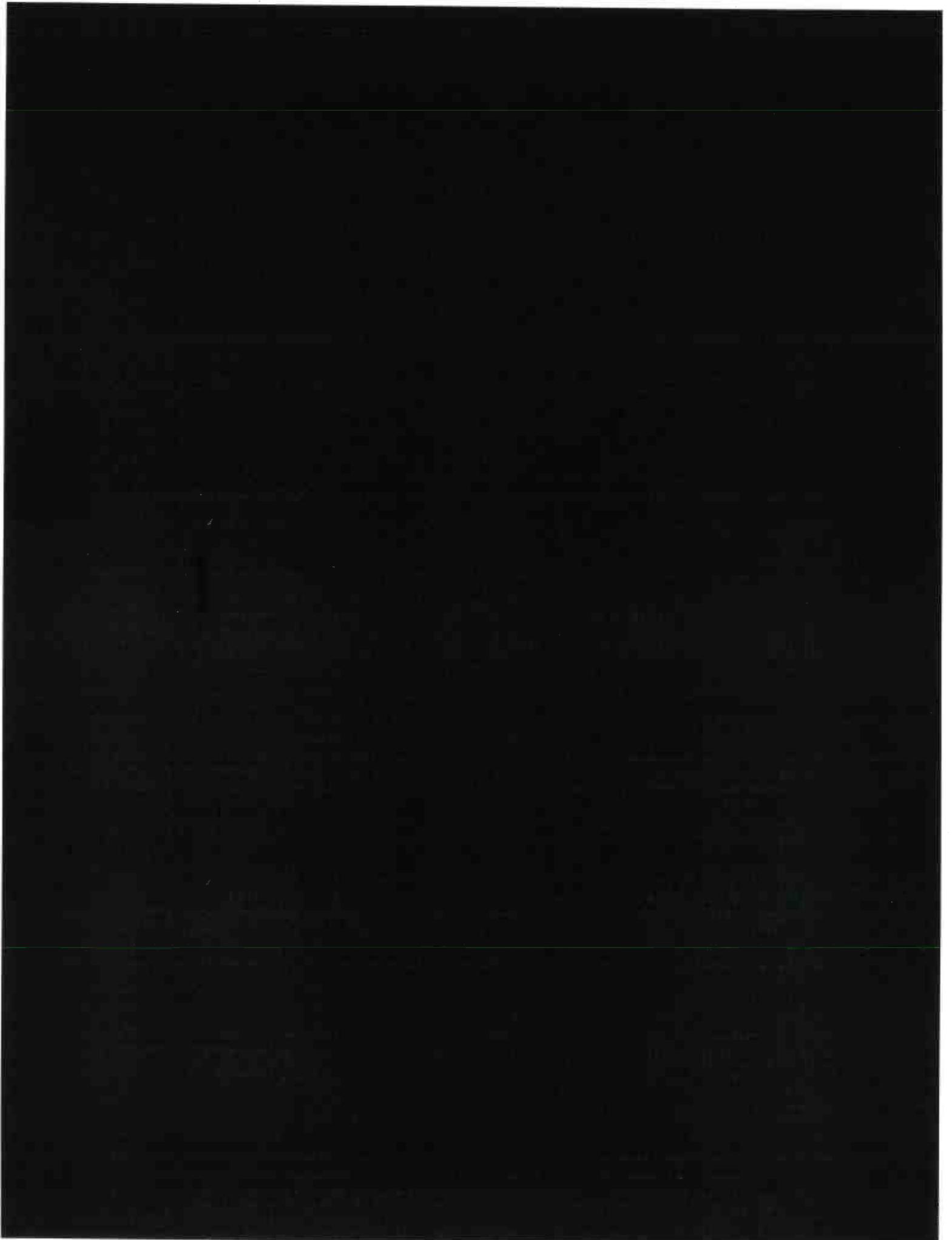


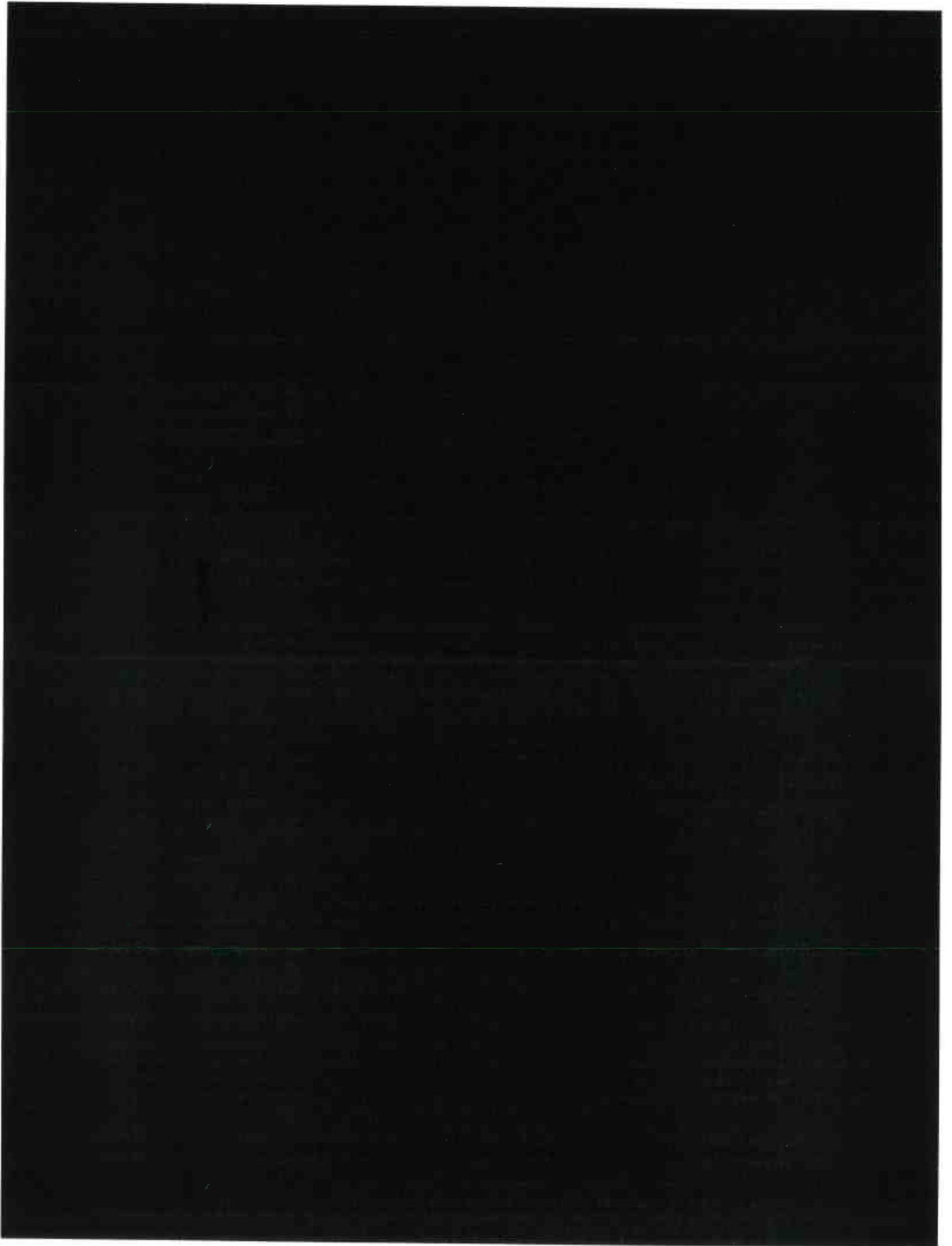


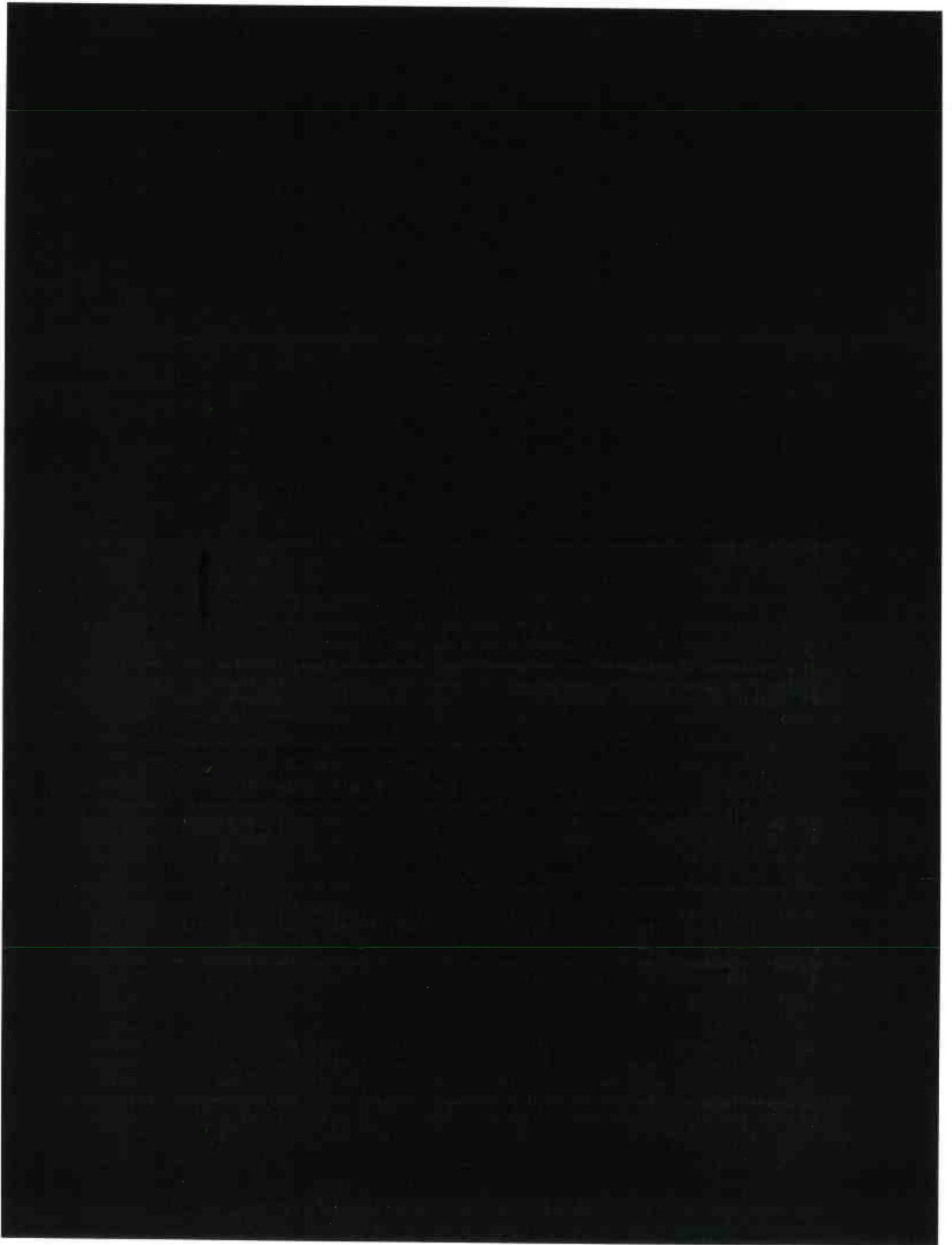


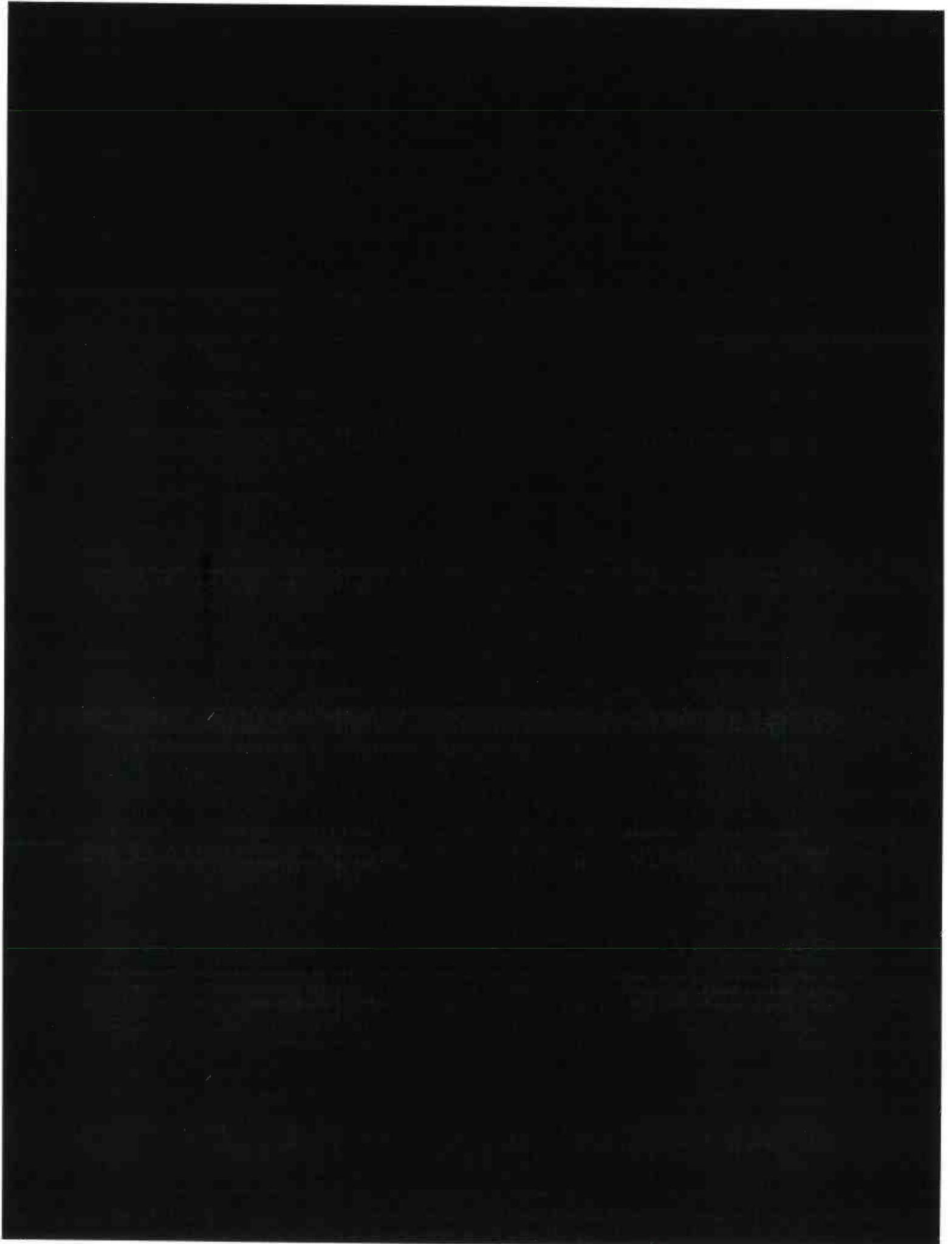












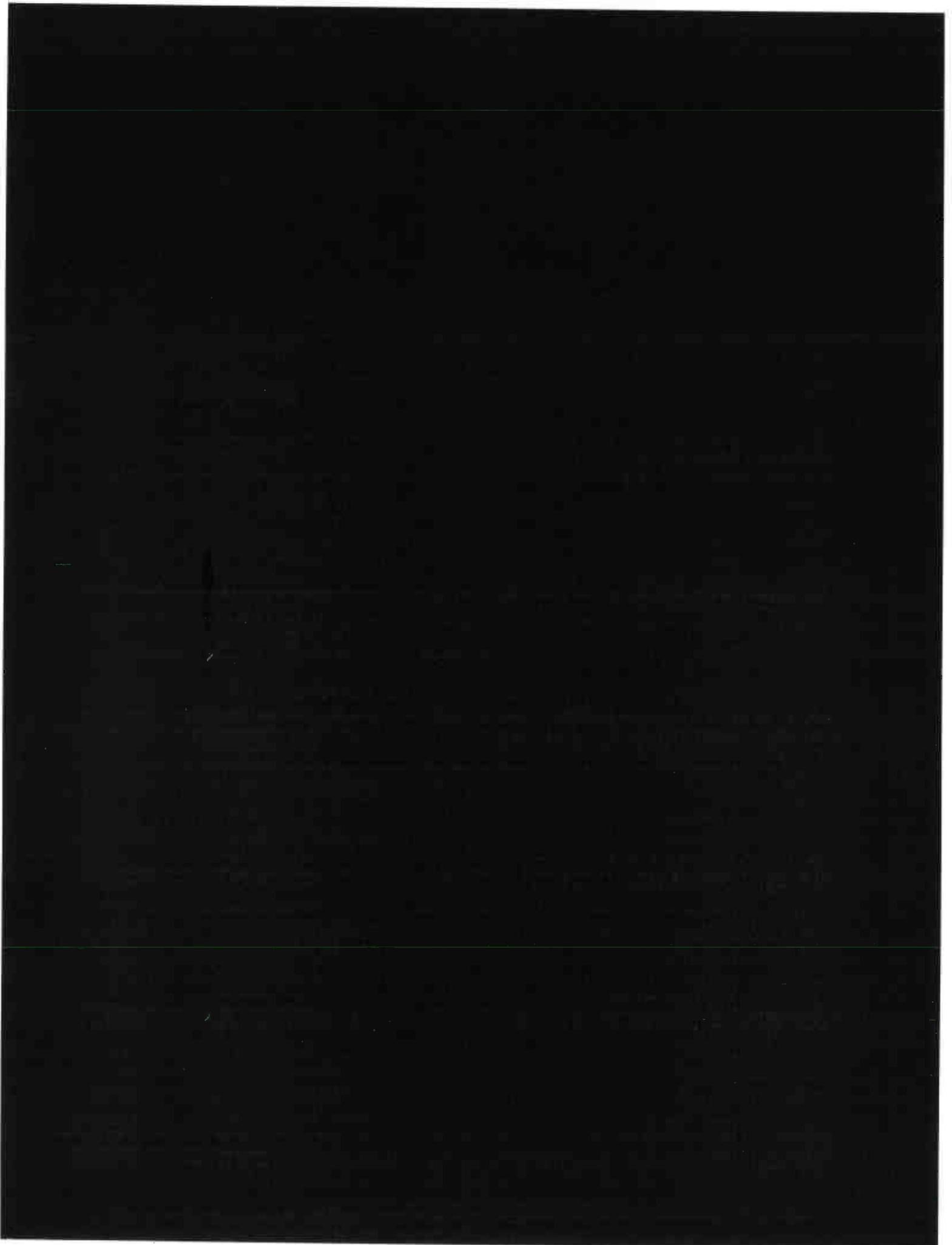
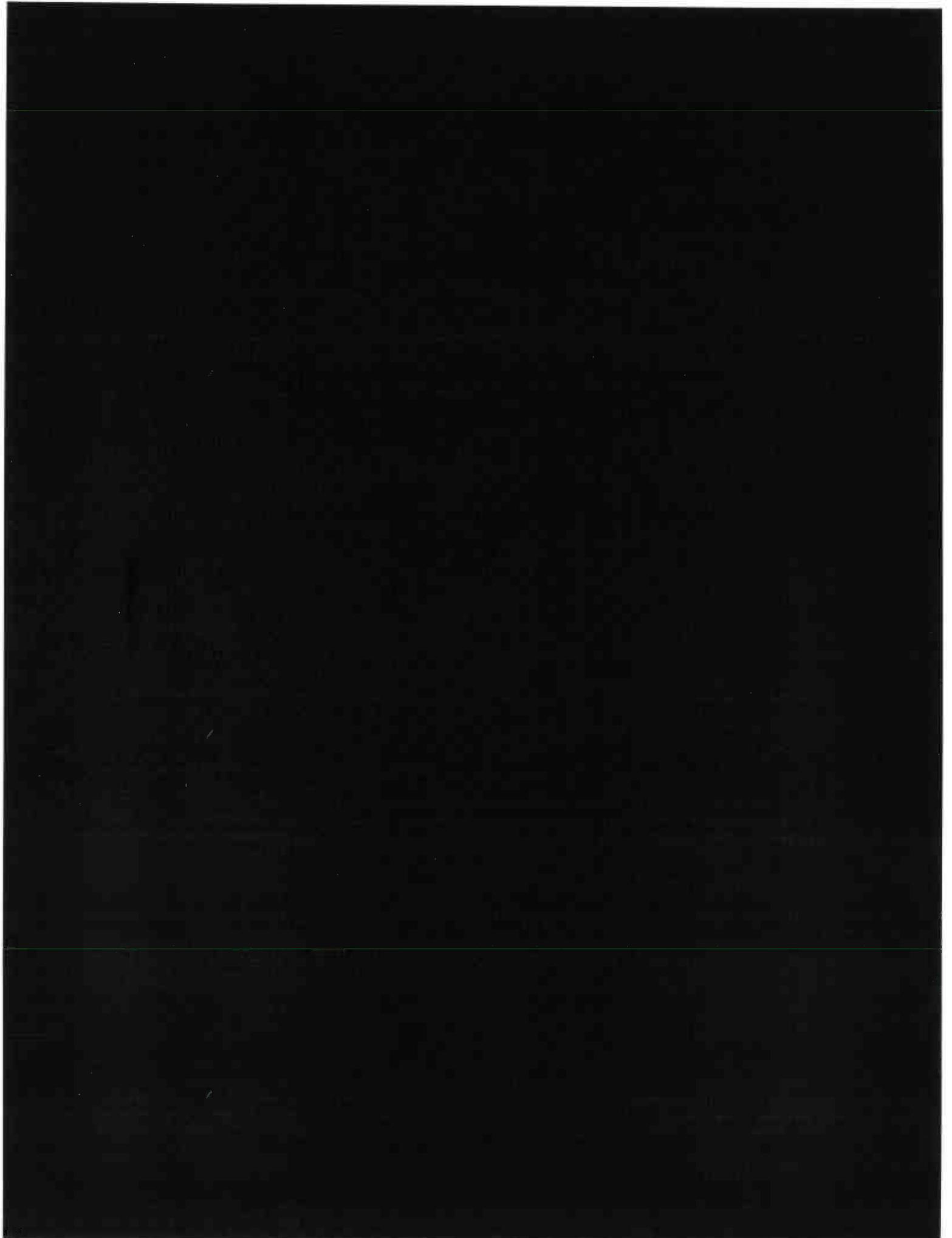
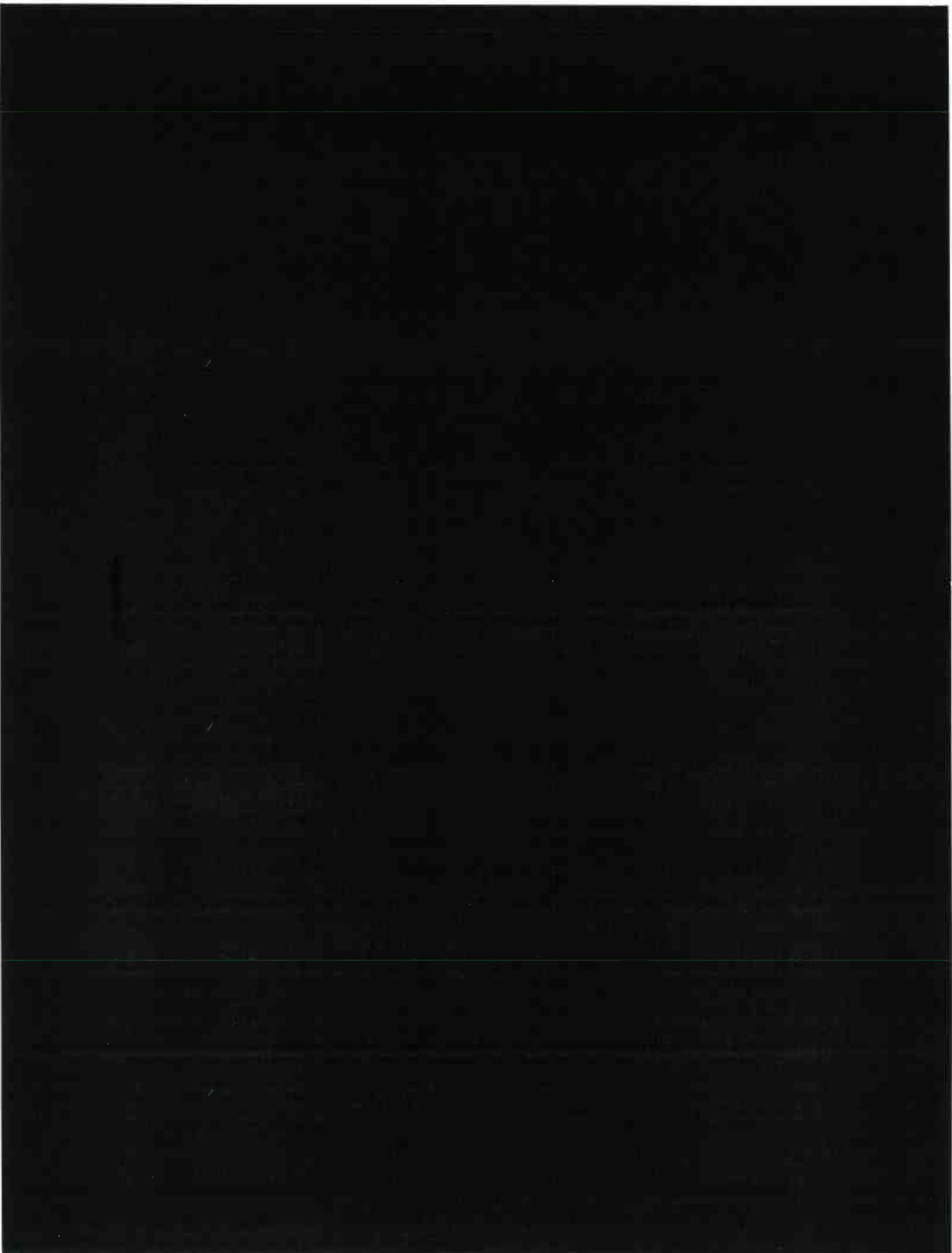
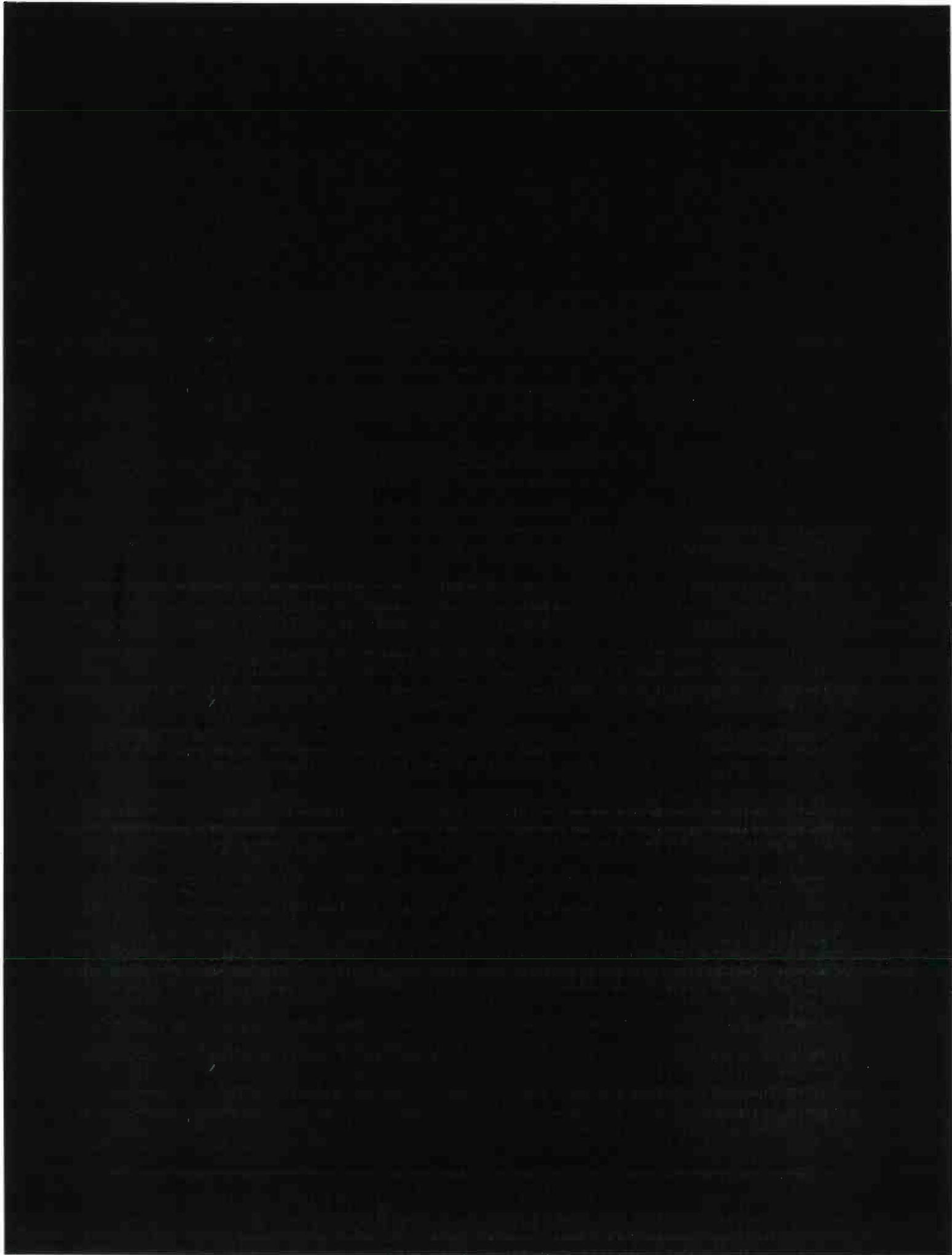
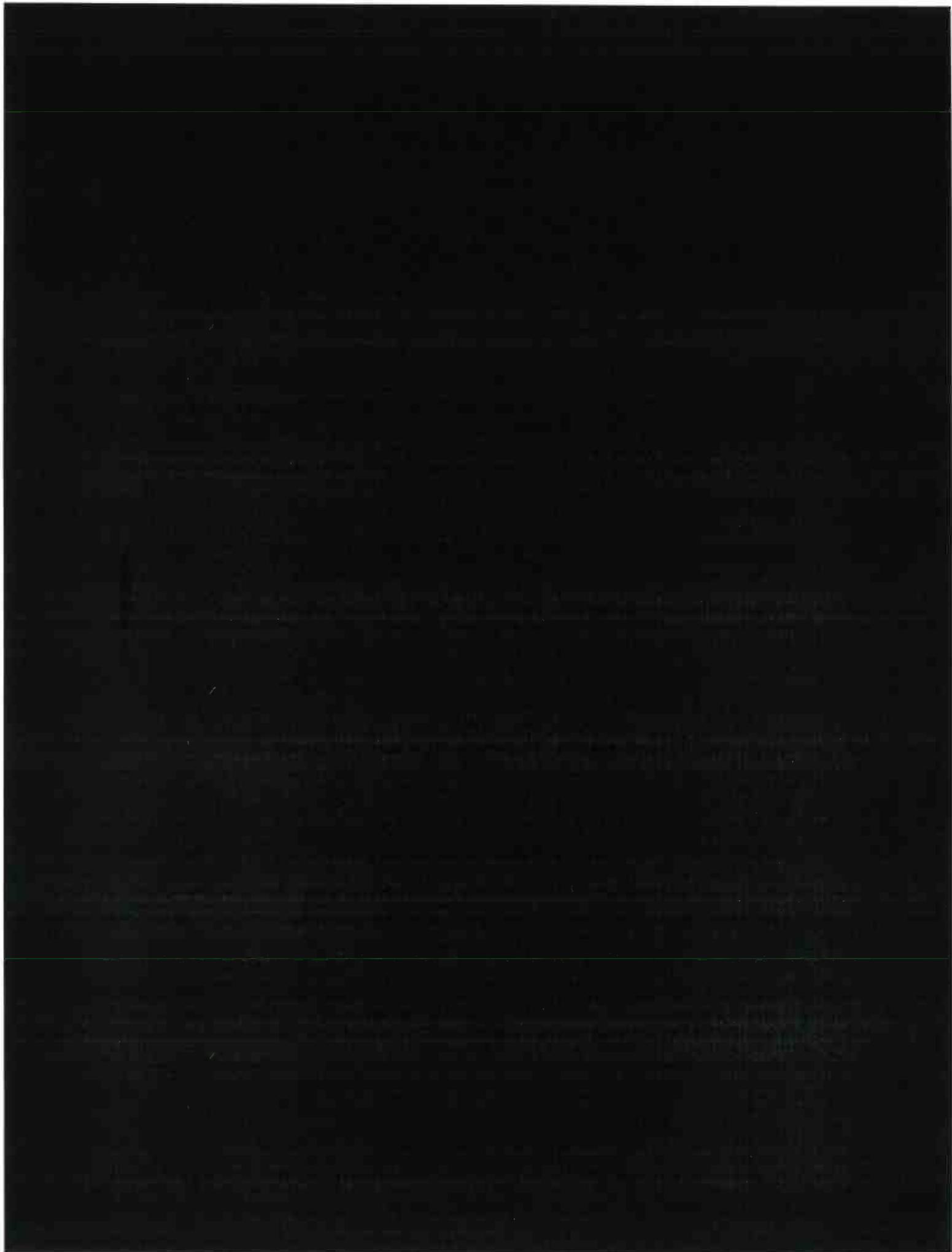


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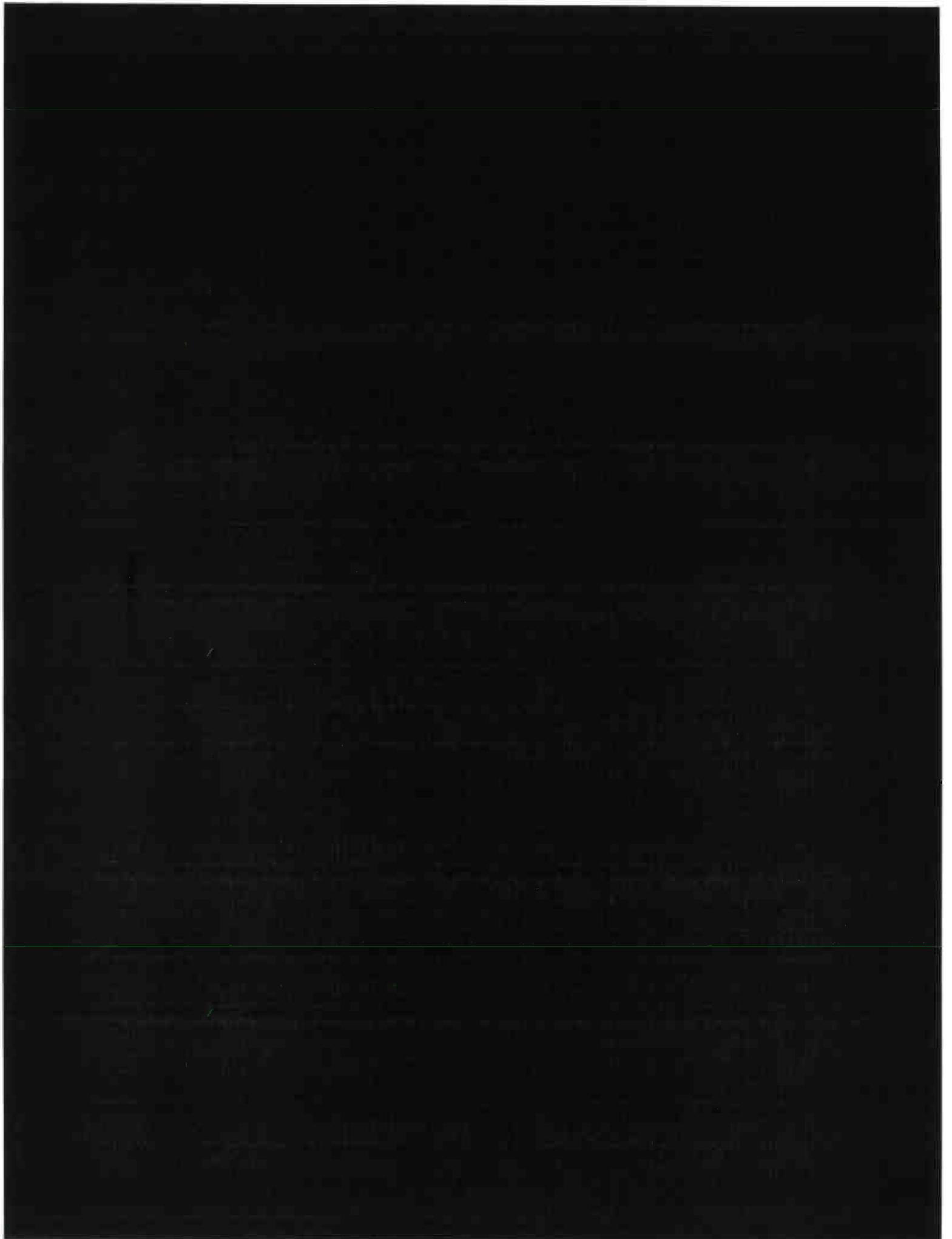


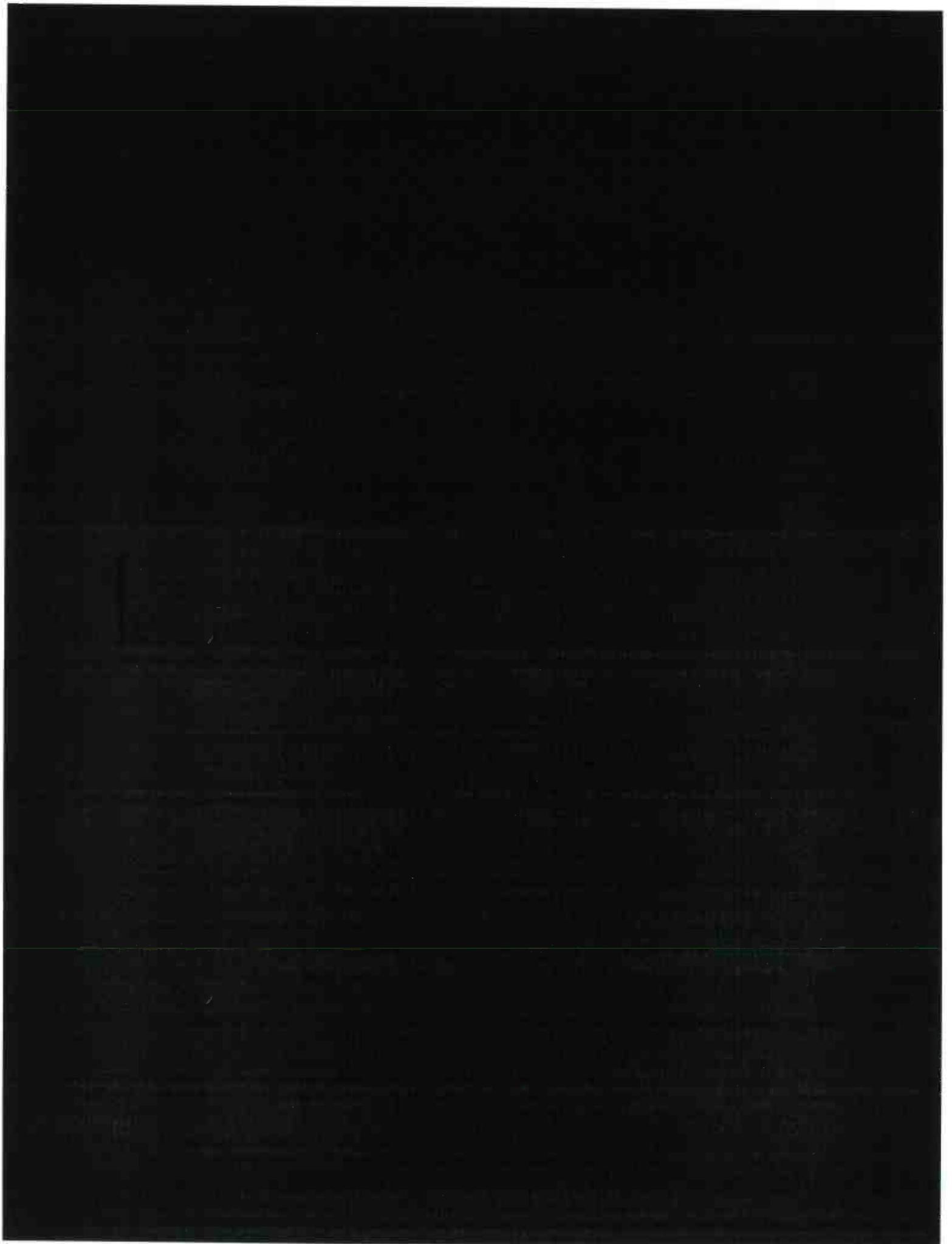


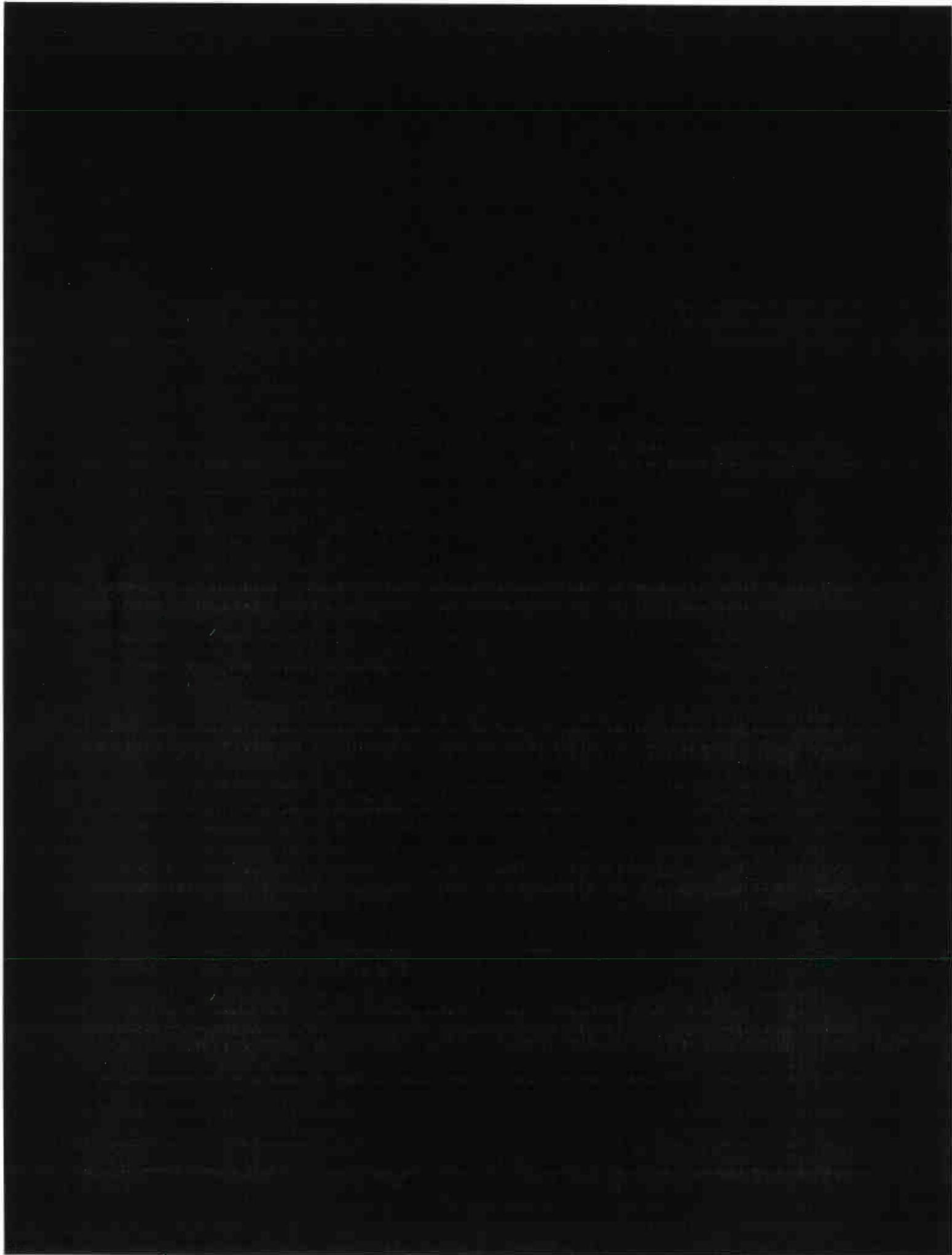


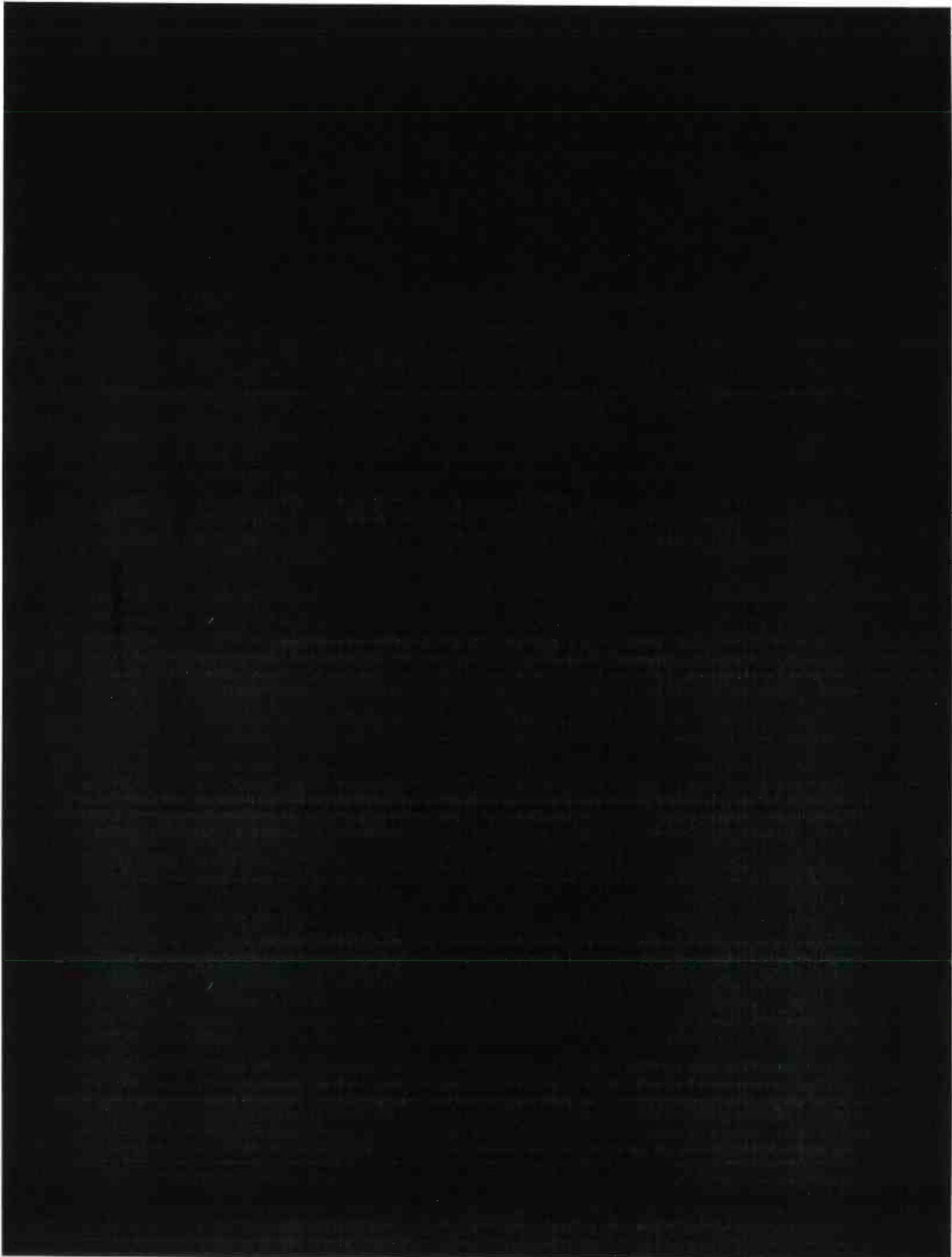


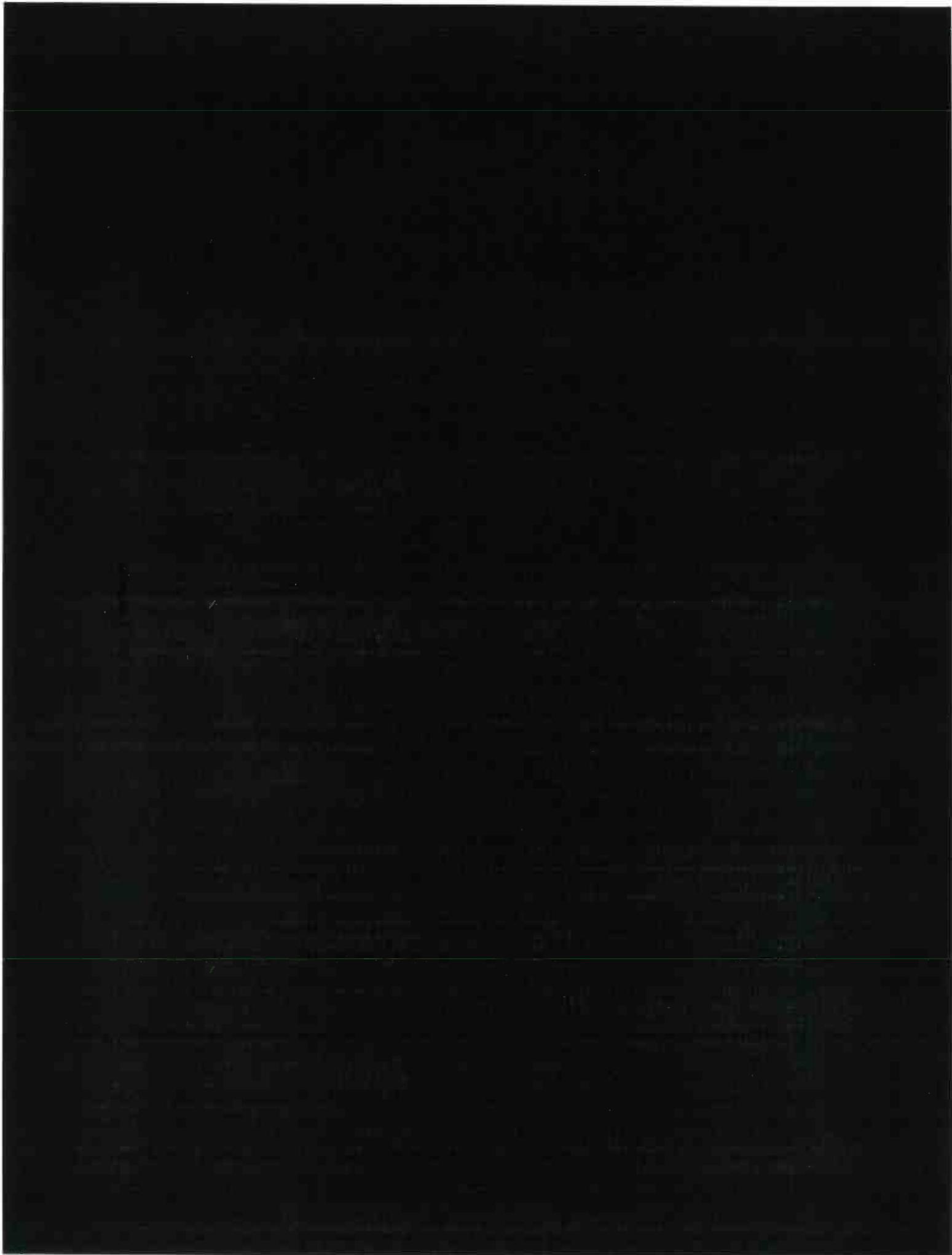


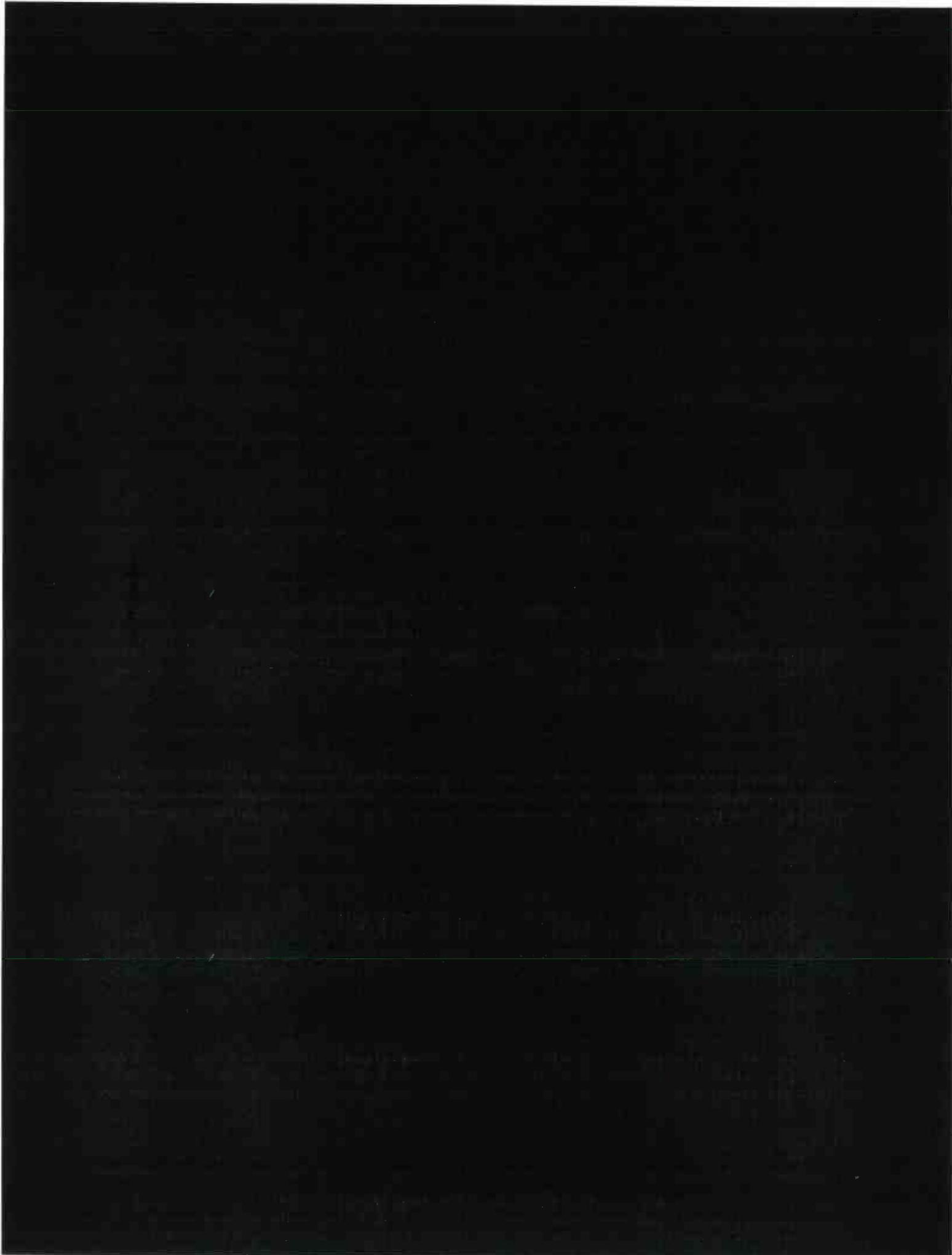


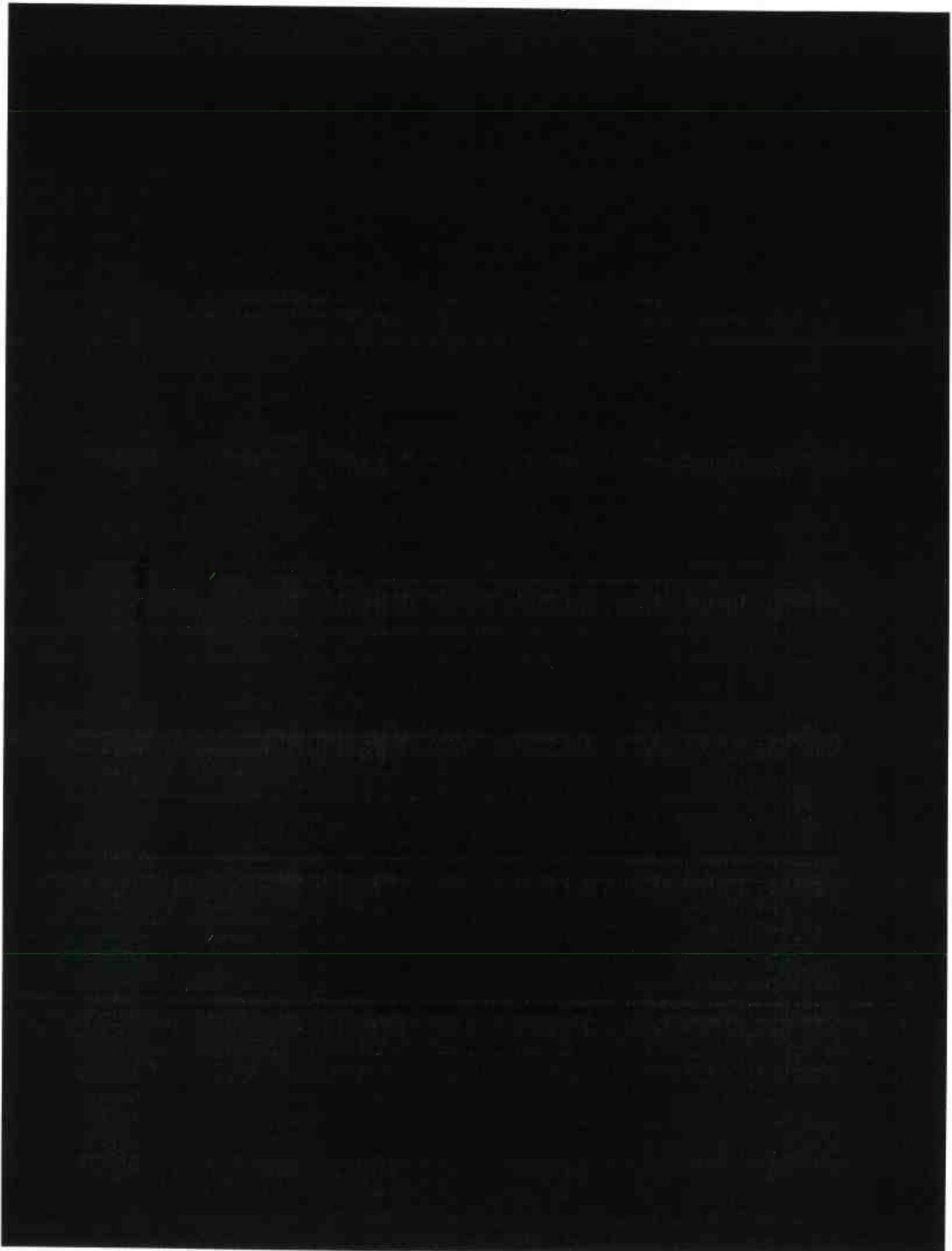


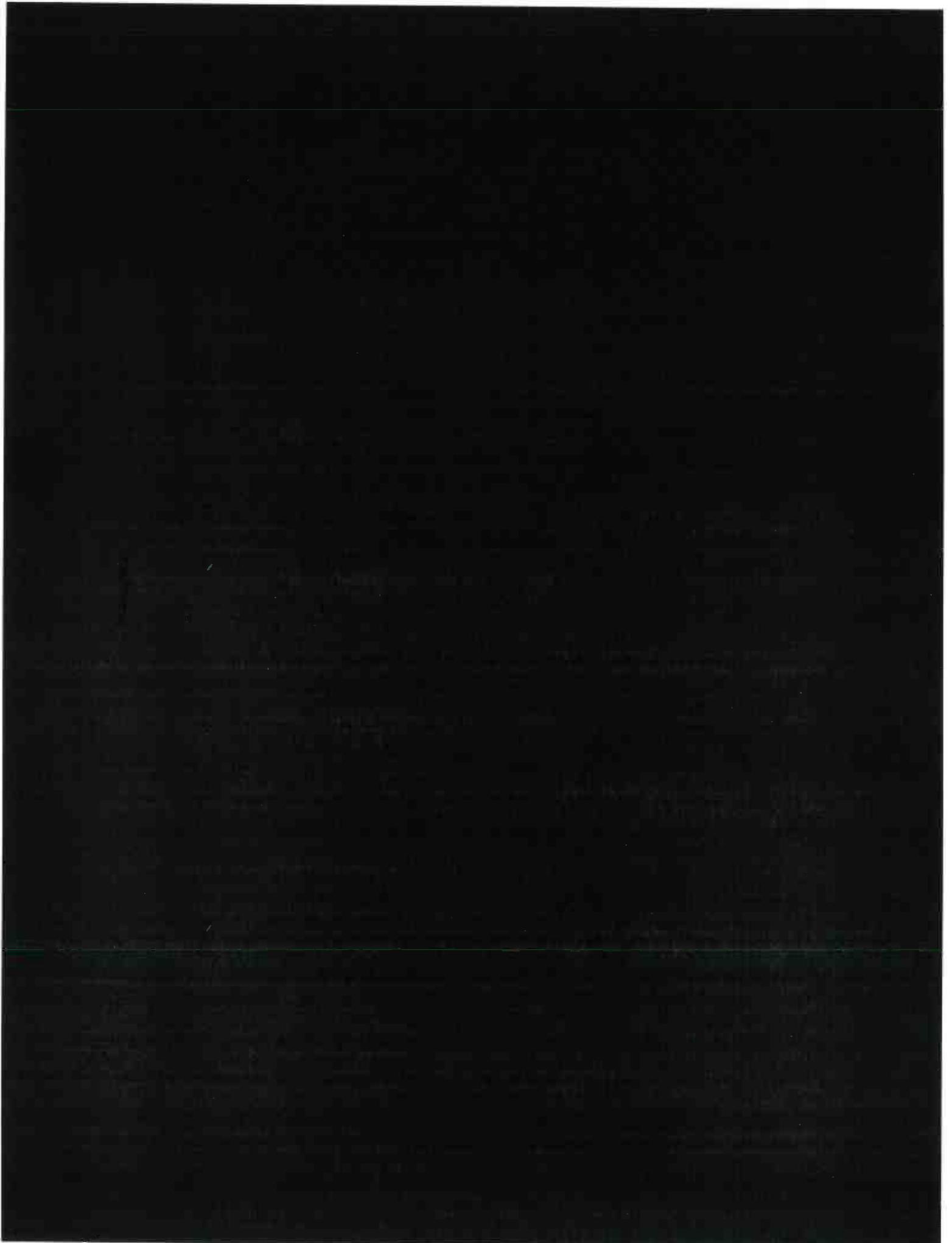


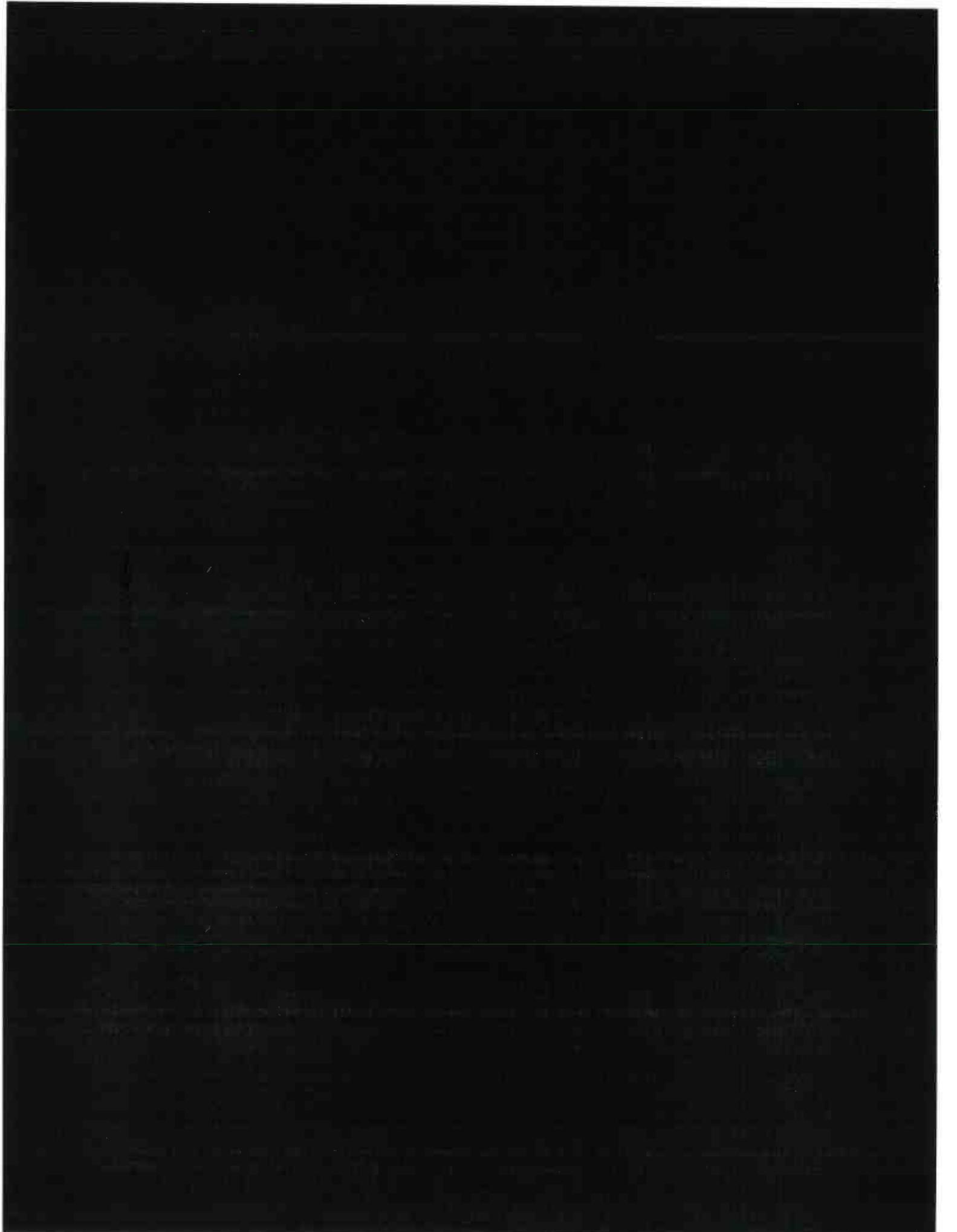


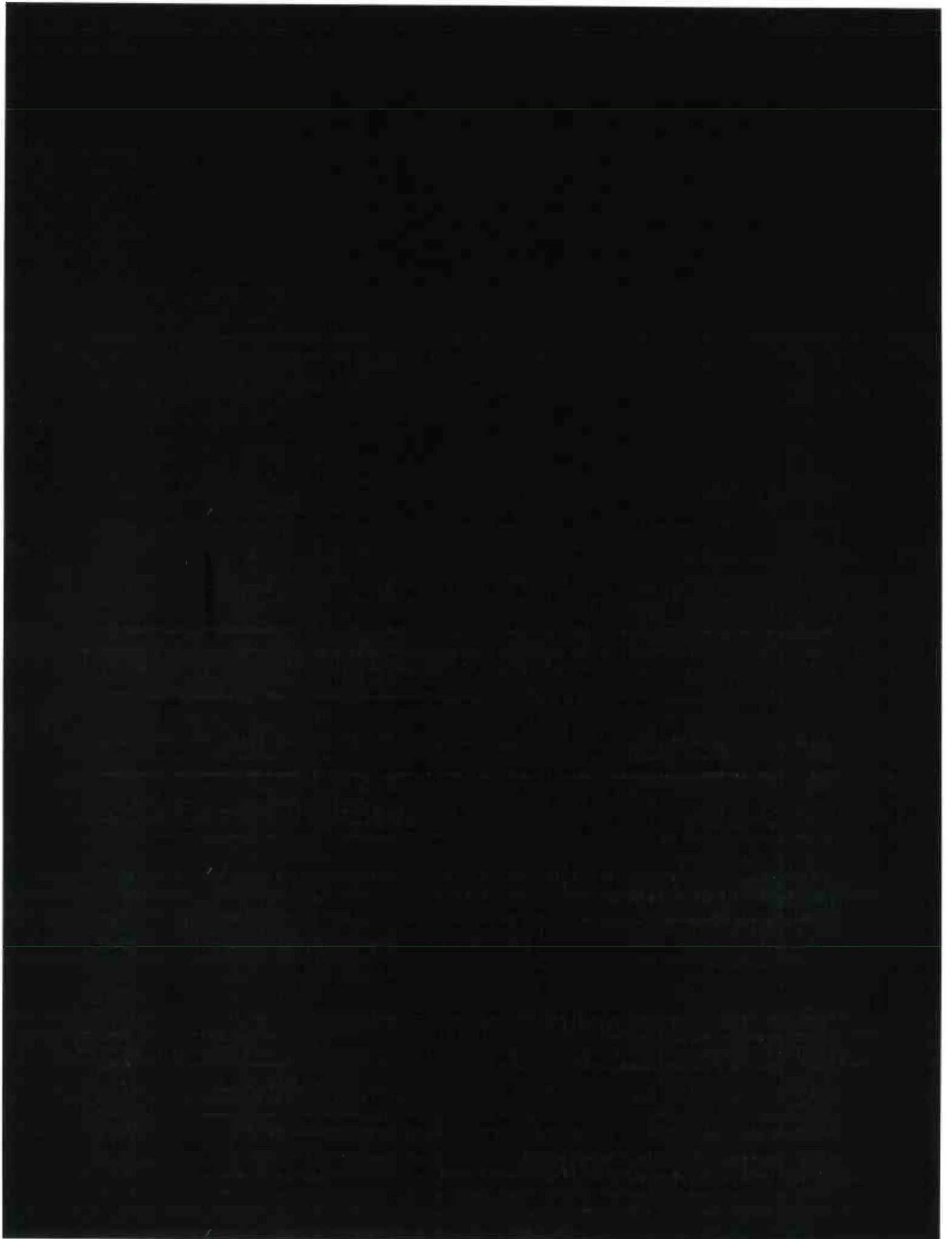


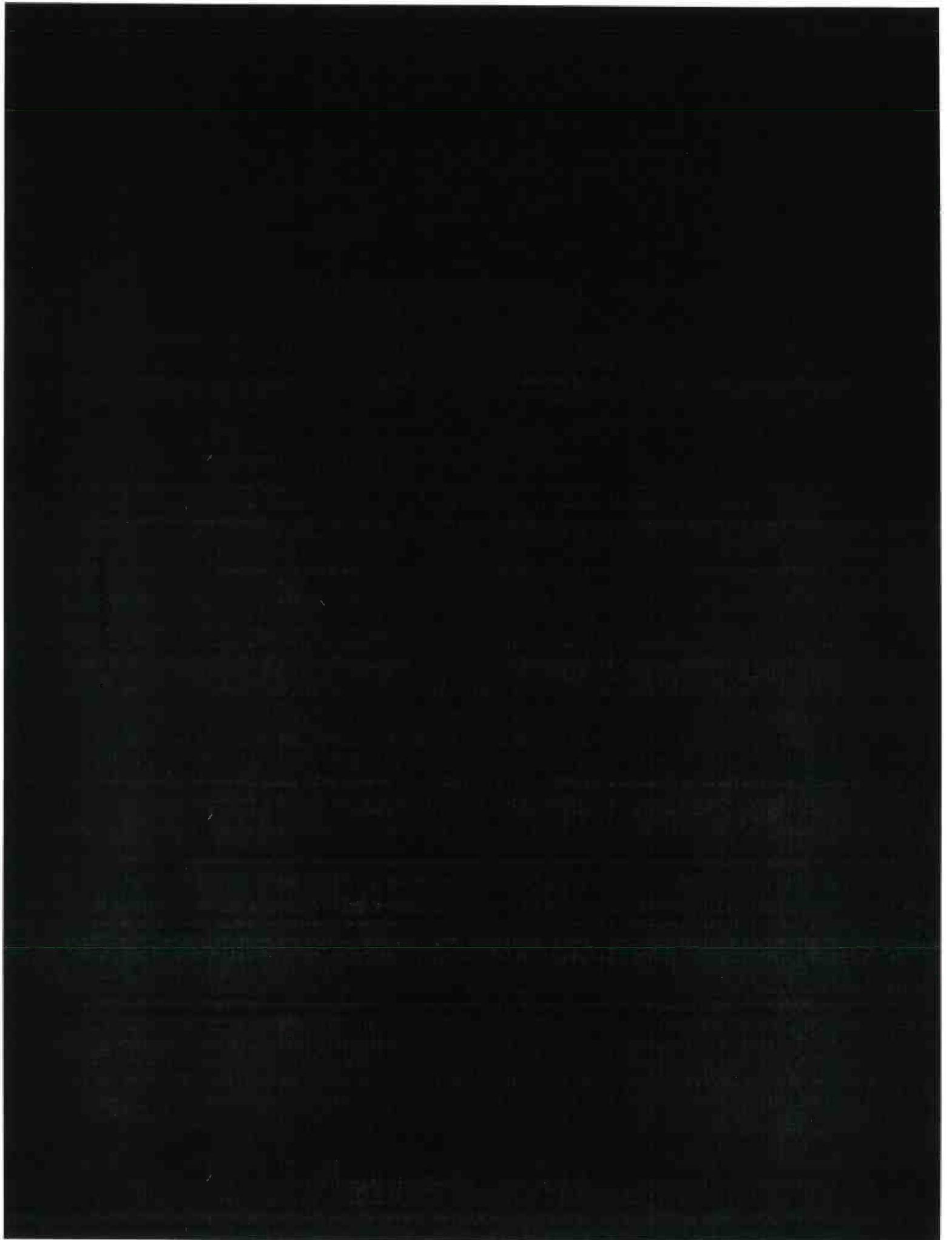


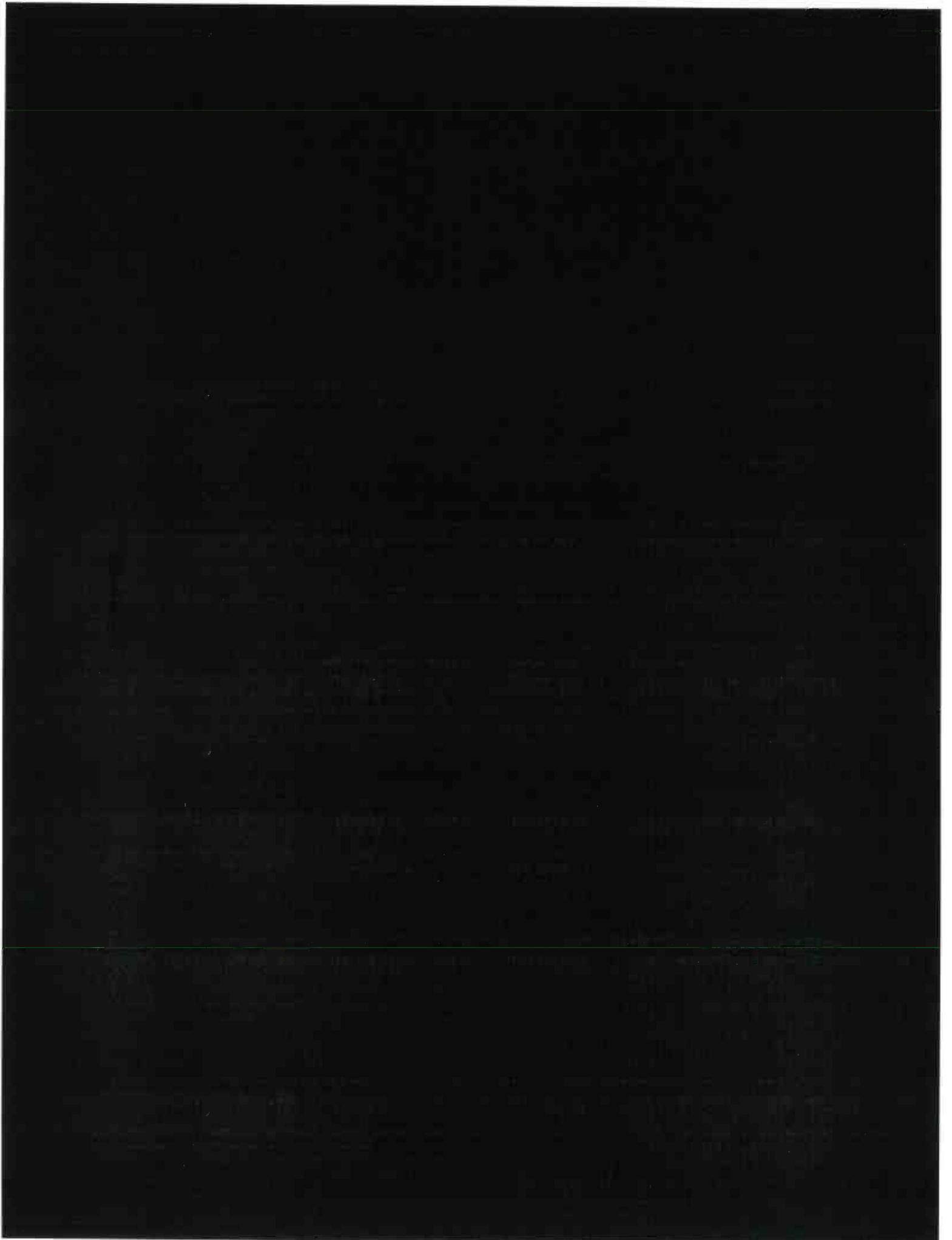


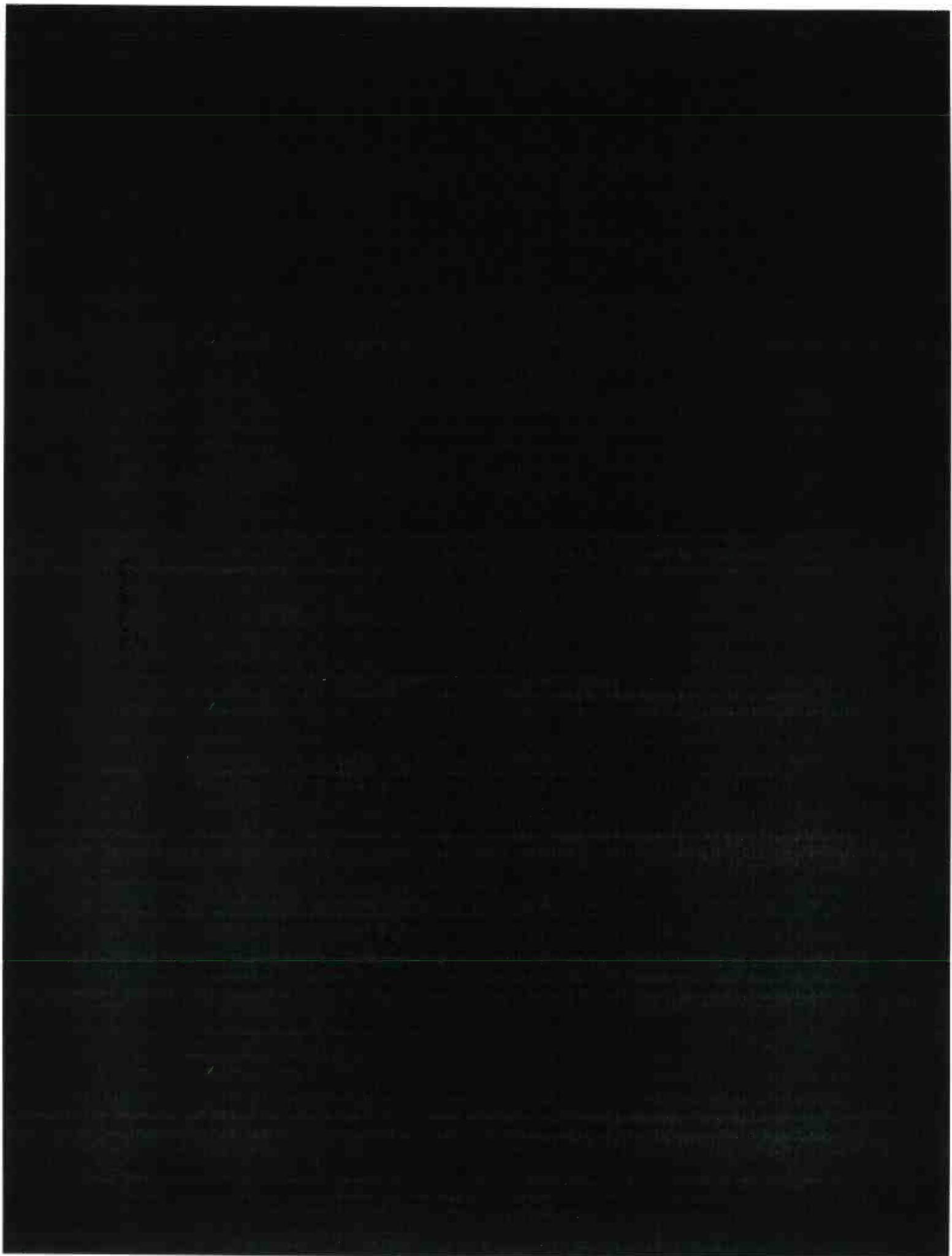


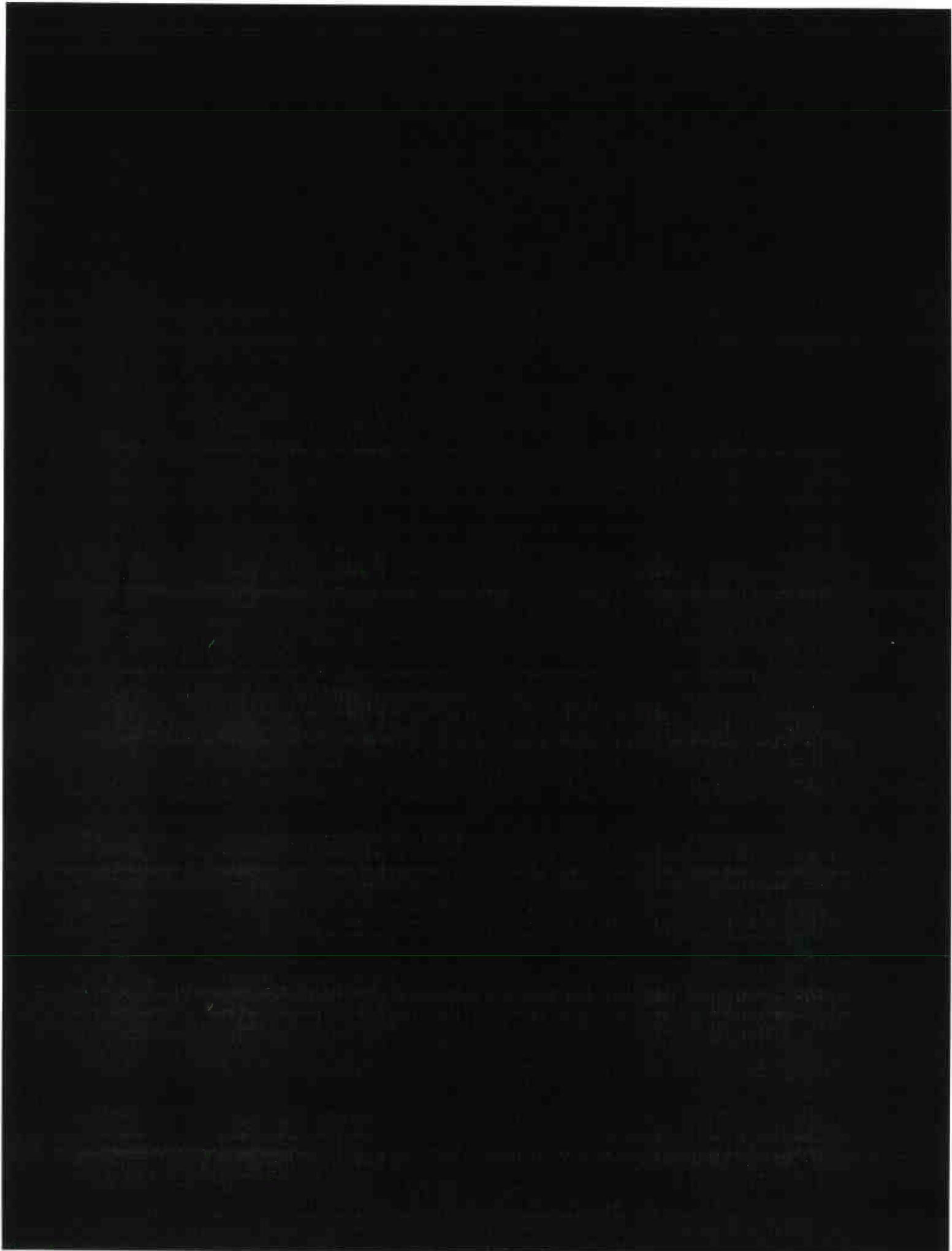


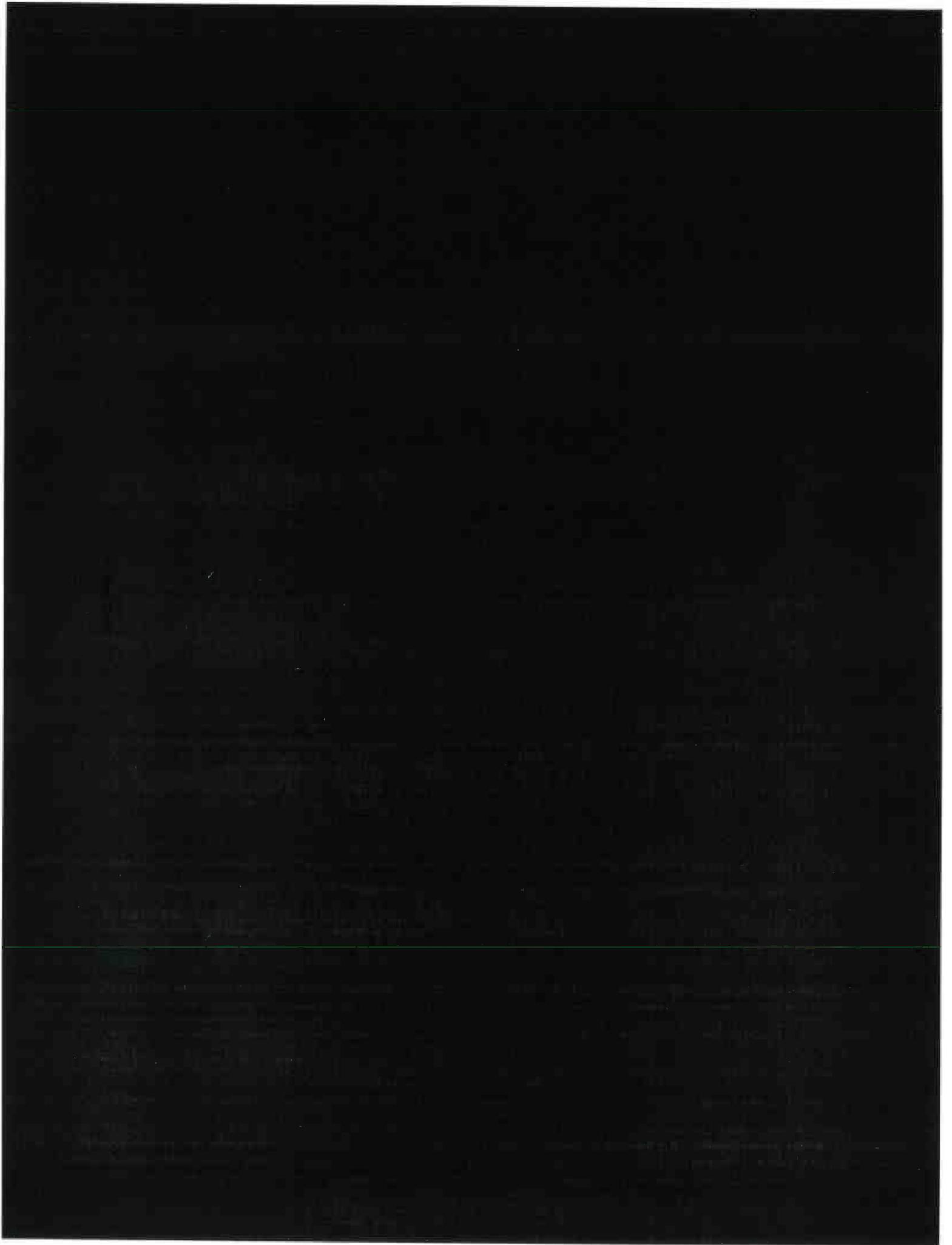


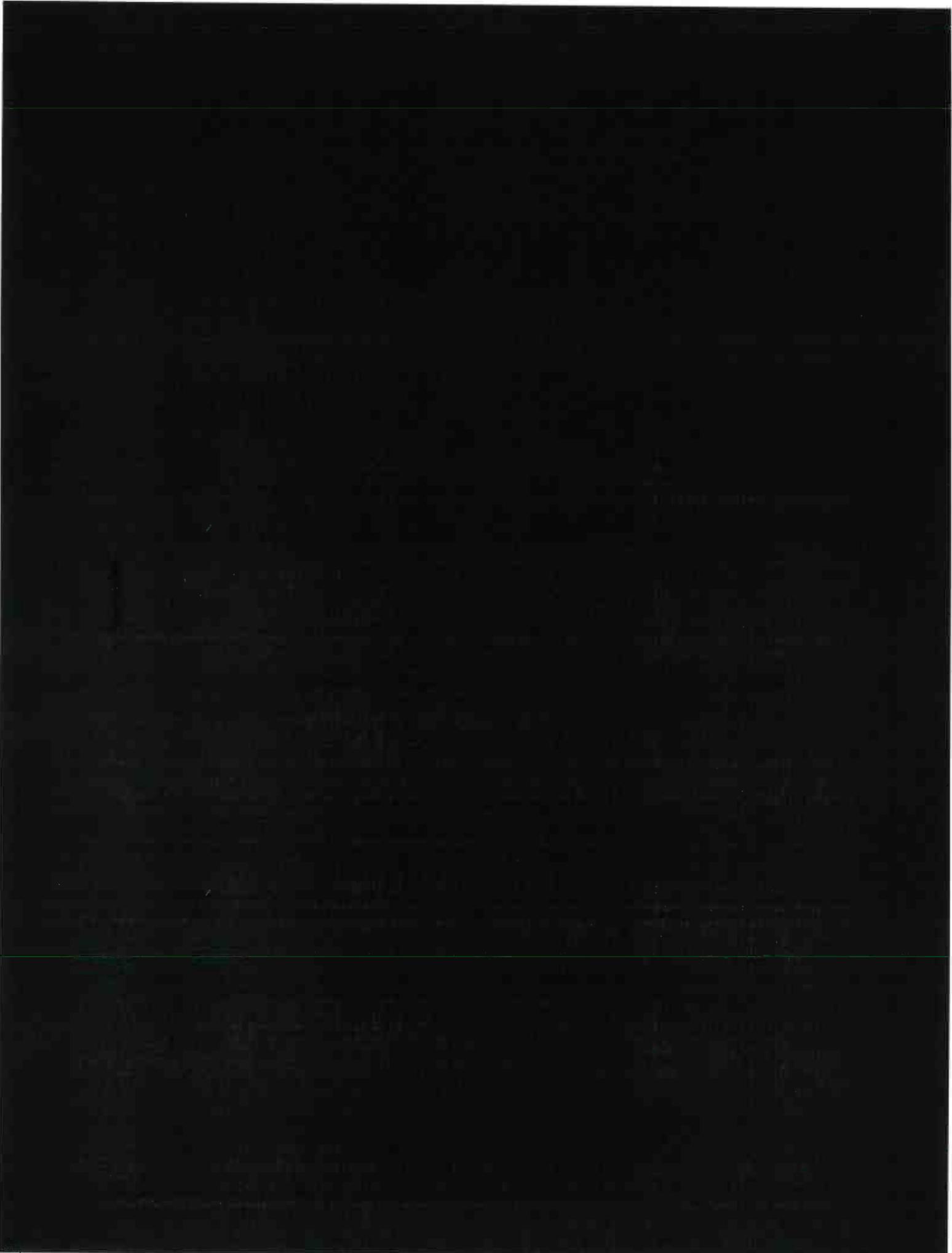


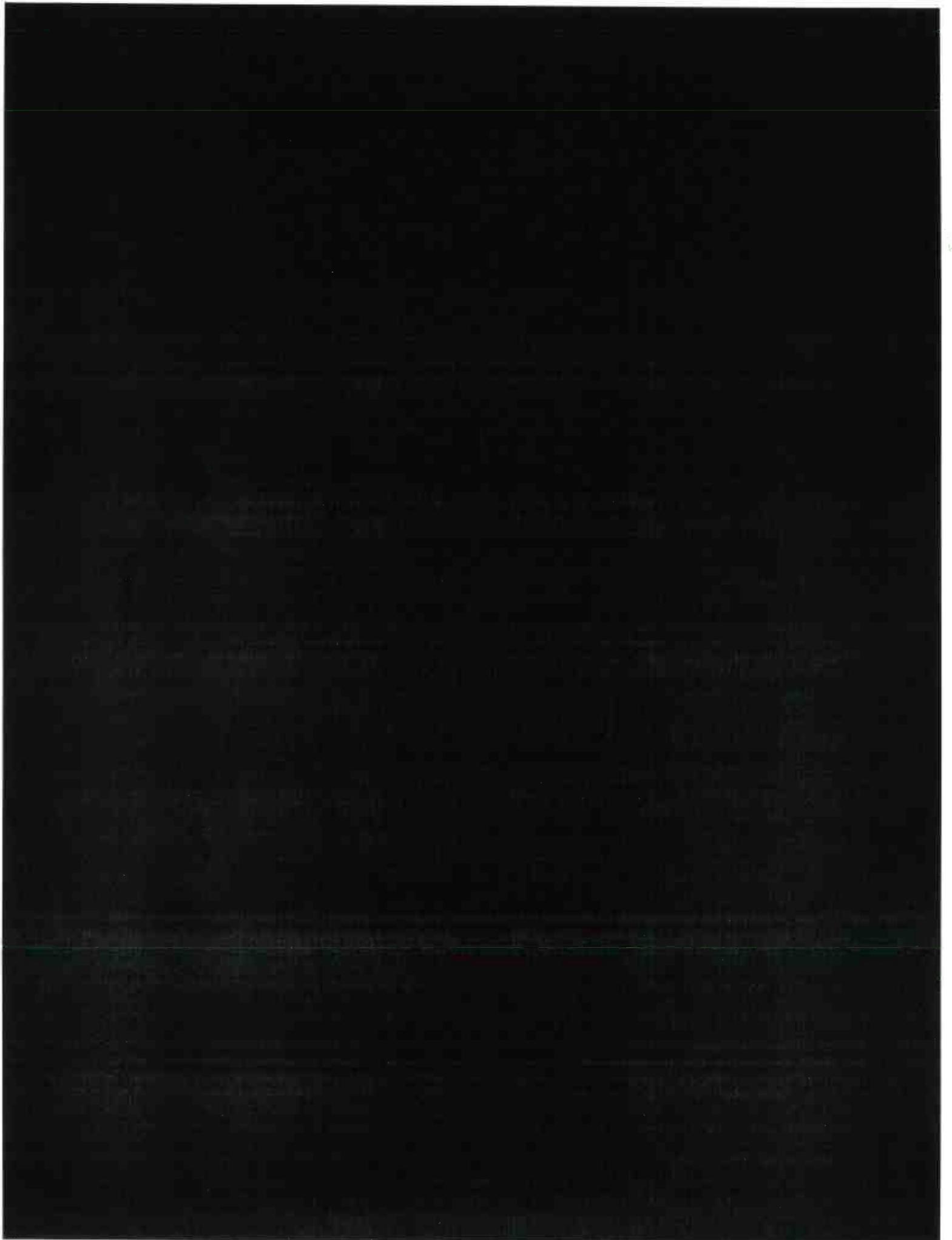


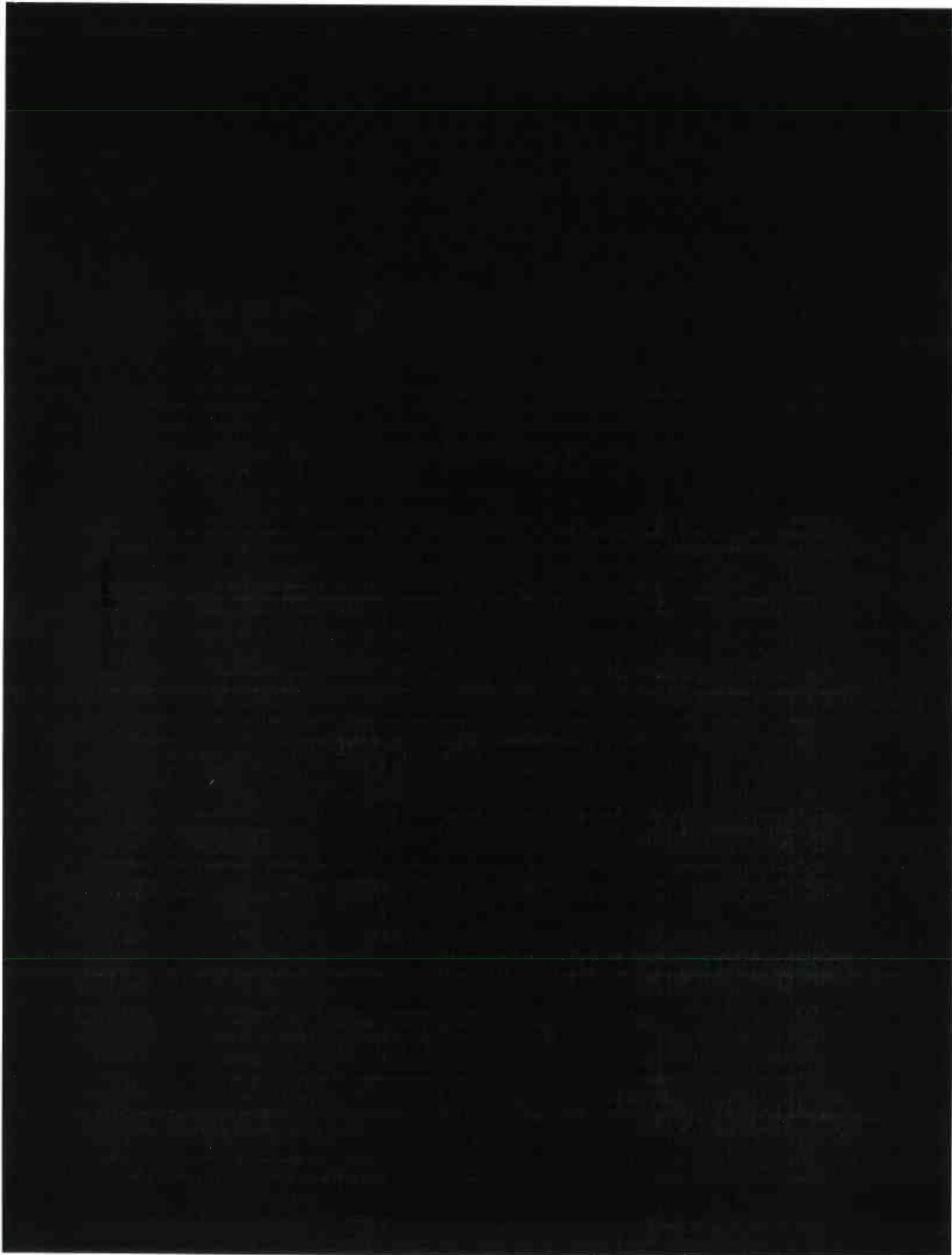


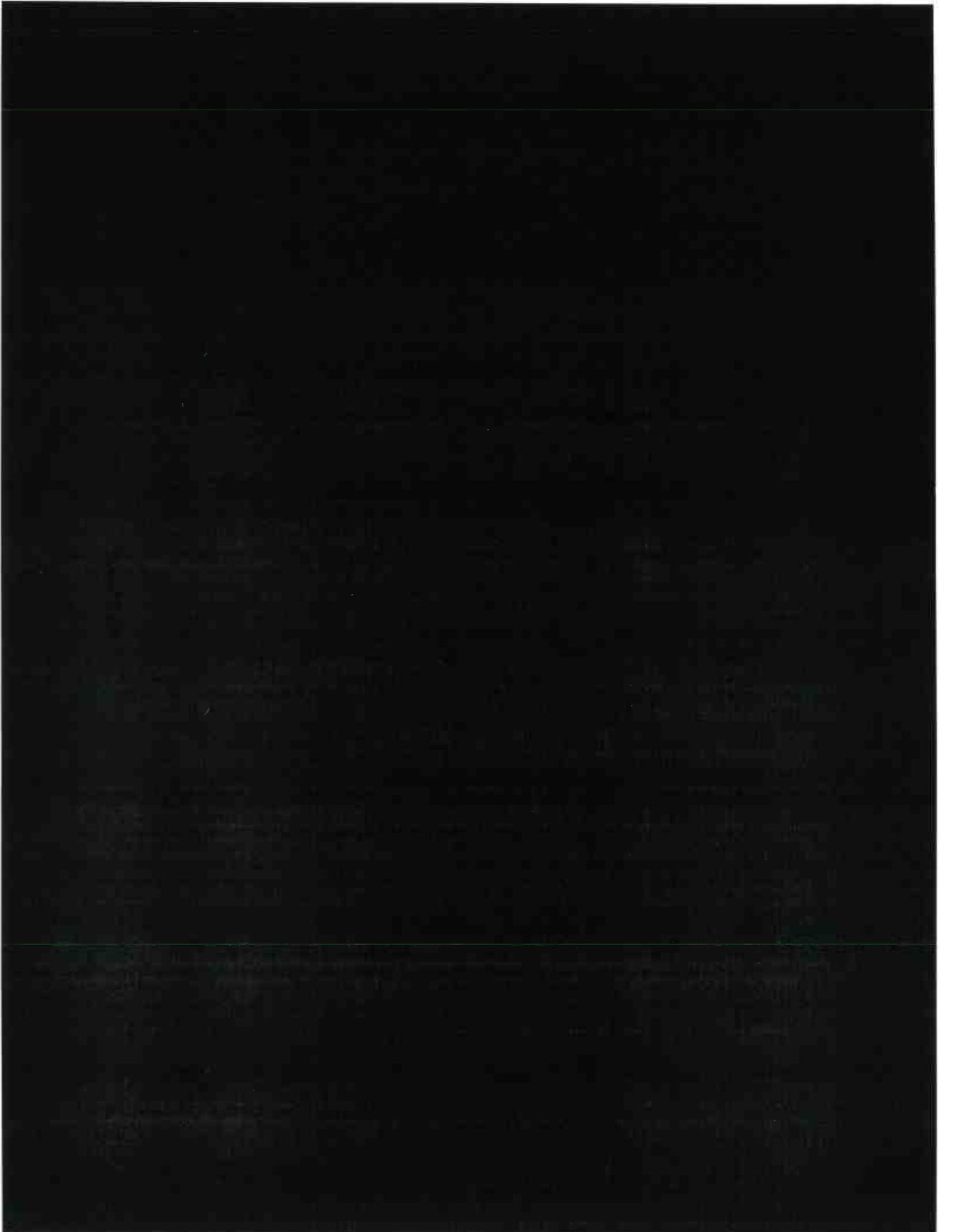


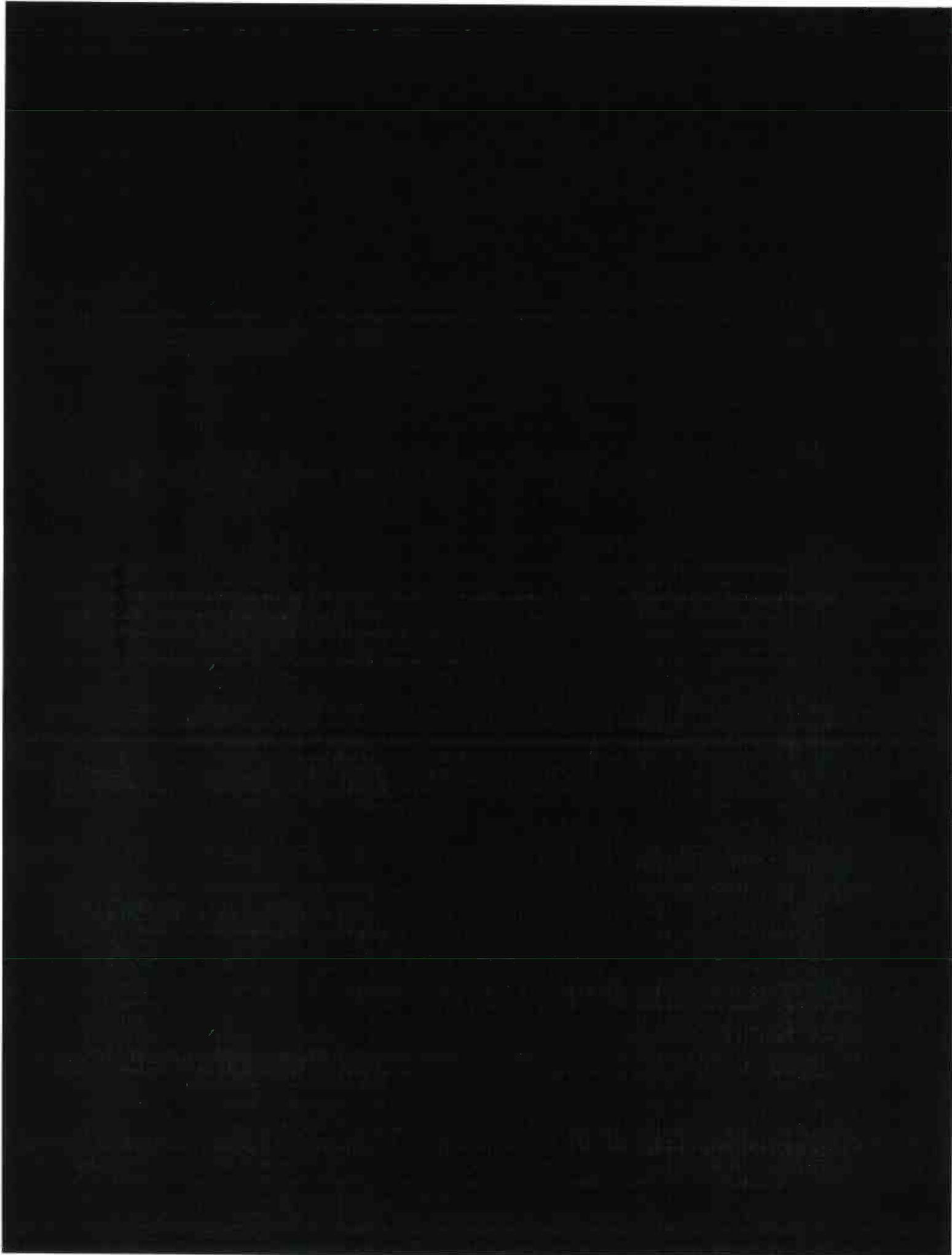


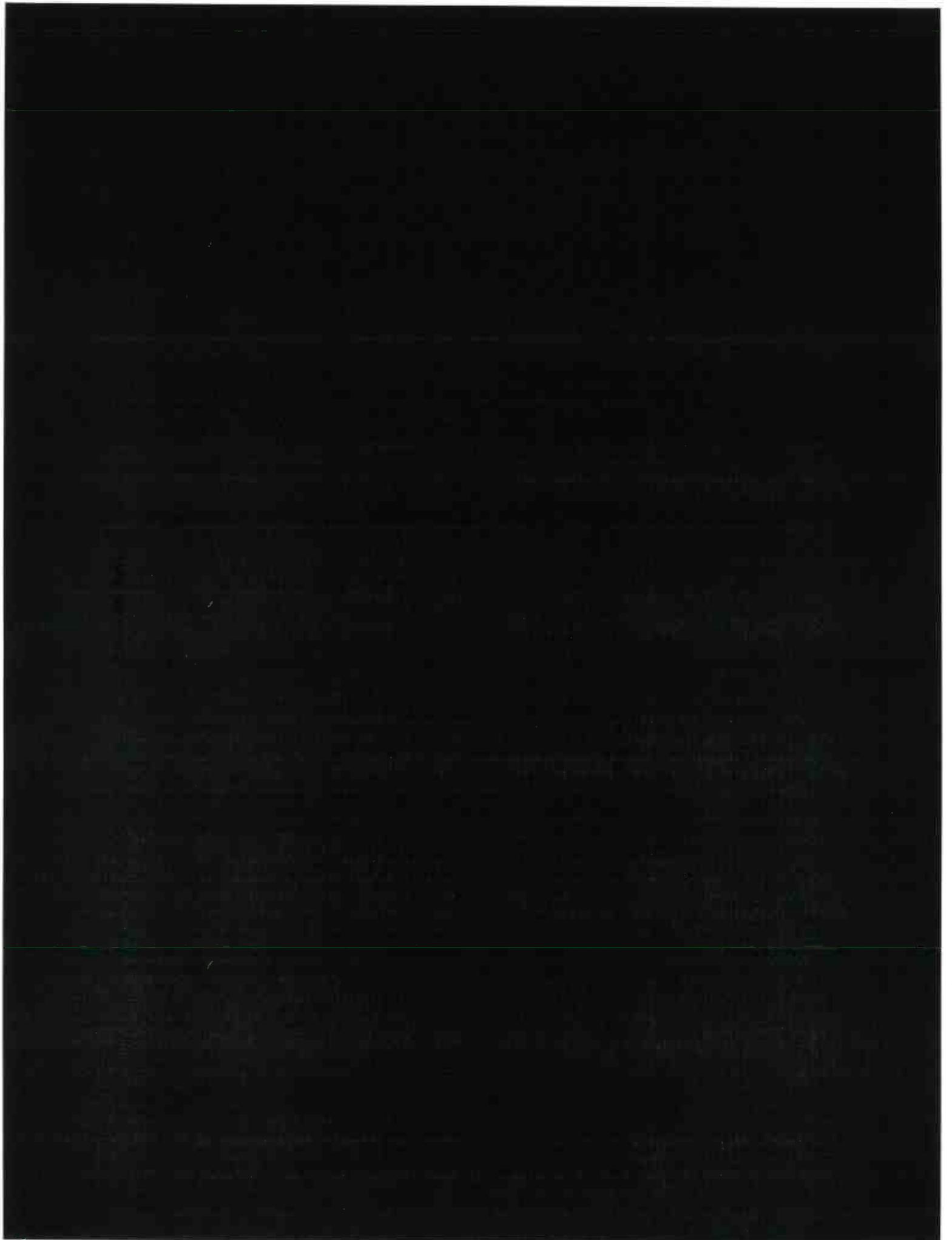


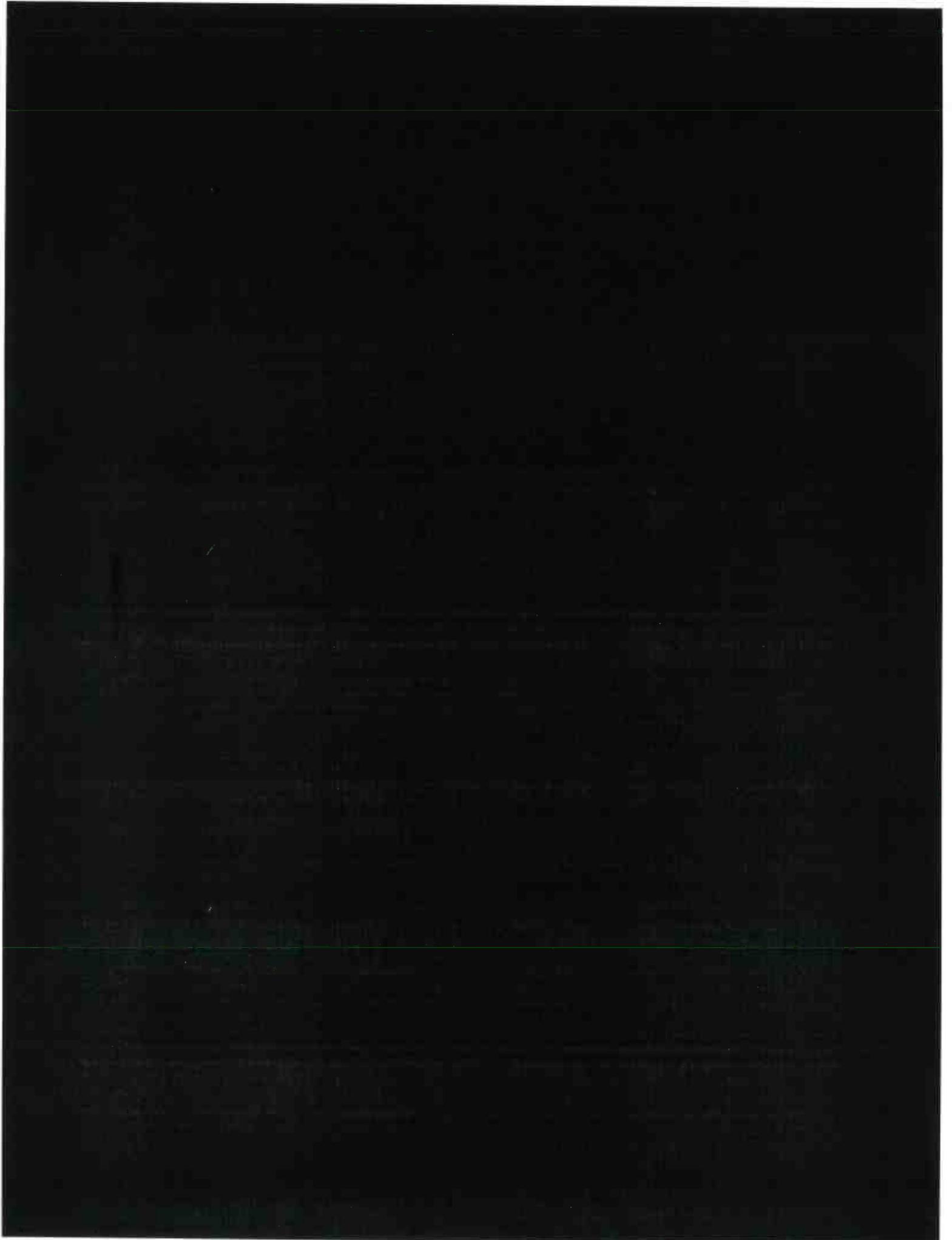


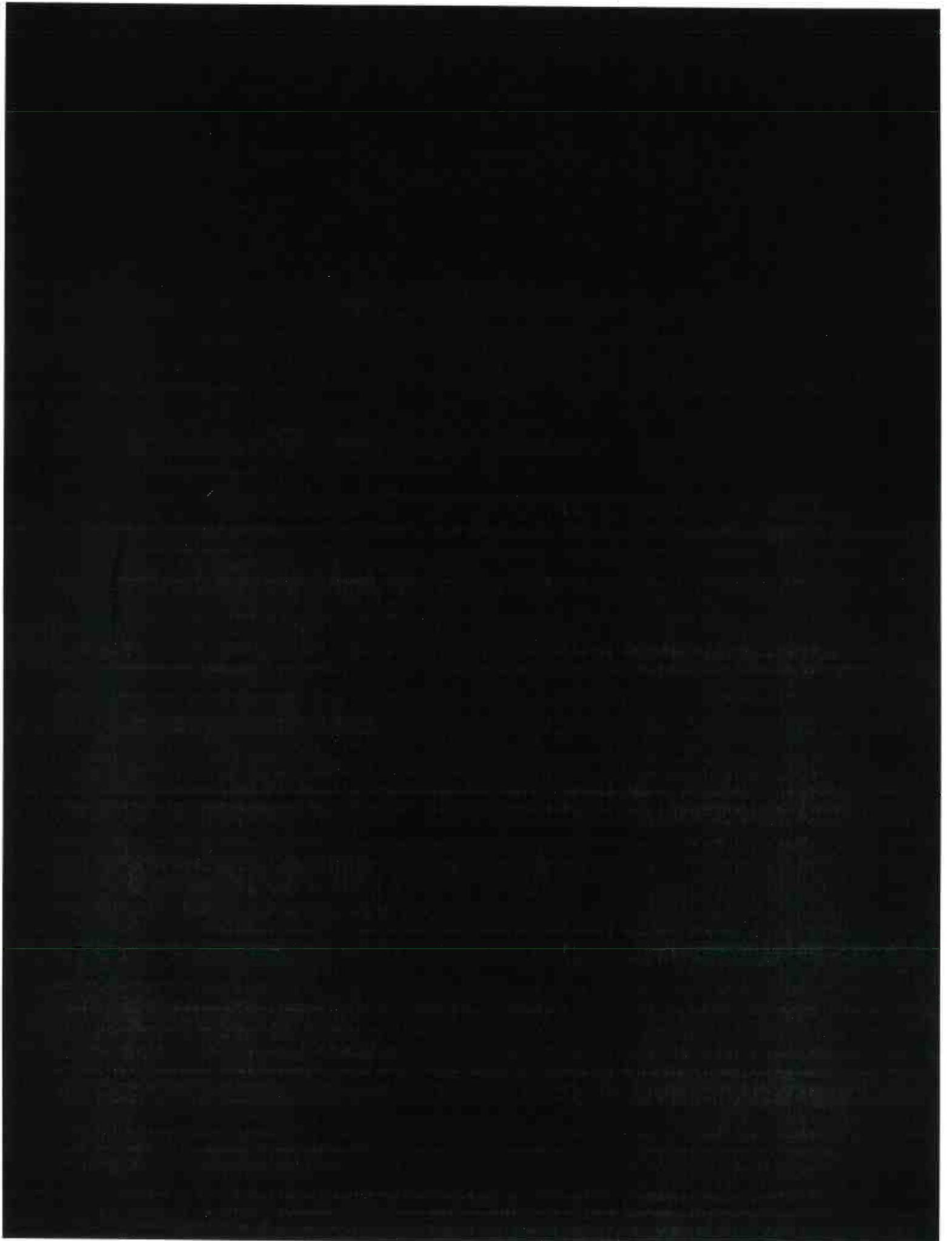


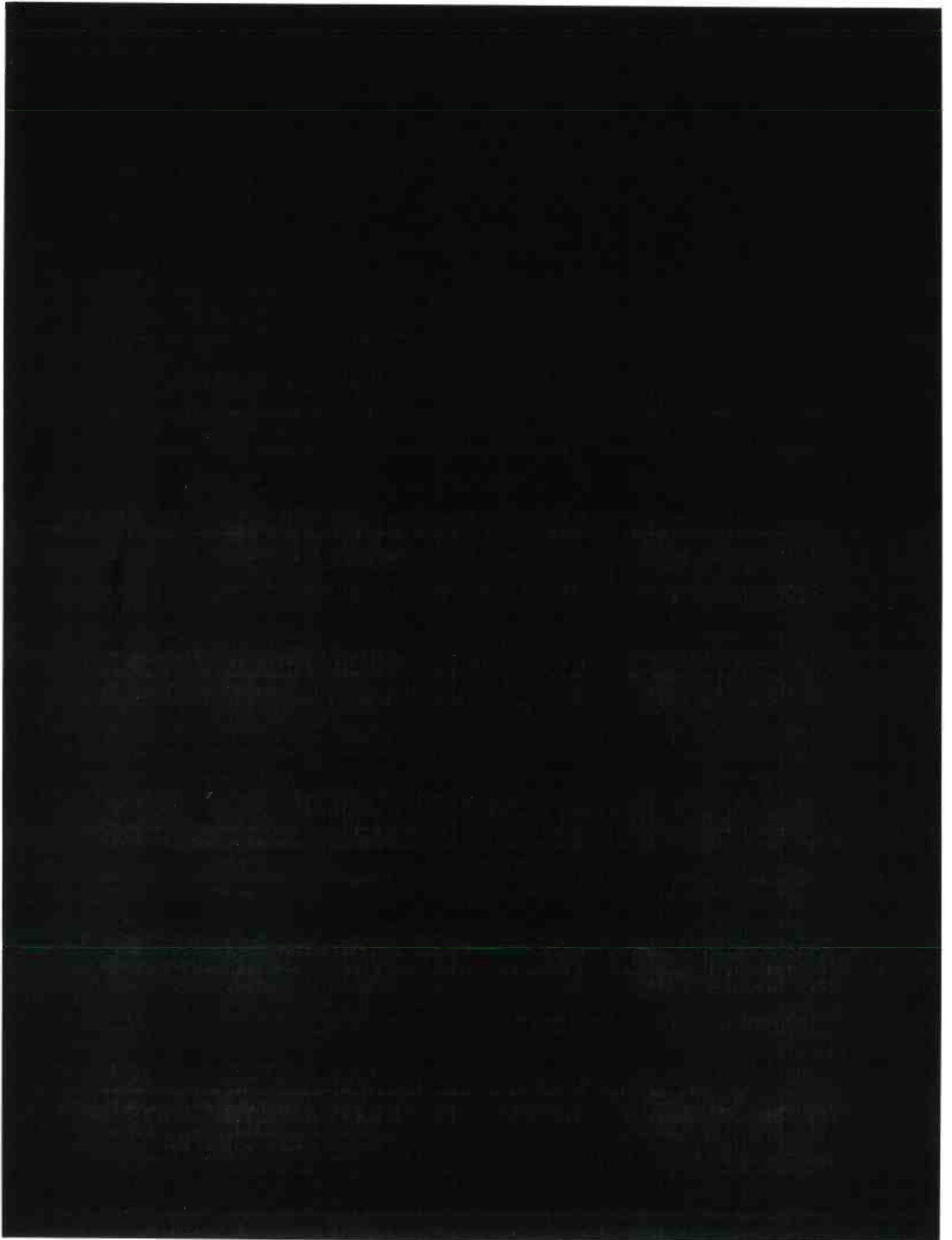


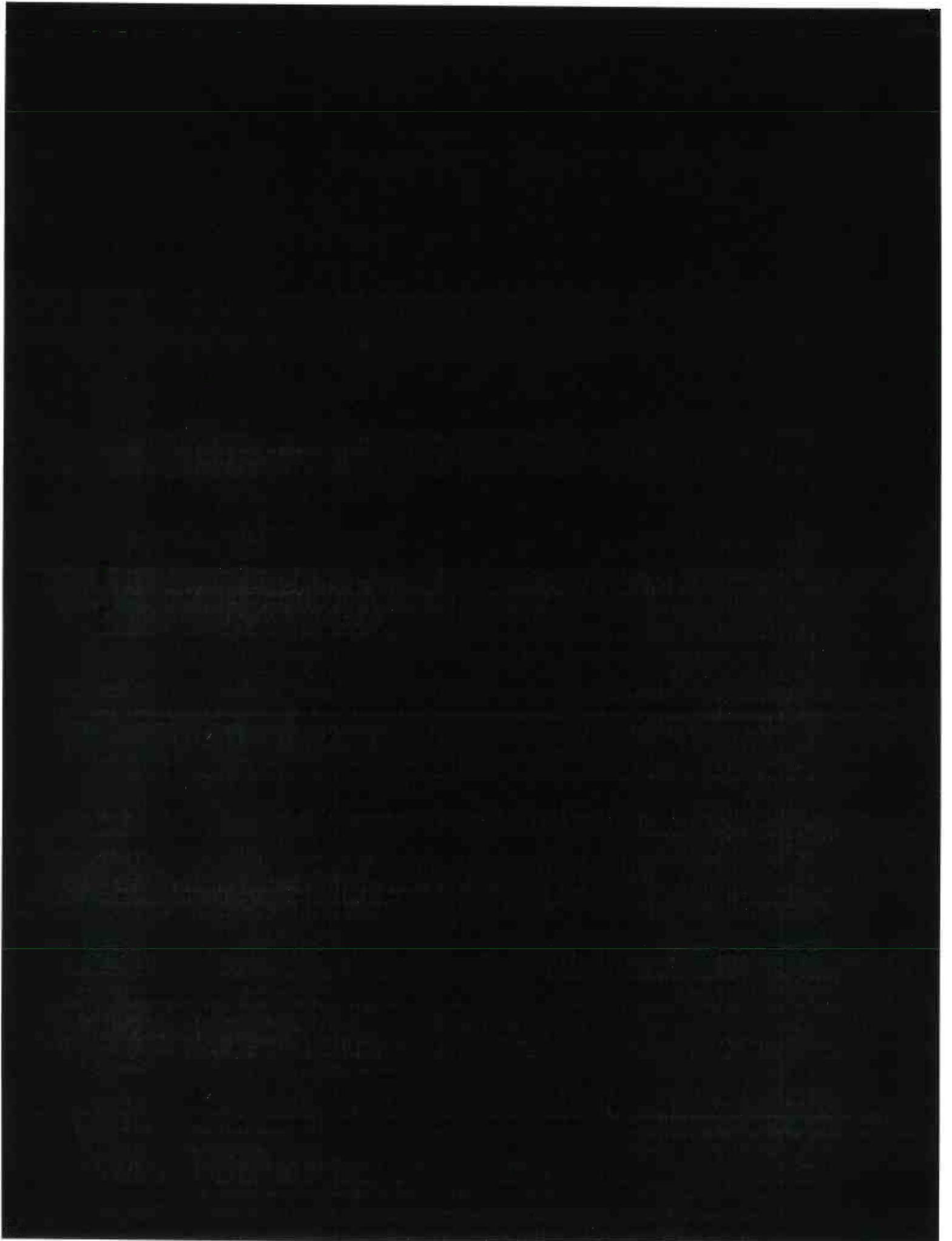




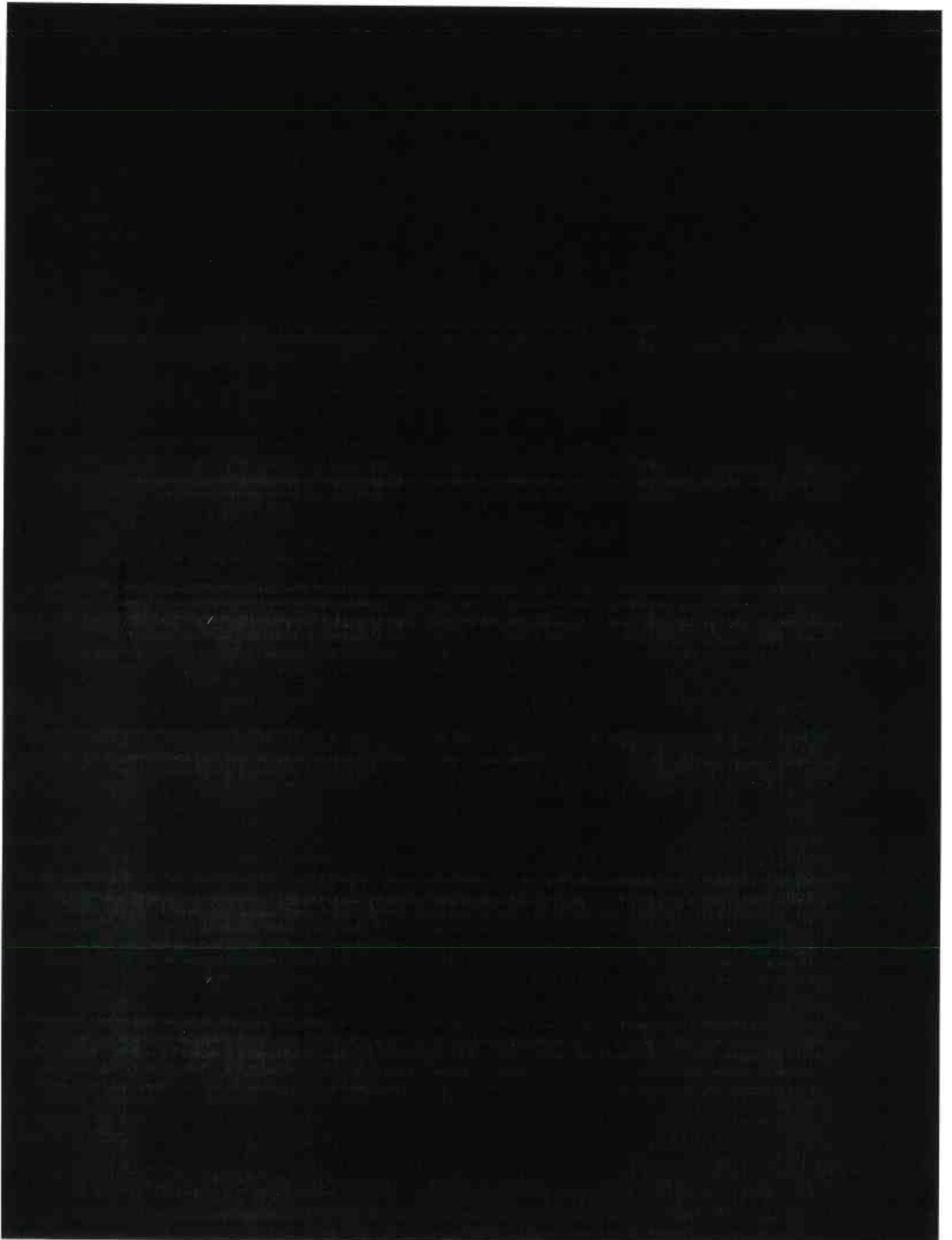


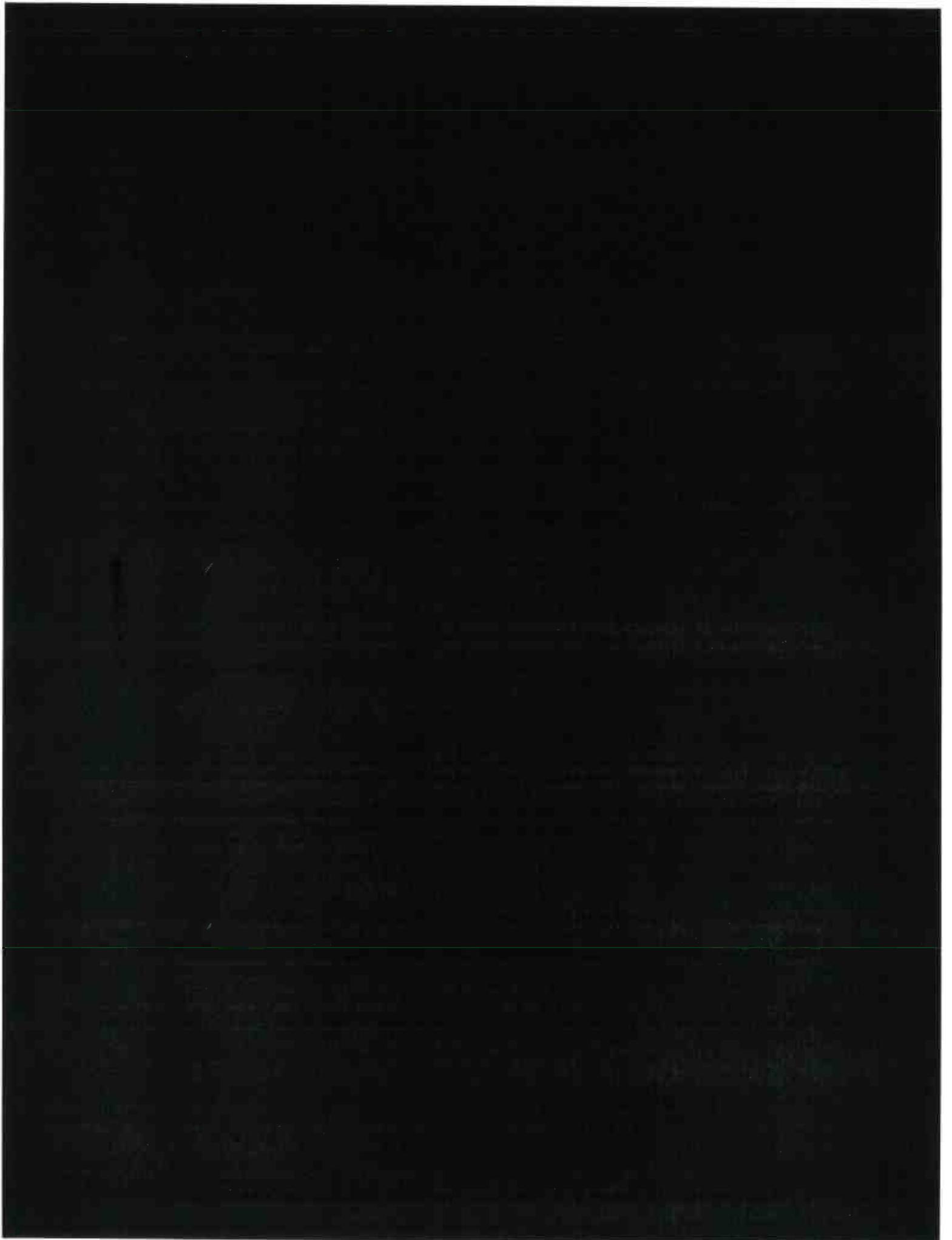


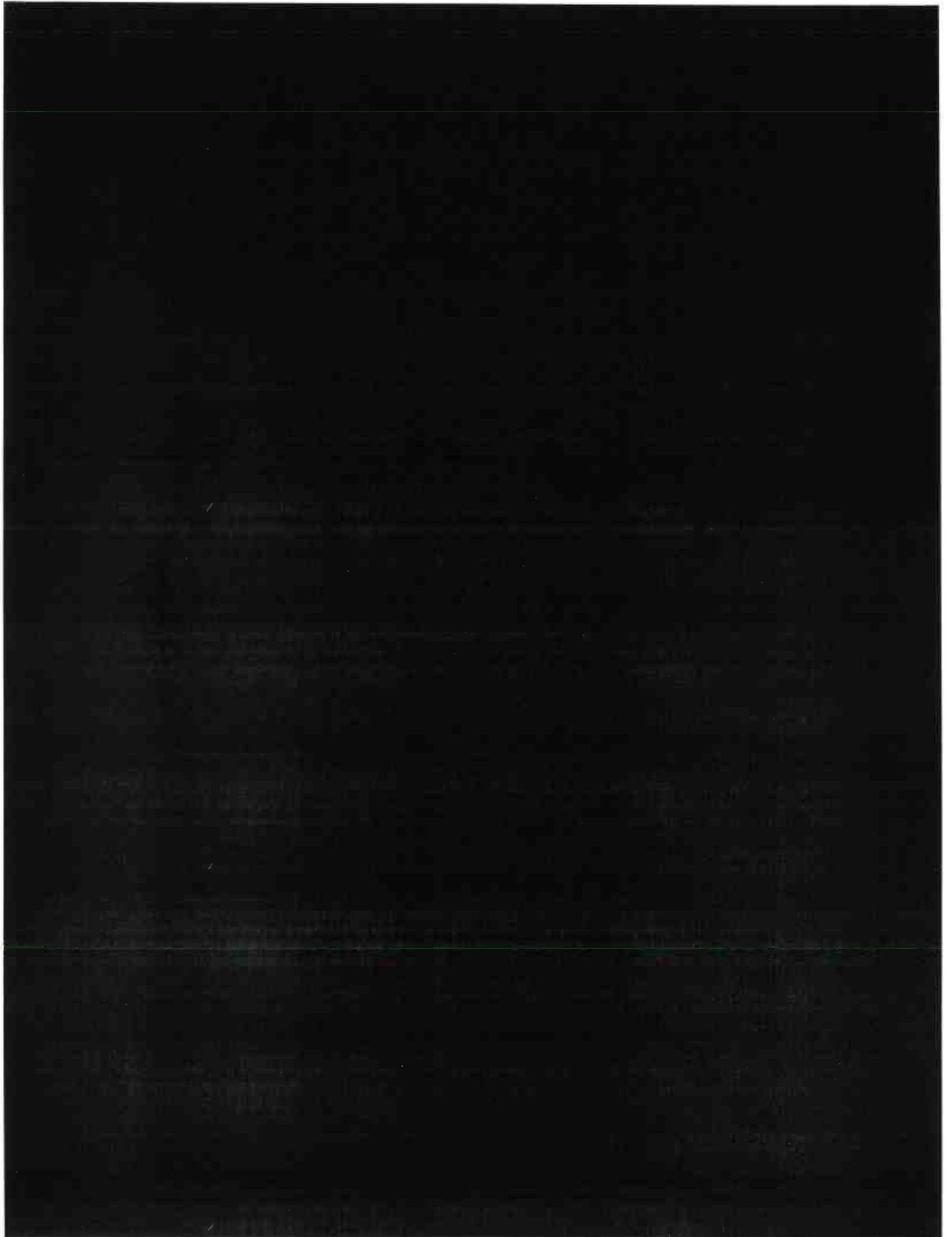


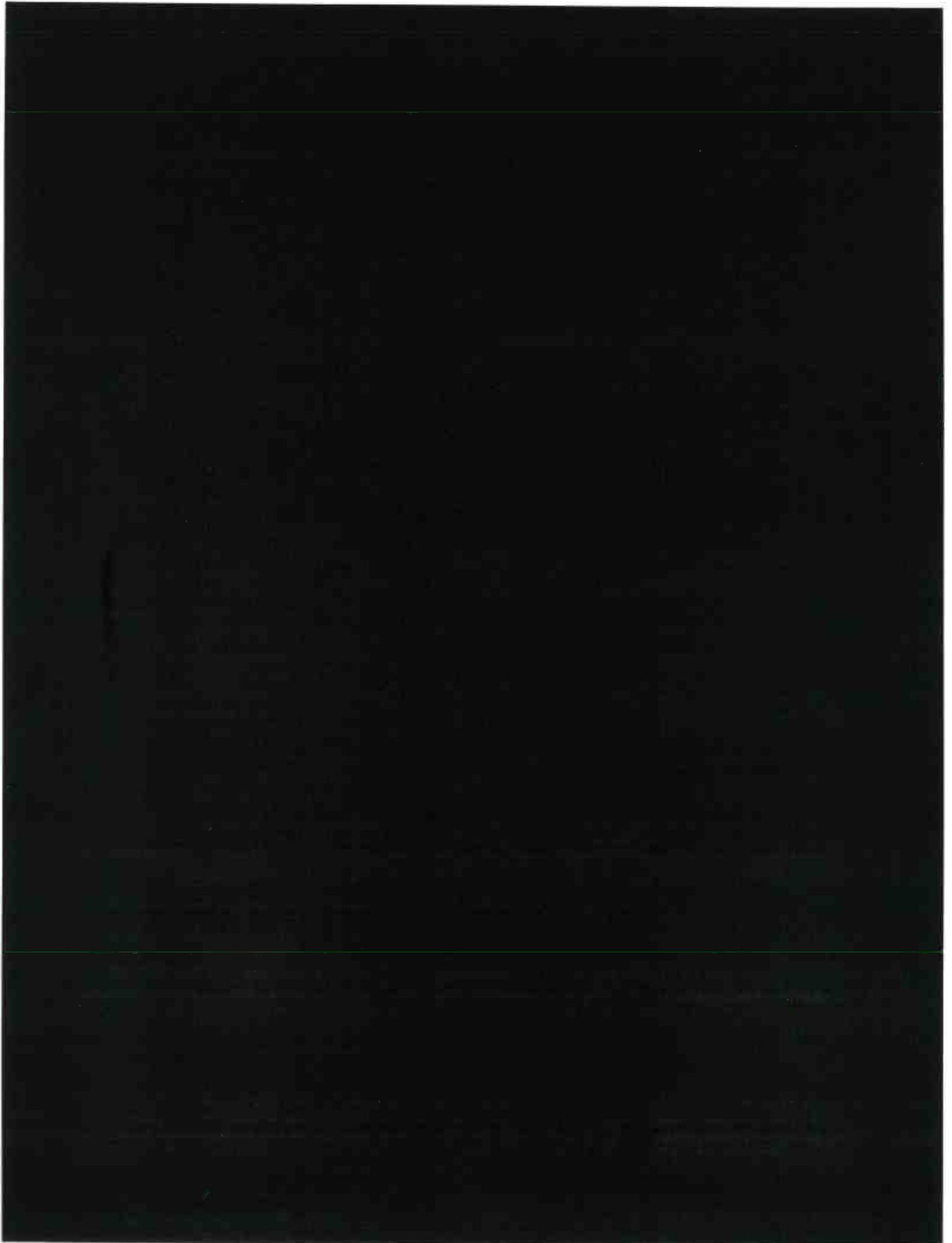


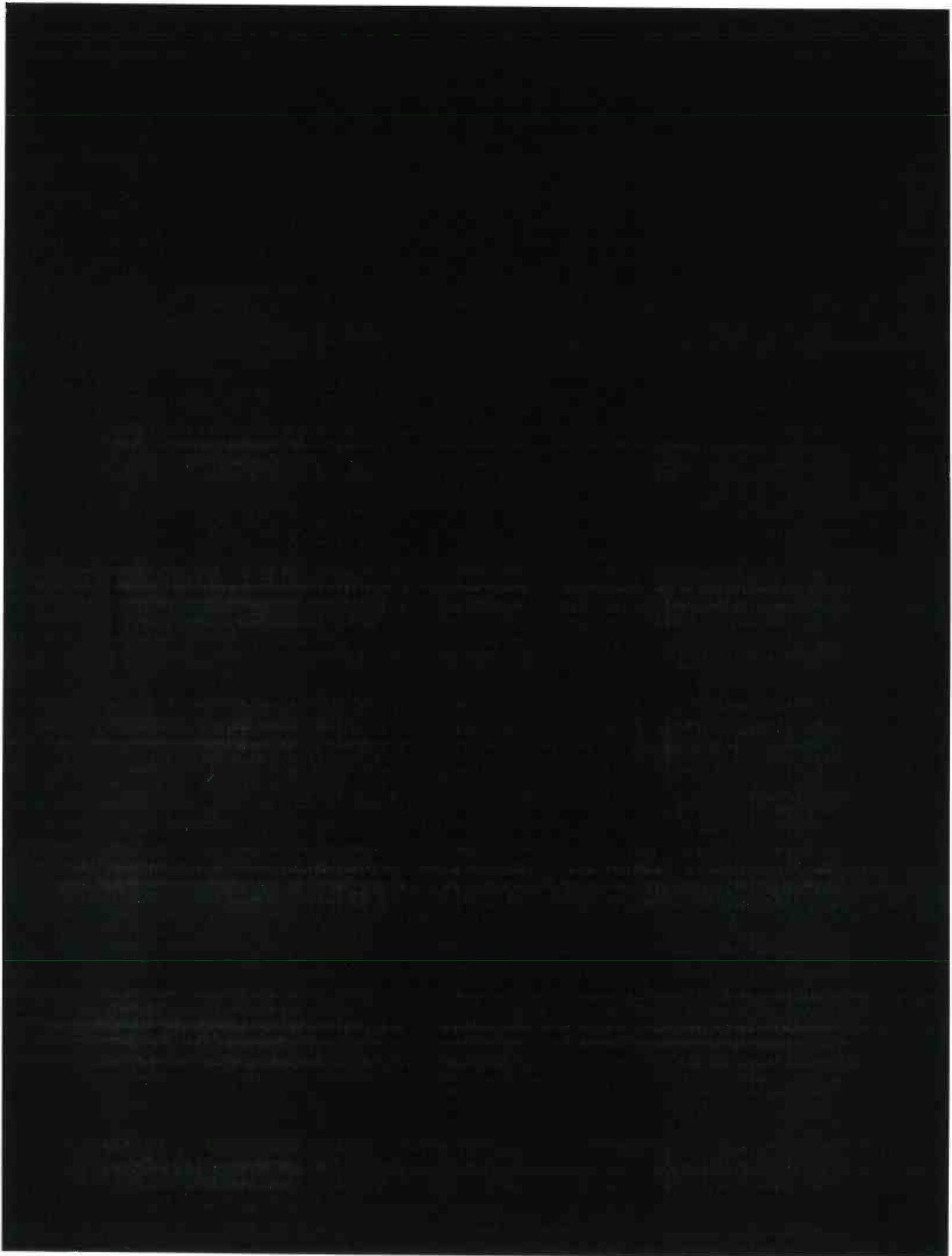


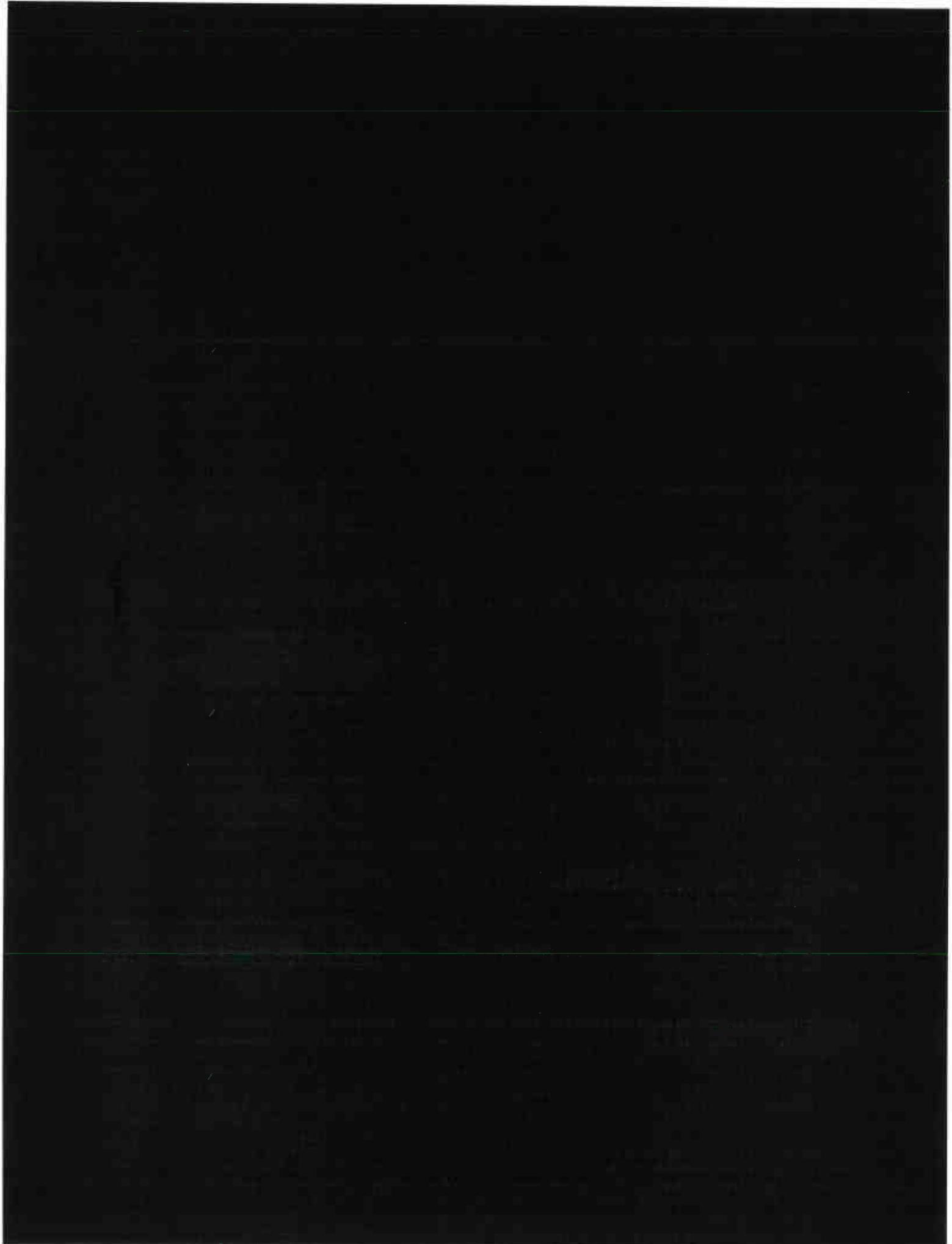


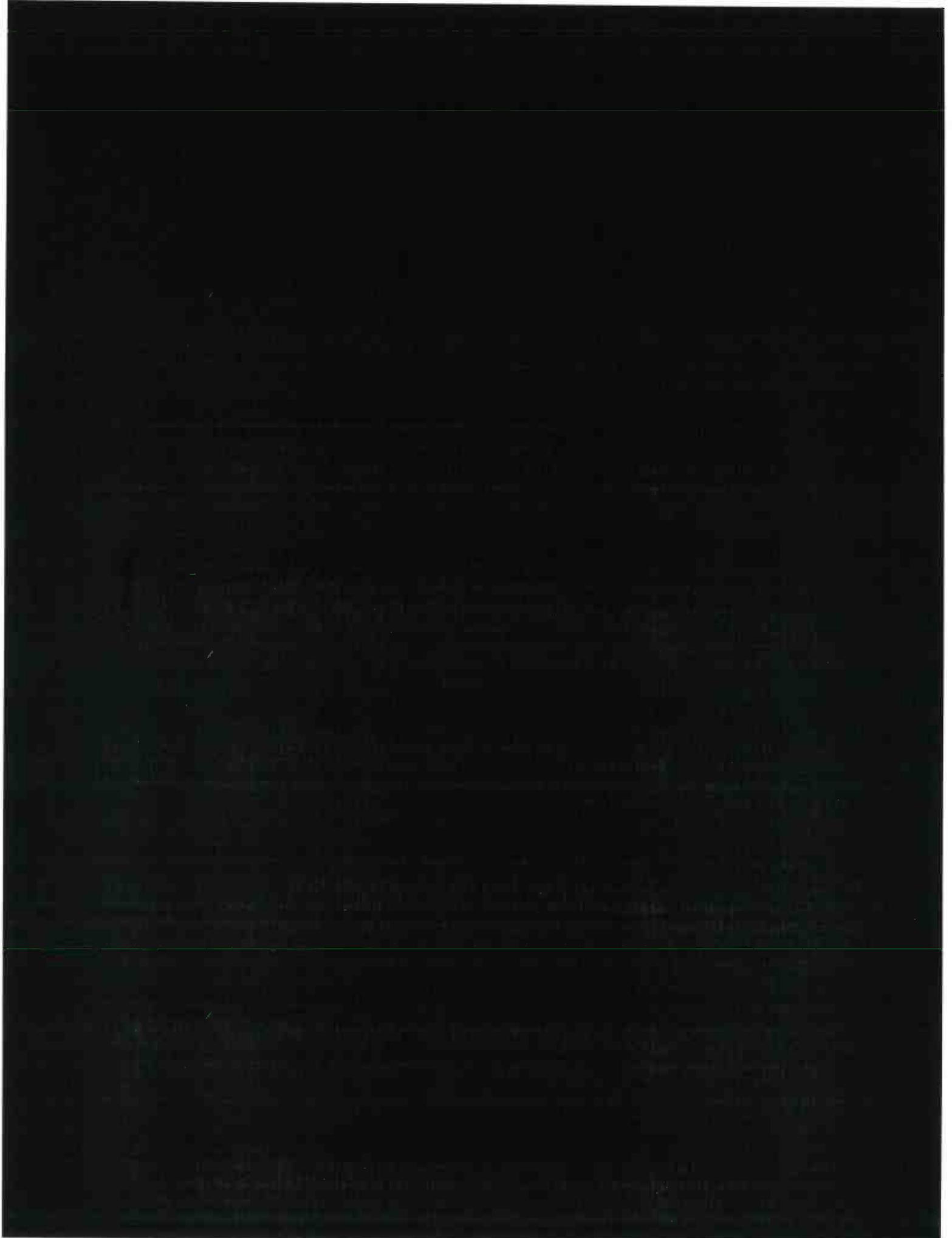


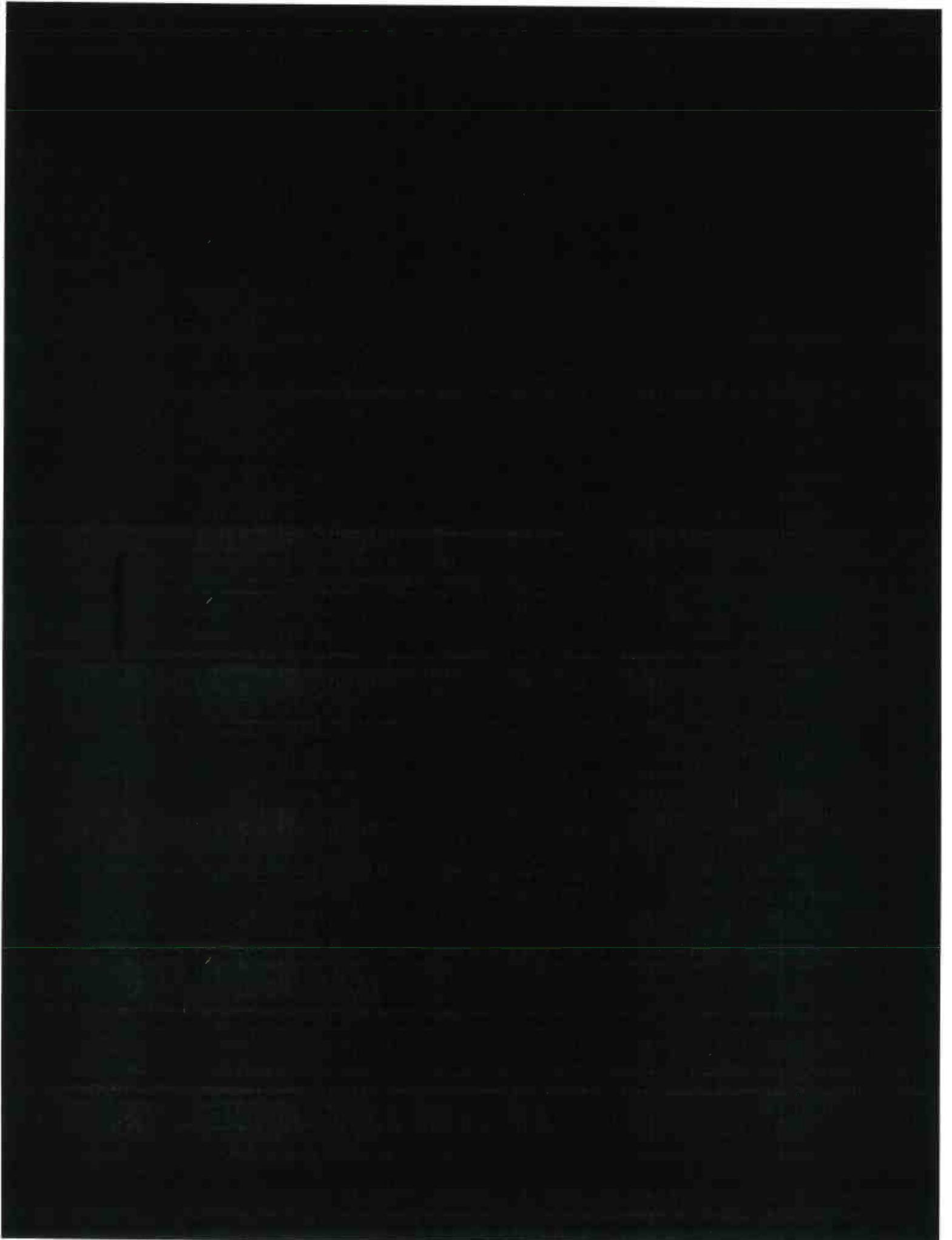


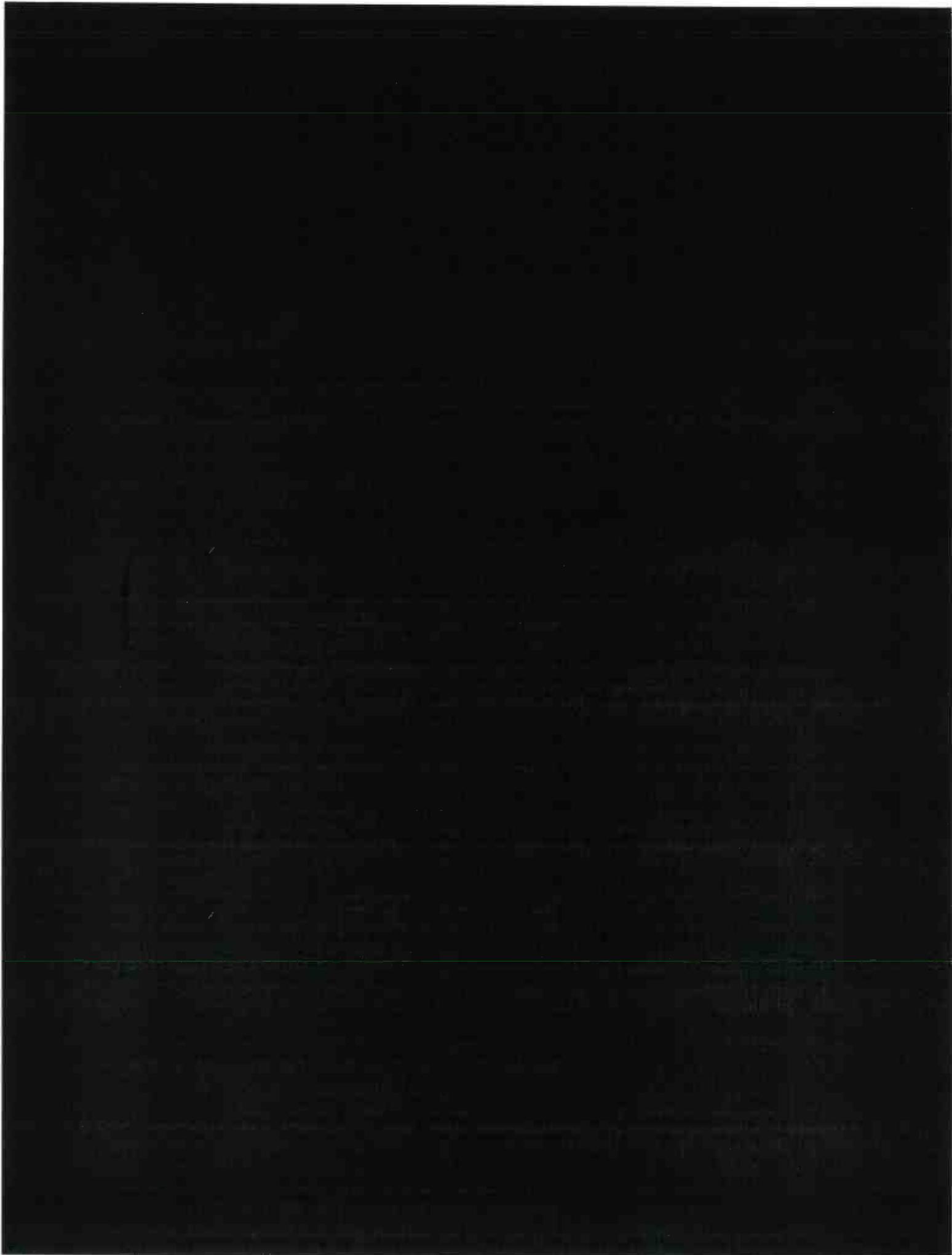


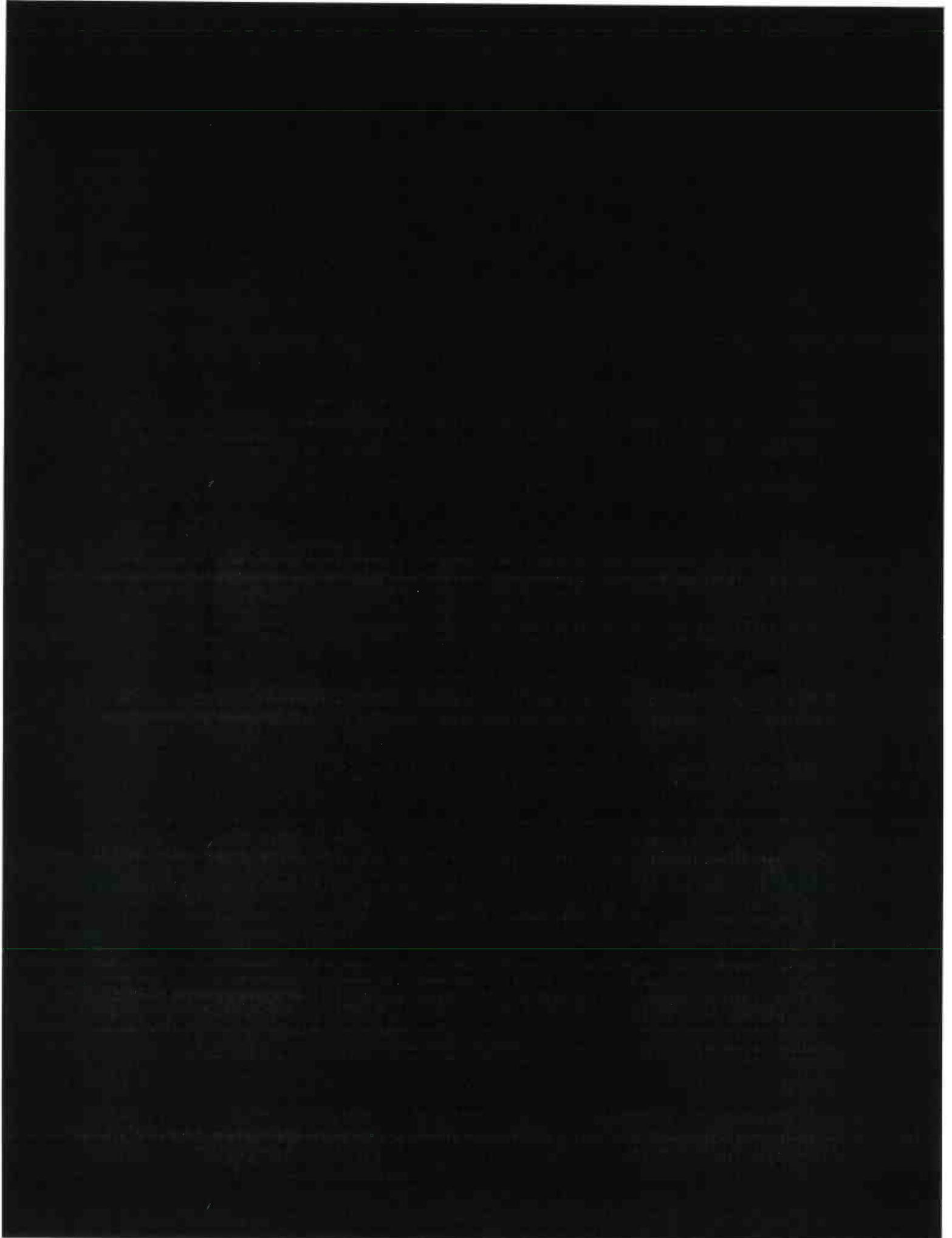


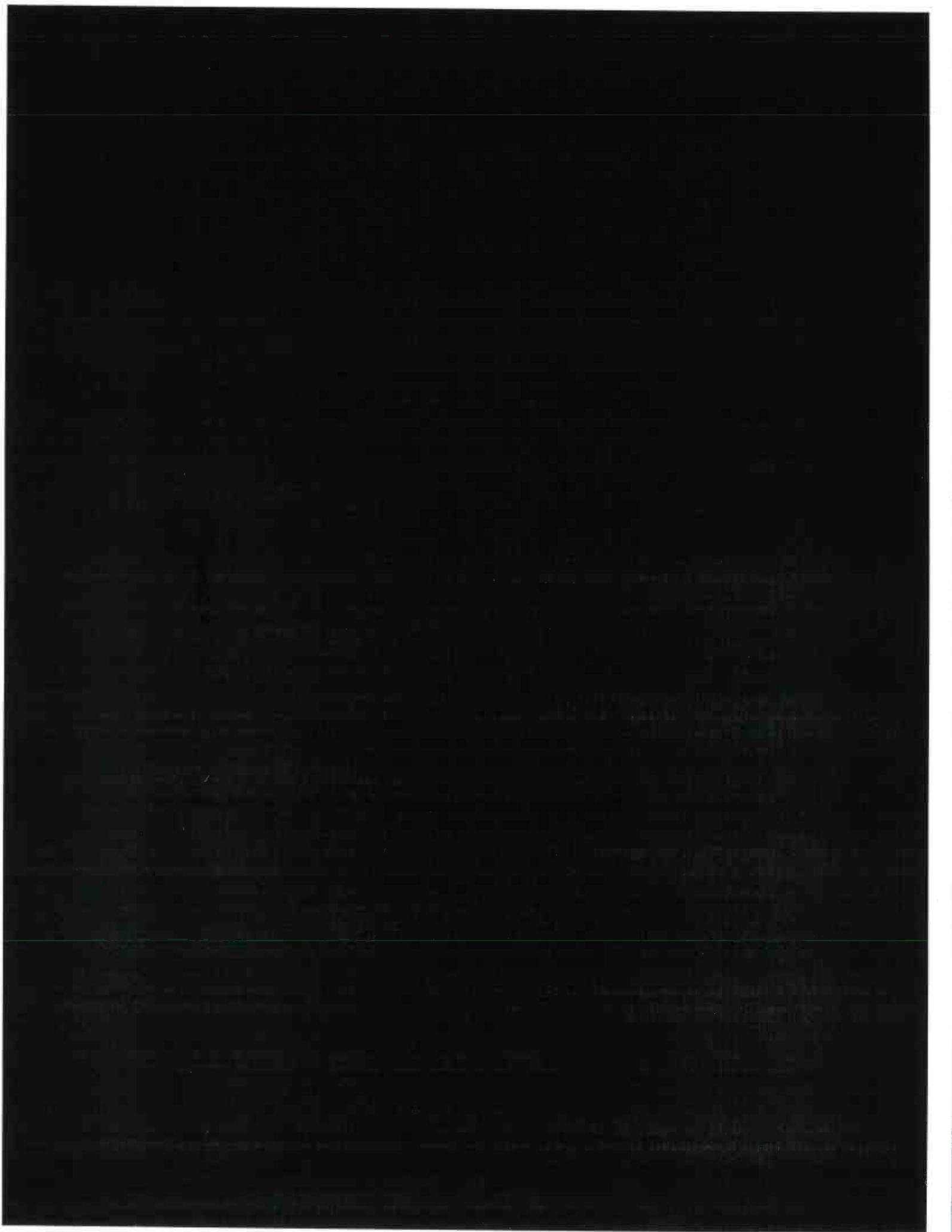


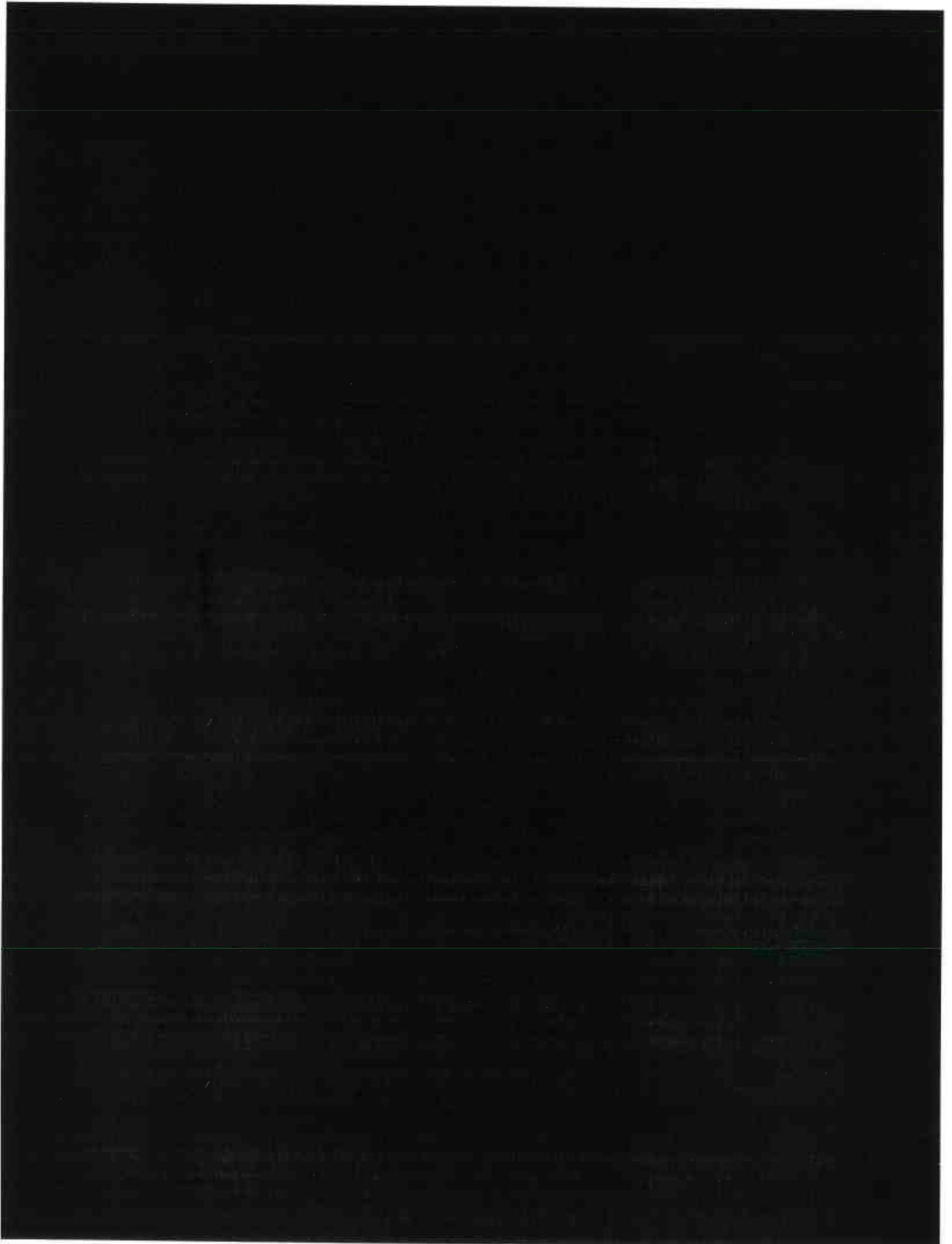












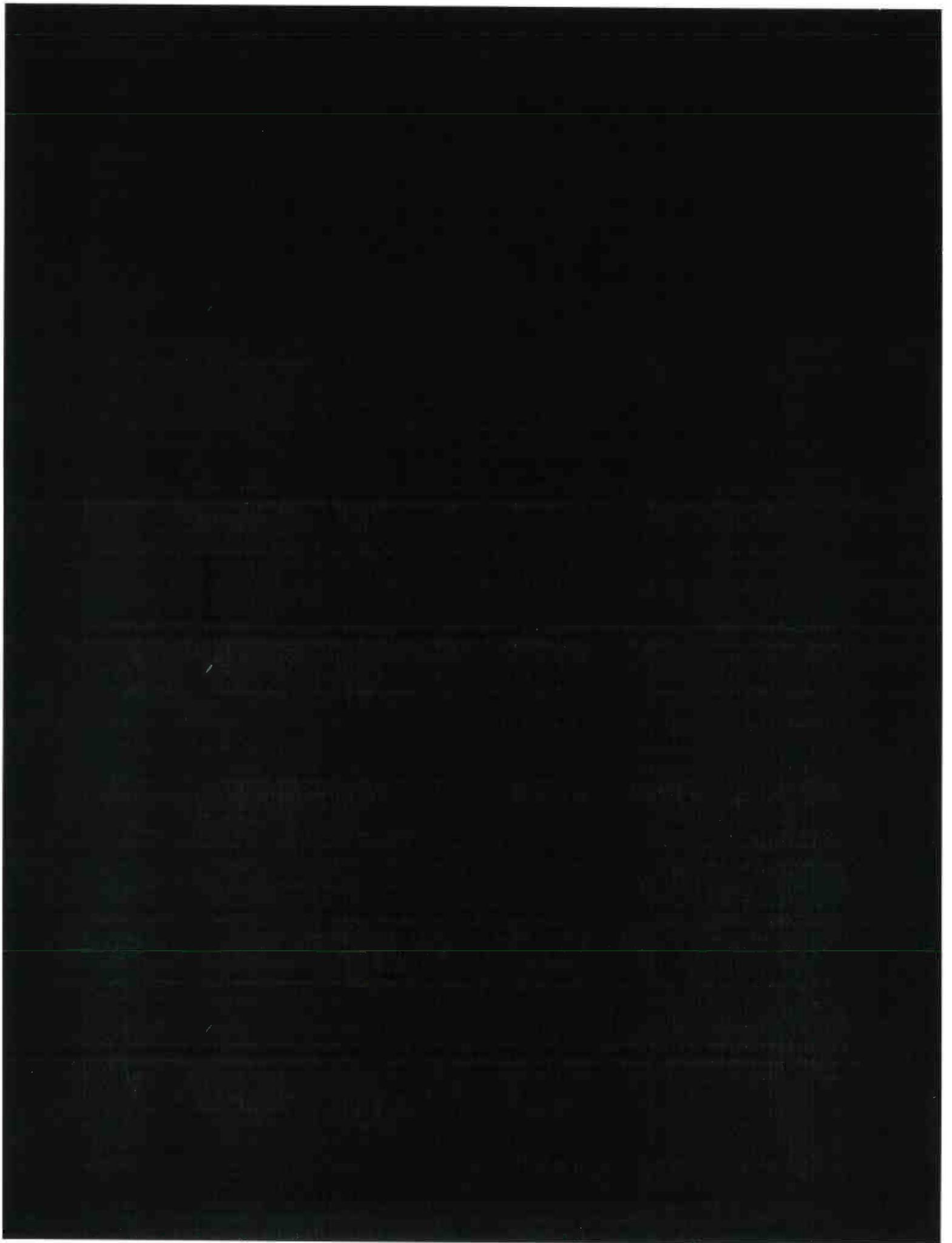


EXHIBIT H



EXHIBIT I

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:

THE FORTIETH STATEWIDE
INVESTIGATING GRAND JURY

Motions for Pre-depravation Hearing

*
* Supreme Court of Pennsylvania
* 2 W.D. MISC. DKT. 2016
*
* Allegheny County Common Pleas
* No. 571 M.D. 2016
*
*
* Notice Number 1
*

OPINION AND ORDER

Krumenacker, J: Currently before the Court are various Motions for Pre-depravation Hearings filed by persons named, but not indicted, in the Fortieth Statewide Investigating Grand Jury's Report Number 1 relative to Notice Number 1 (Report). The Motions seek to have evidentiary hearings prior to the release of the Report arguing that such hearings are required by due process as the reputation interest of the nonindicted named persons will be harmed by the release of the Report. The Office of Attorney General (OAG) responds that the Investigating Grand Jury Act (Grand Jury Act), 42 Pa. C.S. §§ 4541-4553, provides the requisite due process by: requiring that a named nonindicted person be informed of the existence of the critical language in the report; providing an opportunity to file a written response to the report; and providing for the inclusion of such response in the report that is released to the public. 42 Pa. C.S. § 4552 (e).

DISCUSSION

The specific constitutional question before the Court is whether a named nonindicted person in a grand jury report is, prior to the public release of the report, entitled by virtue of due process to have a full pre-depravation hearing, including the right to cross-examine Commonwealth witnesses, present witnesses of their own, and present evidence. "Courts examine procedural due process questions in two steps: the first asks whether there is a life,

liberty, or property interest with which the state has interfered, and the second examines whether the procedures attendant to that deprivation were constitutionally sufficient.” J.P. v. Dep’t of Human Servs., 170 A.3d 575, 580–81 (Pa. Cmwlth. 2017) (citing Kentucky Dep’t of Corr. v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)). In Pennsylvania a person’s reputation is recognized as a fundamental right in Sections 1 and 11 of Article I of the Pennsylvania Constitution. “In Pennsylvania, therefore, reputational harm alone is an affront to one’s constitutional rights.” D.C. v. Dep’t of Human Serv., 150 A.3d 558, 566 (Pa. Cmwlth. 2016). Accordingly, our Courts have long recognized that this fundamental interest in reputation “cannot be abridged without compliance with constitutional standards of due process and equal protection.” R. v. Com., Dep’t of Pub. Welfare, 535 Pa. 440, 454, 636 A.2d 142, 149 (1994) (citing Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 193, 532 A.2d 346, 350 (1987)). Having answered the first question and determined that there is a fundamental interest affected by naming a nonindicted person in a grand jury report the second question, what level of due process is owed, must be addressed. This question is one of first impression in the Commonwealth.

The Pennsylvania Supreme Court has recently explained that

“Due process is a flexible concept which “varies with the particular situation.” Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). Ascertaining what process is due entails a balancing of three considerations: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The central demands of due process are notice and an “opportunity to be heard at a meaningful time and in a meaningful manner.” Commonwealth v. Maldonado, 576 Pa. 101, 108, 838 A.2d 710, 714 (2003) (quoting Mathews, 424 U.S. at 333, 96 S.Ct. at 902); see also Anderson Nat’l Bank v. Lockett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692 (1944) (“The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as

are adequate to safeguard the right for which the constitutional protection is invoked.”).

Bundy v. Wetzel, ___ Pa. ___, ___, ___ A.3d ___, ___, 2018 WL 2075562, at *4 (Pa. 2018).

In Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15, 4 L.Ed.2d 1307 (1960), the United States Supreme Court addressed the questions of: (1) whether the Commission on Civil Rights was authorized by Congress to adopt Rules of Procedure which provide that the identity of persons submitting complaints to the commission need not be disclosed and that those summoned to testify before the commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the commission; and (2) if so, whether those procedures violated the Due Process Clause of the Fifth Amendment. The Hannah court held that the Commission’s procedural rules were authorized by the Civil Rights Act and did not, in view of the purely investigative nature of the commission’s function, violate the due process clause of the Fifth Amendment.

The Court in Hannah was careful to distinguish the level of due process required differs based upon whether the action taken by the government is adjudicative or investigative in nature, with the former requiring a higher degree of due process than the latter. In this regard the Court opined that

‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that

proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate it need not be bound by adjudicatory procedures.

Id. 363 U.S. at 442, 80 S.Ct. at 1514–15.

In Pennsylvania Bar Ass'n v. Commonwealth, 147 Pa. Cmwlth. 351, 607 A.2d 850 (1992), the Commonwealth Court concluded that before an attorney's name could be placed on a suspected fraud list because the attorney's client was suspected of fraud, the state was required to give the attorney notice and an opportunity to be heard. Later in Simon v. Commonwealth, 659 A.2d 631 (Pa. Cmwlth. 1995), our Commonwealth Court, relying on Hannah, concluded that due process required the Pennsylvania Crime Commission to give notice and the opportunity to respond to persons named in public reports. The Grand Jury Act in section 4552(e) already provides the due process protections required by Simon by requiring notice to named nonindicted persons and providing them a right to respond. 42 Pa. C.S. § 4552(e).

Similar to the Civil Rights Commission and the Crime Commission, a grand jury is an investigative not adjudicative body and so a lesser degree of due process is required than is afforded to those who appear before adjudicative governmental entities. Hannah, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15. Nonetheless as the Simon Court recognized, because the right to reputation is a fundamental one in the Commonwealth some amount of due process is required when a person is named in an investigative report. Simon, 659 A.2d 631, 639. Here application of the Mathews factors results in the same conclusion reached by the Simon Court, that given the investigative nature of a grand jury due process only requires notice and an opportunity to response to a report prior to the release of any report.

The first Mathews factor requires a determination of the nature of the private interest affected by the governmental action and whether such interest is entitled to due process protections. As discussed *supra* under Pennsylvania law there is no question that the right to reputation is a fundamental interest that cannot be abridged without some due process protections. The second Mathews factor requires a consideration of the risk of an erroneous deprivation with the value of additional or substitute safeguards. The Grand Jury Act provides a person named in a report notice of the report, an opportunity to review that portion of the report critical of them, and an opportunity to file response. See, 42 Pa. C.S. §4552(e). The issue then is whether the additional process sought would reduce the risk of erroneous deprivation. The nature of grand jury proceedings significantly minimizes the risk of erroneous deprivations by requiring the findings of the grand jurors be supported by a preponderance of the evidence presented by the OAG through witnesses testifying under oath. Specifically with regards to the Report, the grand jury, in reaching its findings, heard from dozens of witnesses, examined numerous exhibits, and reviewed over half a million pages of internal diocesan documents from the archives of various Dioceses. Further, all current Bishops for the Dioceses were afforded an opportunity to testify before the Grand Jury with one, the Bishop for the Diocese of Erie, testifying and five electing to submit written statements. See, Gr. J., Notice 1 Exs. 472, 478, 479, 480, 481 501, 502, 513, 514, 515, 516. This level of protection is significantly higher than that afforded to the Simon plaintiffs who were named in Crime Commission report with no clear evidentiary basis for their inclusion.

The movants argue that due process requires the opportunity to present evidence to the grand jury to refute the evidence presented by the OAG that resulted in the language critical of them contained in the Report. The Court has found no support for this proposition in either the

laws of the Commonwealth, in Pennsylvania Supreme Court, or United States Supreme Court due process jurisprudence. In comparing the nature of the Civil Rights Commission to other traditional investigative bodies the Hannah Court commented on the nature of grand jury proceedings and explained

we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

Hannah, 363 U.S. 420, 448-49, 80 S.Ct. 1502, 1518. The Hannah Court acknowledged that in the context on grand jury proceedings permitting cross-examination and presentation of evidence by potential targets would be unduly disruptive to the purely investigative function of the grand jury. Similarly, permitting those named in grand jury reports to present evidence would disrupt the investigative function while affording little additional safeguards. Further, permitting persons named in grand jury reports to present evidence, including potentially their own testimony subject to cross-examination, to the grand jury would turn an investigative proceeding into an adjudicative one which is not the purpose or function of an investigative grand jury. See, 42 Pa. C.S. § 4548 (providing that investigative grand juries have the power of inquiry and investigation not adjudication); Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (1986)(purpose of statute authorizing Supreme Court to convene multicounty, investigating grand juries is to enhance ability of Commonwealth to inquire into criminal activity or public corruption reaching into several counties). Adopting the position advanced by the movants

would fundamentally change the Grand Jury Act's procedures, change the historical function of grand juries, and effectively bring the grand jury process to a halt turning each investigation into a full adjudication.

The final Mathews factor requires consideration of the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. Here there are two identifiable state interests are implicated: the interest in having a effective and efficient grand jury process; and the interest in protecting children from child sexual predators and those who enable them. Relative to the first consideration concerning grand juries, the state interest is to have an entity that is capable of conducting inquiries into organized crime or public corruption or both involving more than one county of the Commonwealth. As noted above, never in the history of grand juries have persons under investigation been permitted to cross-examine witnesses or present evidence to an investigative grand jury. To permit persons named in a report the full panoply of due process rights would be a substantial burden to the Commonwealth who would be required to allow such persons access to the testimony of witnesses traditionally shielded in grand jury secrecy, permit them to recall and cross-examine those witnesses, and allow the presentation of new evidence.

Such requirements would disrupt the functions of the grand jury and distract it from its sole function as an investigative body and transform it into an adjudicative body. Investigative grand juries are, by their nature, not adjudicative in nature and the Grand Jury Act narrowly prescribes their authority to be investigative only. It would be a substantial overreach to transform a grand jury into an adjudicative body where the legislature has clearly intended to limit their authority to investigative functions only. Such a transformation would be contrary to the long standing historical role grand juries serve in our system of jurisprudence and would

require the creation of new procedures and safeguards that would burden all those involved with the process including the OAG, supervising judges, and most importantly the grand jurors themselves. Further, if persons named in a report were afforded the right to an evidentiary hearing it would require the hearing be held before the grand jury, whose function it is to weigh the evidence and make factual findings. This procedure would be extremely burdensome significantly increasing the time and expense required to complete each investigation. In some cases, such as the matter *sub judice*, permitting such hearings would be impossible as the grand jury's term has expired and so it cannot be reconvened to review this additional evidence or make or approve changes to the report it issued.

Movants suggest that this can be overcome by having the court conduct pre-depravations hearings and then making any necessary redactions or changes to the Report. There is no provision in the Grand Jury Act, other laws of the Commonwealth, or Pennsylvania Constitution that would authorize the Court to redact or rewrite a grand jury report once it has been submitted by the grand jury. Providing a court with such authority would effectively eviscerate the Grand Jury Act relative to grand jury reports by taking the power to make findings and recommendations away from the grand jury and placing it in the hands of the supervising judge. A grand jury report consists of factual findings by the grand jury supported by a preponderance of the evidence found credible by the jurors and in some cases, such as this one, recommendations for changes to the laws of the Commonwealth. Once a report is submitted to the supervising judge, the Grand Jury Act mandates the supervising judge review the report and if it is supported by a preponderance of the evidence accept the report and make it public. 42 Pa. C.S. § 4552. There exists only a narrow exception to this requirement for reports that are either not supported by a preponderance of the evidence or reports whose immediate release would

prejudice a pending criminal matter. Id. Authorizing a supervising judge to alter the report after its acceptance would fundamentally alter the Grand Jury Act and the power of the grand jury.

The second interest implicate is the Commonwealth's substantial interests to prevent child abuse, to provide justice to those abused children, and to protect abused children from further abuse by identifying abusers and those individuals and institutions that enable the abuses to continue abusing children. See e.g., 23 Pa.C.S. § 6302 (finding and purpose of CPSL). Here the Report is the culmination of two years of investigation into the Dioceses related to allegations of child sexual abuse, failure to make a mandatory report, acts endangering the welfare of children, and obstruction of justice by individuals associated with the Roman Catholic Church, local public officials, and community leaders. This investigation followed the report issued by the Thirty-Seventh Statewide Investigating Grand Jury concerning child sexual abuse in the Altoona-Johnstown Diocese and the failure of Diocesan leaders to protect children from such abuse and to conceal that the abuse occurred. The Commonwealth's interest in protecting children from sexual predators and persons or institutions that enable them to continue their abuse is of the highest order.

Balancing these Mathews factors the Court reaches the same conclusion as did the Commonwealth Court in Pennsylvania Bar and Simon that where an individual is named in an investigative report due process requires only that they be afforded notice of the report and an opportunity to respond to the report in writing. Distinguishable are recent cases involving placing individuals on child abuse registries, such as ChildLine, without affording the affected person any or only limited due process rights. See, J.P. v. Dep't of Human Servs., 170 A.3d 575 (Pa. Cmwlth. 2017) (Department of Human Services violated teacher's due process rights in placing teacher's name on ChildLine and Abuse Registry of alleged child abuse perpetrators, pursuant to

the Child Protective Services Law, where Department did not provide any form of hearing despite teacher's clear request for one). See also, G.V. v. Dep't of Pub. Welfare, 625 Pa. 280, 295, 91 A.3d 667, 676 (2014) (Saylor, J. dissenting) ("I would only observe that the inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question."); D.C. v. Dep't of Human Servs., 150 A.3d 558 (Pa. Cmwlth. 2016) (person whose name is entered into the ChildLine Registry as a perpetrator of child abuse is entitled to a clear and unequivocal notice of the post-deprivation hearing as a matter of due process); K.J. v. DPW, 767 A.2d 609, 616 n. 9 (Pa. Cmwlth. 2001) (Friedman, J., dissenting) ("It shocks my conscience that the Law would allow the investigating caseworker to render a *de facto* adjudication that is adverse to an individual's reputation *without* an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). In each of these cases the state, through one or more agencies, engaged in an adjudicative not investigative role in finding a person a perpetrator of child abuse and as such due process clearly required more process than was afforded to the individuals placed on the registry. Here, by its very nature as an investigating grand jury, the Grand Jury was involved in an investigative function not an adjudicative one and as such those named in its report are entitled to a lesser degree of due process. See, Hannah, 363 U.S. 420, 80 S.Ct. 1502; Simon, 659A.2d 631; Pennsylvania Bar, 147 Pa. Cmwlth. 351, 607 A.2d 850. This degree of due process is met by providing named persons notice of the report and an opportunity to respond to their inclusion in the report. Id.

For the foregoing reasons the following Order is entered:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:
THE FORTIETH STATEWIDE
INVESTIGATING GRAND JURY

Motions for Pre-depravation Hearing

* Supreme Court of Pennsylvania
* 2 W.D. MISC. DKT. 2016
*
* Allegheny County Common Pleas
* No. 571 M.D. 2016
*
*
* Notice Number 1

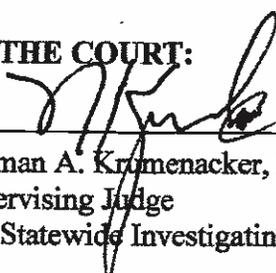
ORDER

AND NOW, this 5 day of June 2018, upon consideration of the Motions for Pre-depravation Hearing and for the reasons discussed in the foregoing Opinion, it is hereby **ORDERED, DIRECTED, AND DECREED** that the Motions for Pre-depravation Hearing are **DENIED**. It is **FURTHER ORDERED, DIRECTED, AND DECREED** that the Motions for Stay are **DENIED**.

The request to certify this matter for immediate appeal is **GRANTED** as the Court is of the opinion that this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Opinion and Order may materially advance the ultimate termination of this matter.

This Opinion and Order are not sealed.

BY THE COURT:



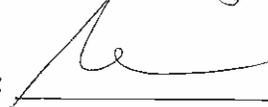
Norman A. Krumenacker, III
Supervising Judge
40th Statewide Investigating Grand Jury

cc: Daniel Dye, Esq., SDAG
Christopher D. Carusone, Esq.
John A. Marty, Esq.
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Christopher M. Capozzi, Esq.
Glenn A. Parno, Esq.
Jessica Meller, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Attorney for Petitioner
(E.g., Appellant, Appellee, Petitioner, Respondent)

Signature: 

Name: Stephen Stallings

Attorney No. (if applicable): 205131

RECEIVED

JUL 10 2018

SUPREME COURT
WESTERN DISTRICT