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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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ENTERED  
Office of Proceedings  
June 24, 2014  
Part of  
Public Record

FINANCE DOCKET NO. 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC-  
PETITION FOR DECLARATORY ORDER

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**TOWN OF BROOKHAVEN'S OPPOSITION TO BROOKHAVEN RAIL TERMINAL'S  
APPLICATION TO CLOSE THE RECORD AND IN SUPPORT OF THE TOWN'S  
APPLICATION TO UPDATE THE RECORD**

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Dated: June 24, 2014

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**Preliminary Statement**

The Town of Brookhaven New York ("Town") submits this Memorandum and attached documents in opposition to the application of Brookhaven Rail Terminal ("BRT") to close the record, and in support of the Town's application to update the record.

We hereby report to the Board that by Order dated June 23, 2014 in the related federal court action concerning the same property and alleged railway extension/spur, the United States District Court for the Eastern District of New York in the matter entitled "*Town of Brookhaven v. Sills Road Realty, Brookhaven Rail LLC, et. al.*", Docket No. CV-14-CV-02286 (GRB), granted a preliminary injunction against BRT and the other operators of the Brookhaven Rail Terminal ("BRT Defendants") "*barring defendants from further mining, removal or sale of sand or other material from the site*" (the "District Court Order", Appendix A). As detailed below, the District Court Order found that the Town:

"presented overwhelming evidence that the lucrative sand mining operation, expected to generate revenues of \$10 million or more, appears independent of any plan that defendants may implement to construct railroad operations at the site, which plan had not advanced beyond a conceptual stage" (*id.*, p. 2)

and that:

"the evidence presented indisputably demonstrate that defendants have engaged in wholesale mining of the parcels entirely independent of any rail construction or development [and that] Defendants' evident intent and actions to strip and sell millions of dollars' worth of sand from the property predates any serious effort to design or construct any rail facilities" (*id.*, pp. 15-16).

The District Court Order further found that the BRT Defendants' actions "presents irreparable risks of contamination of drinking water supplies [and that the] permanent,

detrimental changes to environmentally sensitive land represents a serious risk of irreparable injury to the public” (id., pp. 14).

In addition, finding that the BRT Defendants had apparently dumped 12,000 – 15,000 cubic yards of contaminated “anthropogenic” material (i.e., products of human waste and incineration) on the site of their purported “railway expansion”, the District Court’s Order directed that:

*“upon reasonable notice to defendants, [the Town may] enter the premises to inspect and insure compliance with this Order, photograph the site for purposes of documentation and evidentiary submissions and collect samples of debris for the purpose of testing for contaminants”* (id., p. 20).

In attempting to “close the record” and induce this Board to “rush to judgment” upon a truncated record, BRT is attempting to perpetrate the same fraud upon the Board that the District Court Order specifically found it and the remaining BRT Defendants had attempted to commit upon the United States District Court.

Without limitation, the District Court Order, following a two day evidentiary hearing including the testimony and exhibits proffered by the BRT Defendants, specifically found that their submissions to the Court under oath were frequently “flatly untrue”, filled with “misrepresentations”, and were materially false (id., pp. 9-10).

Specifically, the District Court Order found that the BRT Defendants are not constructing a bona fide “rail extension” at all, but are instead “sand mining” the property at issue “mainly, if not exclusively” for the purpose of earning \$9 - \$10 million from the sale of virgin sand excavated, screened, removed and sold from the site and that the sand mining commenced and continued “well before” the BRT Defendants’ engineers (not even licensed in New York State or authorized to sign and certify engineering plans in New York where the facility is located) even “started” work on a “conceptual” track plan in October 2013. Id., pp. 5, 16.

The BRT Defendants' attempted fraud on the Court, this Board, and upon the Town, did not end there. The Town recently discovered that the BRT Defendants do not even own, control or have access rights to large portions of Parcel C (constituting approximately 73 acres of the 93 acre site at issue) which are instead owned by the Long Island Power Authority ("LIPA"), Long Island's principal and electric gas utility company which, as a result, had served cease and desist letters upon the BRT Defendants charging them with trespass, conversion and worst still, creating damage and risk to public health from their interference with public utility, electric and gas lines (see accompanying Cease and Desist Letters of LIPA/PSE&G, Appendix B; and Declaration of LIPA/PSE&G Survey Manager, Roy D. Hunt, L.S., Appendix C and attachments).

Similarly, the Long Island Railroad Division of New York's Metropolitan Transit Authority ("LIRR") has likewise served a cease and desist notice upon the BRT Defendants charging that their excavation and sand mining at the site is interfering with LIRR property and easements (Appendix D).

In short, the District Court Order, the Declaration of LIPA's Survey Manager, and the LIRR's cease and desist letter all confirm beyond question that the BRT Defendants' claim that they are building a lawful "spur" as defined by 49 U.S.C. § 10906 is false, fraudulent, deceitful, and a brazen pretext to engage in unlawful sand mining and excavation which has caused and is causing, in the District Court Order's words "potential environmental devastation to the site and to Long Island's Sole Source Aquifer" (it's only source of drinking water), all for the purpose of selling virgin sand (a valuable construction commodity) to their excavation partners, affiliates, and third-parties.

Thus, as shown below, the Board should reject the Brookhaven Rail Terminal's brazen attempt to "close the record" and to "rush" this Board into a ruling upon their pending declaratory application by concealing the evidence now developed before the United States District Court and conclusively confirmed in the District Court Order.

### **The District Court Order**

In relevant part, the District Court Order held that:

"At a two-day hearing, the Town established that the anticipated removal of more than two million tons of sand from the site, which is located in the hydrologic recharge zone, *presents a very real risk of contamination to Long Island's Sole Source Glacial Aquifers*. Moreover [the Town] presented overwhelming evidence that the *lucrative sand mining operation, expected to generate revenues of \$10 million or more, appears entirely independent of any plan that defendants may implement to construct railroad operations at this site, which plan is not advanced beyond a conceptual stage*". (*id.*, p. 2);

"'Grading' of the site began more than two years ago.... Remarkably, this work began well before some, if not all, of the conceptual [track] plans were drawn" (*id.*, p. 4);

"It appears, however, that the *purported grading related mainly, if not exclusively, to defendants' sale of sand from parcels B and C*. In fact, *Robert Humbert, an engineer who prepared an O-track design presented by plaintiff...lacks licensure in New York, his plan, the most developed presented by defendants, does not bear the required signature and seal of an engineer licensed to practice in New York...[and] his design remained conceptual...[and] Humbert gave no consideration to geological or environmental issues. Most significantly, Humbert began working on this design in October 2013, long after defendants began clearing and excavating the parcels*" (*id.*, p. 5);

The Court cited to the Ground Lease with Sills Expressway under which BRT "*agreed to provide Sills Expressway with 600,000 tons of sand as part of the consideration for the Lease*", and noted that BRT's CFO, Daniel Miller, obtained "*Sand Estimates*" from his engineers showing a:

*“grading plan revealing that the entire plat was to be excavated down to 50’ above sea level – a calculus that has nothing to do with any then-extant railroad design, but appears designed to maximize the amount of sand that could be removed from the parcels” [2.4 million cubic yards of sand, which “equal to more than two million tons” from Parcels B and C] (id., pp. 5-6).*

The Court rejected, as false, Daniel Miller’s characterization of *“the profit from the removal and sale of sand from the site as a ‘minor consideration’”*, finding it belied by Miller’s testimony that *“defendants stand to profit at least \$9-10 million from the sale of sand removed from parcels B and C (with virtually no capital investments)”*, and that *“the current railroad operation produces approximately \$8 - \$10 million in income following a \$40 million capital investment” (id., p. 6).*

The Court cited to the multiple different *“conceptual drawings”* BRT provided to the Town, including a *“J-shaped track that would traverse the perimeter of the parcels”*, and *“[a]nother illustrating a casino to be operated by the Shinnecock Indian Nation, with BRT offering a passenger spur off the LIRR, while another plan shown to Town officials involved a sports arena” (id., p. 7).*

The Court rejected BRT’s contention *“that the Town was fully informed of its grading plan”*, and instead accepted Commissioner Matthew Miner’s testimony that *“defendants held discussions with Town officials that grading would not exceed a small area surrounding the intended track roadbed” (id., pp. 8-9).* The Court concluded that *“defendants made inarguable efforts to conceal their activities from the Town, which has acted with reasonable diligence under the circumstances” (id., pp. 17-18).*

The Court found that *“defendants have excavated a huge swath of parcels B and C, with little relation to the track path”*, including copies of the various track plans within the body of the Decision *(id., pp. 9-10).*

The Court credited the testimony of “*Stephanie Davis, a well-educated and experienced hydrogeologist, ... that the systematic, large-scale removal of native forest, vegetation, top soil and native sand will have a detrimental effect on both infiltration and filtration of surface water, negatively impacting the quality of drinking water in the Aquifers*” (*id.*, p. 11), and that by “*reducing the elevation of the site from as much as 100 feet (or more) above sea level to fifty feet above sea level, defendants will be excavating within 15 feet of the Upper Glacial aquifer*” and that this “*significant reduction in the amount of sand will increase risk of contamination*” (*id.*, pp. 11-12).

The Court also cited to Stephanie Davis’ observation of “*a large quantity—estimated at 12,000 to 15,000 cubic yards—of anthropogenic debris (commonly defined as debris originating from human activity) on parcels B and C ... which included demolition remnants, tile, bone, glass, metal, pipe, china, asphalt millings and a NYC Metrocard [which] may reflect illegal dumping*” and that “[*s]uch material, which clearly originated elsewhere, presents a potential risk to groundwater and requires testing to determine the nature of the contaminants present*” (*id.*, p. 12).

In rejecting BRT’s contention “*that the Town lacks the power to enforce [its] regulations on parcels B and C, positing that because they intend to construct a railroad spur, their activities are governed by preemptive federal jurisdiction under the Interstate Commerce Commission*”, the Court found instead that the hearing evidence “*established no such relation*” between the BRT defendants’ activities and the construction of a railway spur (*id.*, p. 15). The Court said that “*the evidence presented indisputably demonstrates that defendants have engaged in wholesale mining of the parcels entirely independent of any rail construction or development. Defendants’ evident intent and actions to strip and sell millions of dollars’ worth of sand from the property*

*predates any serious effort to design or construct any rail facilities...*” (*id.*, pp. 15-16). The Court further found that it “*was financially interested personnel of BRT, not engineering experts, who dictated the level to which sand would be excavated*” (*id.*, p. 16).

The Court stated that:

*“[O]n this record, no reasoned determination can be made regarding whether defendants’ intended plans comprise rail-related activities, as the defendants have presented divergent concepts for the parcels—including various track configurations and purposes, from a refrigerator transloading facility to a mini-passenger service for patrons of a non-existent Native American casino. What can be said with certainty, however, is that the mining of sand from the parcels has been demonstrated to be entirely independent of any rail-related activity”* (*id.*, pp. 16-17).

The Court found “*that defendants made inarguable efforts to conceal their activities from the Town, which has acted with reasonable diligence under the circumstances*”, and that granting a preliminary injunction “*would avoid further destruction of the site and thereby help insure protection of a safe drinking water supply [which] would serve the public interest*”, stating that “*the benefits of increased railroad service, though important, pales in comparison to the interest in safeguarding the drinking water supply*” (*id.*, pp. 17-18).

As noted, in addition to an injunction against defendants “*from undertaking any further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from parcels B and C, during the pendency of this action and pending further Order of the Court*”, the Court also granted the right to the Town “*upon reasonable notice to defendants, [to] enter the premises to inspect and insure compliance with this Order, photograph the site for purposes of documentation and evidentiary submissions and collect samples of debris for the purpose of testing for contaminants*” (*id.*, p. 20).

## **The BRT Defendants' Trespass Onto and Conversion and Damage To LIPA Property**

The Town recently learned from LIPA, via PSE&G which operates LIPA's electric and gas transmission facilities, that the BRT Defendants have made materially false representations both to this Board in its filings herein, and before the District Court when they claimed that they possessed supposed "easements" from LIPA to enter upon, excavate, mine, regrade, and lay railroad track on Parcel C (the 73 acre parcel where most of the excavation is occurring). Specifically, when charged by the Town's Complaint and Amended Complaint (*id.*, paras 6, 34[f], 6, 36[f]) with interfering with electrical utility electric and gas lines, BRT falsely claimed, under oath, in both proceedings that it "*holds an easement for the property on which track will be laid [and] purchased two permanent easements from the Long Island Power Authority ("LIPA") that expressly authorize BRT to construct rail and truck access infrastructure between Parcels A and B [the 93 acre property which BRT claims constitutes a railway "spur"]*" (emphasis supplied). See, Reply of BRT dated April 3, 2014 under Finance Docket No. 35141, pp. 8 and 10; Declaration of [BRT Chief Financial Officer] Daniel K. Miller dated May 5, 2014, pars. 19 and 24; and in Mr. Miller's recent testimony before the District Court on May 20, 2014, stating "*we had to secure two easements from LIPA, across LIPA's property*" (Tr. 327)<sup>1</sup>. It turns out that whatever easements BRT may have regarding Parcel B, it does not possess an easement or other legal authority to conduct operations, let alone excavations, over the portion of Parcel C owned by LIPA.

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<sup>1</sup> In the same filings, BRT and Mr. Miller stated:

*"Contrary to the Town's claims, BRT has not laid track directly under the Long Island Power Authority ("LIPA") power lines without proper authorization."*

The intervening facts just discovered demonstrate that the BRT Defendants possess no easement or license from LIPA whatsoever on Parcel C where the bulk of their excavation, regrading and sand mining activities are occurring. According to three separate “*Notice of Cease and Desist-LIPA Owned Land-Sills Road, Yaphank, New York*” sent by LIPA/PSEG to the owners and operators of BRT (see Cease and Desist letters each dated June 10, 2014, collectively, Appendix B hereto), LIPA states that:

“Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property’s topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing in these areas may result in injury or death.”

**The Declaration of Roy D. Hunt, L.S., Manager of LIPA’s Survey Department**

The extent and the precise location of the LIPA fee-owned portions of Parcel C which are being trespassed upon (and whose topography is being altered, and its minerals converted) by the BRT Defendants are detailed in the accompanying Declaration provided to the Town of the Manager of LIPA’s Survey Department, Roy D. Hunt, L.S. (Appendix C) which attaches an “Overlay” depicting the extensive LIPA fee-owned property on Parcel B, and which reads in relevant part as follows:

“2. I am a duly Licensed Surveyor in the State of New York and am employed by PSEG LI.

3. On or about June 6, 2014, I instructed the Survey Department to prepare an “Overlay” depicting LIPA’s fee-owned portions of the 93 acre site which are overlaid over the aerial photograph (“Aerial Overlay”). A copy of the Aerial Overlay is attached hereto and made a part hereof as Exhibit A.

4. It is my understanding, the sections of the property outlined in blue are owned in fee by LIPA and that LIPA's transmission and distribution assets are located on and/or servicing areas identified in Exhibit A.

5. It is my understanding that the areas in Exhibit A have been excavated, sand mined, and the topography and grading radically altered by such excavation and sand mining activities.

6. It is my understanding that LIPA's transmission and distribution assets located on and/or servicing areas identified in Exhibit A have been damaged by such excavation and sand mining activities.

7. It is my understanding that PSEG LI as LIPA's operator is currently exploring LIPA's legal remedies and options with LIPA in light of these circumstances, and are providing this Declaration and documents to the Court and the STB in order to make an accurate legal record of these matters." (Appendix C).

#### **The LIRR's Cease and Desist Letter**

In addition, we recently learned that yet another Cease and Desist letter was sent to BRT's legal counsel, Foley & Lardner, LLP, by the Long Island Railroad Division of the Metropolitan Transit Authority ("LIRR"), asserting that BRT "*has encroached upon, and may have engaged in sand mining on MTA Long Island Railroad ("LIRR") property*", and that the LIRR demands that BRT "*cease and desist from any further encroachment and/or mining on LIRR property*" (see attached letter of LIRR dated June 11, 2014, Appendix D hereto).

#### **The Record is Properly Supplemented with the Attachments Hereto, Which Establish that No Legitimate "Railroad" Activity is Being Conducted on Parcels B and C**

The District Court summarized overwhelming documentary and testimonial evidence, all of which the Town has submitted to this Board in prior filings, and found that BRT is conducting an illegal sand mining operation on Parcels B and C, and is not legitimately constructing a rail track of any kind, let alone a spur. Second, the fact that as to Parcel C BRT is conducting this illegal mining without authority on lands which is owned by LIPA, further establishes that no

legitimate railroad activity in being conducted. And third, as to other areas, the LIRR's cease and desist notice to BRT states that BRT is "encroach[ing]" and illegally "sand mining" on the LIRR's property. All of these facts are clearly directly relevant to this proceeding and are properly submitted as soon as they developed. See Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—in Carbon County, WY, STB Docket No. AB-307 (Sub-No. 5X), 2004 WL 2619754 (S.T.B. Nov. 9, 2004) ("the supplemental statement that IMR seeks to file *responds to new allegations raised in WYCO's reply to protests and more fully explains the factual situation. Thus, we will accept the supplemental statement for filing to complete the record in this proceeding*") (internal citation omitted; emphasis added).

**The Board Should Not Close the Record Without Hearing  
From LIPA and the LIRR**

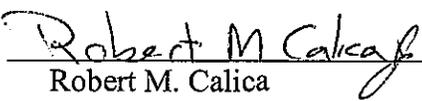
The evidence and submissions thus far amply establish that BRT is not legitimately constructing a rail line or a spur, and cannot invoke federal preemption to excuse its illegal sand mining. The Town is not aware of any claimed defense BRT has to LIPA's assertion that BRT has no right to operate or excavate on the portion of Parcel C owned by LIPA. The Town is also not aware of any purported defense BRT has to the LIRR's objection that BRT has encroached onto its lands and is conducting illegal sand mining there as well. As far as the Town is aware, in the two weeks following the LIPA and LIRR cease and desist notices, BRT has not even responded to LIPA or the LIRR, let alone has it proved that it does possess the land use and excavation rights over the area of Parcel C owned by LIPA or the area owned by the LIRR. In fact, when the Town alerted the District Court to the cease and desist notices, BRT only argued that it possesses easements over Parcel B and it did not address any right it claims over the Parcel C portion owned by LIPA. And as to the LIRR, BRT merely summarily claimed that the dispute with the LIRR should not be considered relevant. The District Court declined to consider the

cease and desist notices without explanation, although that Court's Preliminary Injunction Order issued one week later makes clear that even without considering LIPA's and the LIRR's orders, it is obvious that BRT is illegally sand mining and can claim no federal pre-emption (Appendix A).

The Town asserts that any ruling from this Board in favor of BRT without the Board hearing from LIPA or the LIRR, would not be based on a complete record. If, as the public utility and the public transportation authority have asserted in their cease and desist notices, BRT does not possess the legal right to operate or excavate at the parts of the site where BRT purports to be erecting a supposed rail facility and spur, any declaration this Board may make in favor of BRT could be useless. LIPA and the LIRR may have no motive to join this and the related proceeding before this Board, but they clearly possess directly relevant information regarding the merits of both proceedings. Thus, a request from this Board or its staff to LIPA and the LIRR that they comment or respond to any claims BRT may hereafter make regarding the cease and desist notices is warranted and proper. Alternatively, the Board should allow the Town an opportunity to provide LIPA and the LIRR with any response BRT may hereafter make regarding the cease and desist notices, with a request that they each provide a reply to be submitted to this Board in this and the related proceeding.

Dated: June 24, 2014

ROSENBERG CALICA & BIRNEY LLP

By:   
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**CERTIFICATE OF SERVICE**

I, JUDAH SERFATY, hereby certify that on the 24th day of June, 2014, I caused to be served the within **LETTER AND TOWN OF BROOKHAVEN'S OPPOSITION TO BROOKHAVEN RAIL TERMINAL'S APPLICATION TO CLOSE THE RECORD AND IN SUPPORT OF THE TOWN'S APPLICATION TO UPDATE THE RECORD STRIKE** upon the attorneys/parties by E-mailing same to their email addresses:

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Dated: June 24, 2014



JUDAH SERFATY

# APPENDIX A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiffs,

**ORDER**

-against-

CV 14-2286 (GRB)

SILLS ROAD REALTY LLC, BROOKHAVEN  
RAIL LLC f/k/a U S RAIL NEW YORK LLC,  
BROOKHAVEN TERMINAL OPERATIONS,  
OAKLAND TRANSPORTATION HOLDINGS  
LLC, SILLS EXPRESSWAY ASSOCIATES,  
WATRAL BROTHERS, INC., and PRATT  
BROTHERS, INC.,

Defendants.

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**GARY R. BROWN, United States Magistrate Judge:**

*“What a way to run a railroad!” -cartoonist Ralph Fuller, Ballyhoo (1932)*

Before the Court is a motion by plaintiff Town of Brookhaven (the “Town”) seeking a preliminary injunction to prevent defendants associated with the Brookhaven Rail Terminal

(collectively “BRT”) from the continued excavation, removal and sale of sand from an environmentally sensitive, 93-acre site located in Yaphank, NY, purportedly in connection with the construction of a railroad facility. Defendants have resisted the Town’s efforts to enforce regulations that would limit sand mining at the site, claiming that these operations are incidental to grading in preparation for the installation of a railroad spur that falls exclusively under the jurisdiction of federal authorities and hence outside the realm of the Town’s regulation.

At a two-day hearing, the Town established that the anticipated removal of more than two million tons of sand from the site, which is located in a hydrologic recharge zone, presents a very real risk of contamination to Long Island’s sole source glacial aquifers. Moreover, plaintiff presented overwhelming evidence that the lucrative sand mining operation, expected to generate revenues of \$10 million or more, appears entirely independent of any plan that defendants may implement to construct railroad operations at the site, which plan has not advanced beyond a conceptual stage. As such, I find that the issuance of a preliminary injunction barring defendants from further mining, removal or sale of sand or other material from the site is appropriate for the reasons set forth herein.

### **PROCEDURAL HISTORY**

On April 9, 2014, plaintiff filed a complaint in state court, seeking declaratory judgment, preliminary and permanent injunctive relief and damages arising out of defendants alleged violations of State and Town law as well as the “So Ordered” stipulation filed in this Court in *Sills Road Realty v. Town of Brookhaven*, CV 07-4584 (TCP) (ETB). On or about that same date, defendants filed a Notice of Removal from New York State Supreme Court.<sup>1</sup> See Notice of

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<sup>1</sup> The parties consented to the removal of this action. See Notice of Removal, Ex. E, DE [1]. Defendants assert that federal jurisdiction is appropriate because plaintiff’s claim are pre-empted by federal law and because plaintiff’s amended complaint arises out of, references, incorporates, and sues upon alleged breaches of an April 22, 2010 Stipulation of Settlement arising from an earlier lawsuit between the same parties. The April 22, 2010 Stipulation of

Removal, Docket Entry (“DE”) [1]. On April 24, 2014, plaintiffs applied to the Honorable Leonard D. Wexler, for an order to show cause and a temporary restraining order (“TRO”). *See Application for Leave to Submit Application for Leave to Submit Application for Order to Show Cause and Temporary Restraining Order Pursuant to FRCP 65 (“Appl. for TRO”), DE [12].* On April 25, 2014, plaintiffs moved for a preliminary injunction. *Motion for Preliminary Injunction (“Prelim. Mot.”), DE [14].*

Due to a scheduling conflict, the hearing was held by the Honorable Joseph F. Bianco on April 28, 2014. Judge Bianco reserved decision, and recommended the parties try to reach an interim agreement. *See generally Min. Ent., Apr. 28, 2014, DE [16].* On April 30, 2014, the parties filed a letter stating they were unable to reach an agreement among themselves and once again sought the Court’s intervention. *See Letter to Judge Bianco, Apr. 30, 2014, DE [20].*

During a telephone conference, Judge Bianco set a show cause hearing for May 12, 2014, before Judge Wexler. *See generally Min. Ent., May 1, 2014, DE [23].* At the hearing, Judge Wexler granted plaintiff’s request for a TRO and scheduled a preliminary injunction hearing for May 16, 2014. *See Min. Ent., May 13, 2014, DE [36].*

On May 19, 2014, the parties consented to the undersigned’s jurisdiction and the preliminary injunction hearing commenced. *See Consent to Jurisdiction by US Magistrate Judge, May 19, 2014, DE [40]; Min. Ent. May, 19, 2014, DE [41]; Minute Order, May 19, 2014, DE [42].* Upon consent of the parties, the TRO was extended to July 1, 2014, pending decision on the preliminary injunction motion. *See E-Order dated June 10, 2014.*

## **FACTUAL BACKGROUND**

### **Defendants’ Business Activities**

Beginning in or about 2011, defendants and/or affiliated entities began operating a freight

railway facility on a 28-acre tract referred to parcel A in Yaphank, NY. Defendants' Opposition ("Defs' Opp."), Declaration of James J. Pratt, III ("Pratt Decl."), ¶¶ 4-5, DE [29-2]. Defendant Sills Road, LLC ("Sills Road"), a conglomerate created by "a producer and users of crushed stone," principally developed the terminal as a means "to meet the needs of its members for the economical transportation of stone and other construction materials." *Id.* ¶ 5. The facility abuts both the Long Island Rail Road ("LIRR") and the Long Island Expressway ("LIE"). BRT transloads freight from train cars onto trucks, which deliver the material via the LIE. By all accounts, BRT has proven successful, attracting important commercial clients, such as Home Depot and a major commercial bakery, providing freight rail transportation in a region generally underserved by such services, and offering economic benefits and reduction of traffic on crowded railways. *See* Transcript ("Tr.") of 5/19/2014 - 5/20/2014 Preliminary Injunction Hearing at 308, 355, DE [45]; *see also generally* Pratt Decl.

According to defendants, BRT has reached capacity, and they have engaged in discussions with customers about expanding their facilities. Tr. 353; Defs' Opp., Declaration of Daniel K. Miller ("Miller Decl."), ¶ 15, DE [29-3]. On June 1, 2012, defendant Sills Expressway Associates, LLC ("Sills Expressway") leased parcels B and C, totaling 93 acres, to defendant Sills Road for a 25-year period. Ex. 33. The New York State Department of Transportation provided a \$2.5 million grant to help fund that expansion. Tr. 305.

"Grading" of the site began more than two years ago. Tr. 311-12. Remarkably, this work began well before some, if not all, of the conceptual plans were drawn. Miller testified that the defendants initially were leveling the entire site—which he claimed was more efficient—but then decided to "reorient" construction after litigation began, though few details were presented regarding this reorientation. Tr. 311-12.

It appears, however, that the purported grading related mainly, if not exclusively, to defendants' sale of sand from parcels B and C. In fact, Robert Humbert, an engineer who prepared an O-track design presented by defendants, testified that the clearing, grubbing and excavation work at the site could have been done far more "surgically" to accommodate his design. Tr. 218. As Mr. Humbert lacks licensure in New York, his plan, the most developed presented by defendants, does not bear the required signature and seal of an engineer licensed to practice in New York. Tr. 200. He further explained that his design remained conceptual, and thus did not require such approval. *Id.* In designing his concept, Humbert gave no consideration to geological or environmental issues. Tr. 202. Most significantly, Humbert began working on this design in October 2013, long after defendants began clearing and excavating the parcels. Tr. 199.

Other evidence emerged that helped explain defendants rush to excavate the property. It is beyond dispute that defendants have engaged in a large-scale excavation, sifting and sale of sand from the parcels. Expert witnesses for both plaintiff and defendants observed sand screening equipment in operation at the site, and aerial views confirm the remarkable scale of the operation. Tr. 105, 210.

From the outset, the operations on parcels B and C centered on excavation and sale of sand. Indeed, in the lease agreement, Sills Road agreed to provide Sills Expressway with 600,000 tons of sand as part of the consideration for the lease. Ex. 30 at 2. In a November 2012 email between Dan Miller, the CFO of BRT, and an engineering firm, Miller obtained "sand estimates" from the firm. Accompanying that email was a "Phase 2" grading plan revealing that the entire plat was to be excavated down to 50' above sea level—a calculus that has nothing to do with any then-extant railway design, but appears designed to maximize the amount of sand

that could be mined and removed from the parcels. Tr. 284-86. Remarkably, one engineer inquired about reducing the elevation of the site to 56'; in response, one of the BRT partners advised the engineer to assume a 50' elevation. Tr. 288-290. Based on that assumption, the engineers calculated that BRT could expect to sell approximately 2.4 million cubic yards of sand (equal to more than two million tons) from parcels B and C. Tr. 292.

In at least five instances during the hearing—even in response to a question from the Court—Miller characterized the profit from the removal and sale of sand from the site as a “minor consideration.” *See* Tr. 281, 283, 287, 291, 293. This claim is belied both by the information that emerged during the hearing as well as the actions of Miller and others associated with defendants. By his estimation, defendants stand to profit at least \$9-10 million from the sale of sand removed from parcels B and C (with virtually no capital investment), a figure Miller readily provided. Tr. 293. Ironically, when asked by the Court about the profits from the existing railroad operation on parcel A, Miller had more difficulty producing a figure, but ultimately conceded that the current railroad operation produces approximately \$8-10 million in income following a \$40 million capital investment. *Id.*

Miller’s declaration establishes beyond any doubt that the defendants are conducting a sand mining business completely separate and apart from any railroad construction:

*Harm To Sand Customers & Loss Of Sand Business*

As part of the construction process, BRT has entered into business relationships with local trucking companies, landscape companies, and contractors involved in the removal of excess sand and materials for site grading. There are over 90 companies that rely upon BRT as their source for sand (the “Sand Customers”).

\* \* \*

*Even if the Sand Customers are able to obtain sand from other sources, the stoppage in sand supply will result in irreparable harm to the BRT because it will lose the Sand Customers’ business as a result of its inability to meet their*

*commercial needs. BRT will lose their business because the Sand Customers will no longer consider BRT to be a consistent, reliable source for sand.*

Miller Decl. ¶¶28-31 (emphases added); Tr. 318 (“When you are not able to provide a consistent supply for a season, there is a lot of customers that won’t use your facility for that year”). Miller utilizes depletion allowances to account for the sand removed from the site, but reported that he was insufficiently familiar with accounting to know whether depletion is generally associated with mining operations. Tr. 284. It is. *See Internal Revenue Service, Overview of the Mining Industry* at 11 (Nov. 2006), available at [www.irs.gov](http://www.irs.gov) (“Depletion allows the owner of the mine or mineral interest to recover basis in the minerals just as depreciation allows a manufacturer to recover the cost of equipment and buildings”).

*Notice to and Approval from the Town*

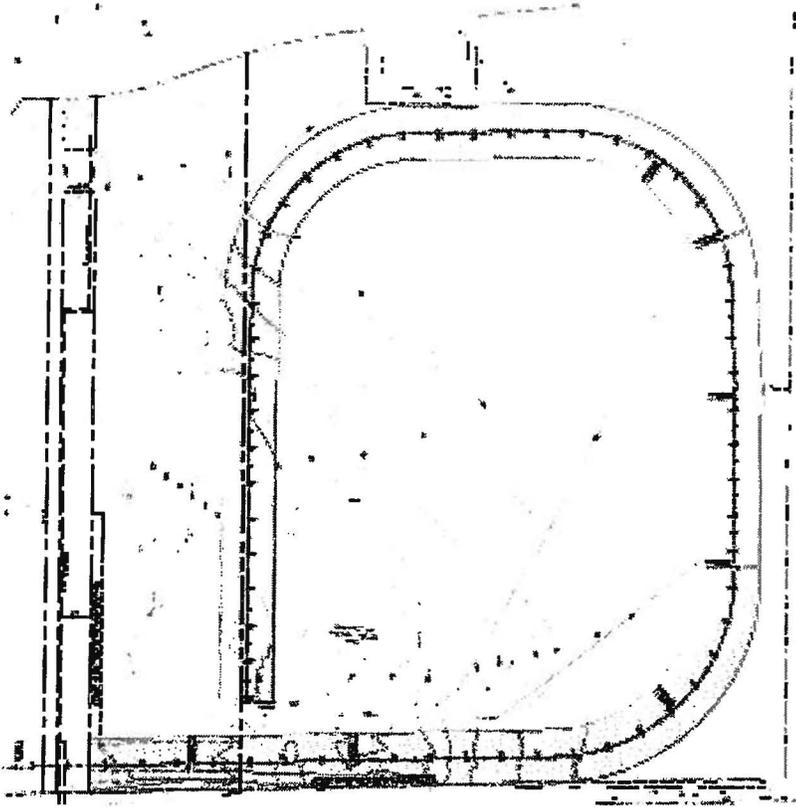
BRT provided the Town with a number of conceptual drawings for their potential expansion onto parcels B and C. Tr. 112, 121. One of those concepts involved a J-shaped track that would traverse the perimeter of the parcels. Tr. 113-15. Another illustrated a casino to be operated by the Shinnecock Indian Nation, with BRT offering a passenger spur off the LIRR, while another plan shown to Town officials involved a sports arena. Tr. 121, 126; Ex. 28. In yet another incarnation, BRT presented the Town with “preliminary” list of potential activities for the site, including a salt offloading facility. Tr. 146; Ex. U. Matthew Miner, the Town’s Commissioner of Waste Management and Chief of Operations, testified to numerous discussions with BRT about construction activities. The gravamen of those talks involved defendants clearing and grading a limited area around the intended path of the track. Tr. 116. Indeed, Miner testified that a specific agreement was reached that BRT would clear only a 150’-wide pathway along the track to allow for entry of heavy construction equipment. Tr. 116-17, 161. This

tentative approval was given subject to approval by the National Environmental Policy Act (“NEPA”) and Surface Transportation Program (“STP”), and was expressly limited to the track area, as no final plan had been presented concerning the accompanying buildings. Tr. 117-118.

While defendants contest this notion, arguing that the Town was fully informed of its grading plans, evidence submitted by defendants corroborate Miner’s account. A letter dated June 29, 2012 to Miner from BRT advises the Town that “[c]onstruction . . . will begin with clearing and grading of the track right of way and installation of track, in accordance with the proposed ‘J track’ layout.” Ex. FF. Furthermore, in his sworn declaration opposing the motion, CFO Miller makes the following statement:

As we have advised the Town repeatedly, the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area depicted in Exhibit O to the [Town’s Declaration].

Miller Decl. ¶ 9 (emphasis in the original). That exhibit appears as follows:

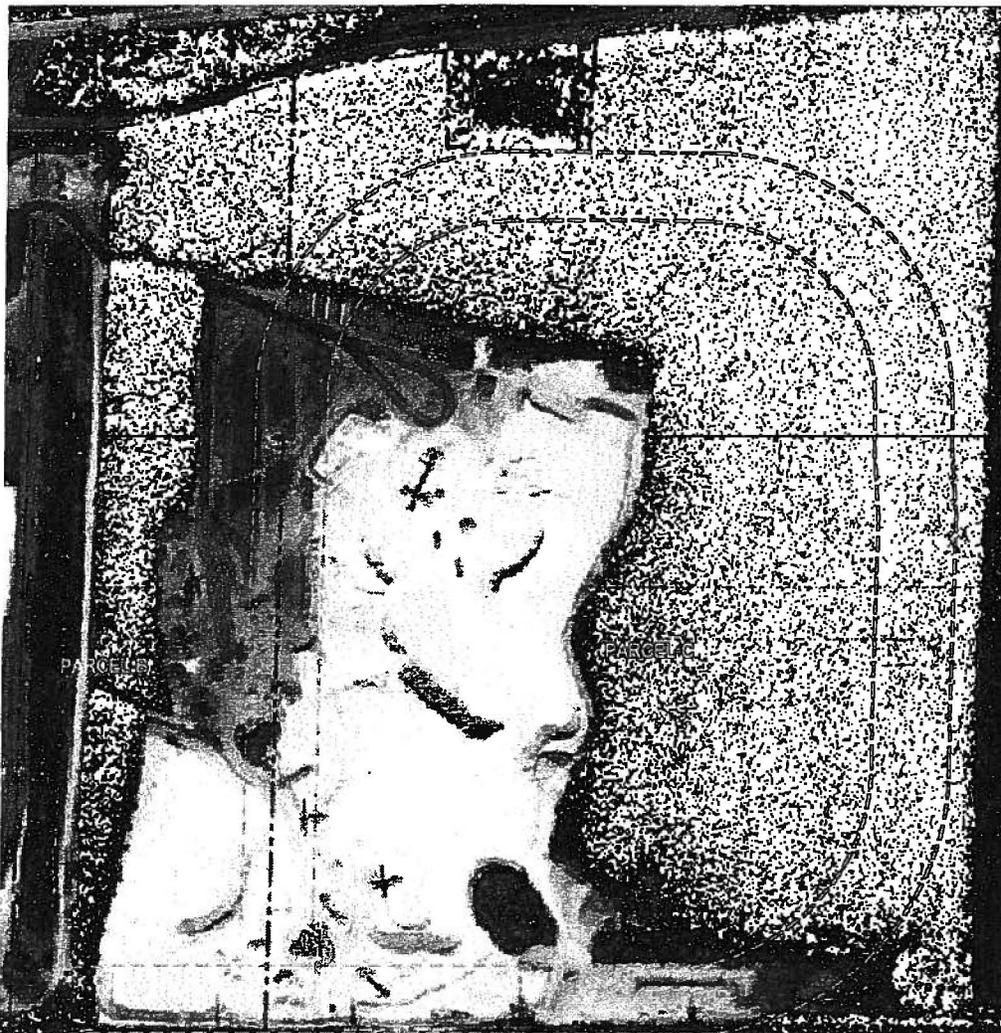


Because Miller avers that defendants “advised the Town repeatedly” that grading was limited to the grey, shaded portion of the plan submitted as Exhibit O, it is plain that, as Miner testified, defendants held discussions with Town officials that grading would not exceed a small area surrounding the intended track roadbed.

Notably, Miller’s sworn statement to this Court that “the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area” was flatly untrue. An inspection of the site ordered by the Court revealed that at least 50 percent of the vegetation had been stripped from the 93-acre site as part of the defendants’ excavation of sand. Tr. 101. Indeed, an overlay of the track plan over an aerial photo of the site<sup>2</sup> reveals that defendants have excavated a huge swath of parcels B and C, with little relation to the track path:

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<sup>2</sup>The photo used here reportedly was taken in October 2013—the evidence suggests that defendants have more



Prelim. Mot., Ex. B-1, DE [14-3]. Miller’s representation in his declaration that grading the shaded area was the *only* construction activity at the site can only be considered a misrepresentation to this Court.

Lastly, documents were introduced that had been filed between 2010 and 2013 with the Town by an engineering firm hired by defendants regarding activities on parcels A, B, and C. Tr. 312-318; Ex. GGGG. Earlier reports—relating only to parcel A—described the work as an “Excavation and Mining Operation.” *Id.* Later reports—relating to parcels B and C—describe

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extensively excavated the site in the interim.

the operation simply as “excavation ongoing.” *Id.* Despite the different nomenclature used in these reports, there were no significant differences in the mining work conducted on the three parcels. Tr. 317-8. Thus, the documents reported “excavation” to the Town on parcels B and C, when, in truth, defendants were conducting a mining operation.

*Environmental Risks Presented by Defendants’ Activities*

Stephanie Davis, a well-educated and experienced hydrogeologist, inspected and studied the site. Tr. 9-24. By way of context, Davis explained that Long Island is served by three glacial aquifers, which supply nearly all the drinking water for Nassau and Suffolk counties. Tr. 17-18. These aquifers, the Upper Glacial, Magothy and Lloyd, are more or less geographically coextensive and are layered at different depths underground. The Upper Glacial aquifer, closest to the surface, is the easiest to tap but the least pure and supplies half of Suffolk’s drinking water; beneath it is the purer Magothy aquifer, which supplies 100% of the water in Nassau County and the other half of Suffolk’s drinking water; and the Lloyd aquifer, the deepest of the three, requires special permits to tap and is considered the water source of last resort. Tr. 19. The subject parcels constitute part of a Deep Recharge zone—which are of the highest importance for the water supply—as infiltrating surface water creates pressure in the Upper Glacial aquifer, forcing water into the Magothy aquifer, effectively recharging the latter. Tr. 20-22. The presence of native sand in a Deep Recharge zone—which both facilitates infiltration by surface water and filters that water—proves critical to this function. Tr. 22-24.

Davis opined that the systematic, large-scale removal of native forest, vegetation, topsoil and native sand will have a detrimental effect on both infiltration and filtration of surface water, negatively impacting the quality of the drinking water in the aquifers. Tr. 24-26. She further advised, upon reviewing some of defendants’ plans, that in reducing the elevation of the site

from as much as 100 feet (or more) above sea level to fifty feet above sea level, defendants will be excavating to within fifteen feet of the Upper Glacial aquifer. Tr. 27-29. This significant reduction in the amount of sand would increase risk of contamination. Tr. 31. Similarly, removal of topsoil and vegetation, which has already occurred throughout a wide swath of the site, further decreases the filtration capacity of the site. Tr. 28-29. An environmental engineer called by the Town similarly opined that the reduced material would decrease the filtering capacity of the site, raising groundwater concerns. Tr. 251-2.

Davis further opined that the various iterations of defendants' planned expansion of their railroad operation would heighten the risk of contamination of the aquifers. She explained that compaction of the remaining sand from construction and operations would further reduce the amount of infiltration of surface and rainwater. Tr. 28. Davis also opined that contaminants discharges associated with several of the proposed uses for the property—such as petroleum products and salt—combined with the compromised filtration capacity, would present risks of contamination of the aquifer. Tr. 33-56. Contamination of this nature would compromise the potability of the water in the aquifer, which may or may not be remedial through treatment. Tr. 57. Davis's testimony went largely un rebutted by defendants.

Finally, while inspecting the site, Davis observed a large quantity—estimated at 12,000 to 15,000 cubic yards—of anthropogenic debris (commonly defined as debris originating from human activity) on parcel B and C. Tr. 59-69. This material, which included demolition remnants, tile, bone, glass, metal, pipe, china, asphalt millings and a NYC Metrocard, may reflect illegal dumping. *Id.* Such material, which clearly originated elsewhere, presents a potential risk to groundwater and requires testing to determine the nature of the contaminants present. Tr. 70. Defendants offered testimony that, in large part, this material was discovered on

parcels B and C, though some constitutes demolition debris from work on parcel A. Tr. 315-16.

As of now, defendants claim that the material is being “stockpiled” and will eventually be removed and disposed of properly. *Id.*

## DISCUSSION

### The Standard of Review

A party seeking preliminary injunctive relief must demonstrate

‘(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff’s favor; and (3) that the public’s interest weighs in favor of granting an injunction.’

*Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). The Court has “wide discretion in determining whether to grant a preliminary injunction,” as it is “one of the most drastic tools in the arsenal of judicial remedies.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citations omitted).

### Irreparable Harm

“A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). In this regard, the Supreme Court has observed:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

*Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987); *cf. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 13-CV-35653, 2014 WL 1814172, at \*6 (9th Cir. May, 8, 2014) (“The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of

money damages can normally remedy such damage. The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis.”)

The record here demonstrates overwhelmingly that, absent preliminary relief, irreparable harm will result from defendants’ activities. The undisputed testimony of two expert witnesses—a hydrogeologist and an environmental engineer—clearly shows that defendants’ ongoing removal of more than two million tons of native sand as well as topsoil and vegetation from parcels B and C, which comprise portions of an environmentally sensitive, hydrologic recharge zone, will significantly reduce infiltration and filtration of contaminants from groundwater. Furthermore, defendants’ decision to excavate the site to a uniform elevation of 50 feet above sea level—to within 15 feet of Long Island’s sole source aquifer—presents irreparable risks of contamination of drinking water supplies. These permanent, detrimental changes to environmentally sensitive lands represent a serious risk of irreparable injury to the public. *Environmental Defense Fund v. Tennessee Val. Authority*, 468 F.2d 1164, 1183 (6th Cir. 1972) (“activities . . . such as the cutting and burning of timber, the movement of massive amounts of earth, the construction of large earthworks, and the relocation of roads and bridges” constitute irreparable harm). In the face of such risk, injunctive relief may be warranted. *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (“Broader injunctive relief is appropriate, of course, where substantial danger to the environment . . . is established”).

### **Likelihood of Success**

The next issue then is whether there is a likelihood of success on the merits, or, failing that, a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff’s favor. Once the merits of this litigation are clearly defined, the issue becomes fairly straightforward. Among other things, the Town seeks a

declaratory judgment upholding its right to enforce its code as against defendants in relation to the activities on parcels B and C. The Town's code prohibits the mining of sand except as such "operations are incidental to the development of the site for residential, commercial or industrial purposes," or in the case of "industrial or commercial zoned premises," mining "shall be limited to the extent necessary to accommodate the construction of the structures or uses to be contained thereon." Brookhaven Town Code Section 53-3.

Defendants' principal, if not exclusive, response to this claim is that the Town lacks the power to enforce these regulations on parcels B and C, positing that because they intend to construct a railroad spur, their activities are governed by preemptive federal jurisdiction under the Interstate Commerce Commission ("ICC"). *See* Defendants' Post-Hearing Memorandum in Opposition ("Defs' Post-Opp.") at 9, DE [48] ("The key issue . . . is preemption"). The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, et seq. (the "Termination Act") "expressly preempts 'remedies provided under Federal or State law' and vests the Surface Transportation Board [the "STB"], a federal agency, with exclusive jurisdiction over 'transportation by rail carriers' and 'the construction . . . of . . . facilities . . .'" *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). As relevant herein, the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." *Id.* at 642.

If the evidence presented showed that the operations being carried out on parcels B and C were related to one of these activities, the case might present a close question. However, the evidence established no such relation. As described above, the evidence presented indisputably demonstrates that defendants have engaged in wholesale mining of the parcels entirely independent of any rail construction or development. Defendants' evident intent and actions to

strip and sell millions of dollars' worth of sand from the property predates any serious effort to design or construct any rail facilities, beginning with the lease of the property, which includes a provision to pay some of the rent using 600,000 tons of mined sand. It was financially interested personnel at BTR, not engineering experts, who dictated the level to which the sand would be excavated. Sand mining commenced well before any significant design effort began, and to date, despite the large-scale excavation that has taken place, that design remains "conceptual." Not one foot of track or a single railroad tie has been laid. The only substantial activity reflected in the testimony and documents is the excavation, refining and sale of sand from the parcels. Because there is no showing that the activity in question—the mining of sand—constitutes "transportation by rail," such activity does not fall within the STB's exclusive jurisdiction. *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011) ("Both the courts and the STB thus consistently find that to fall within the STB's exclusive jurisdiction, the facility or activity must satisfy both the 'transportation' and 'rail carrier' statutory requirements").

Plaintiff argues extensively that the contemplated railroad construction does not satisfy the statutory requisites for a railroad spur, and that at least some of the anticipated uses constitute "activities not integrally related to rail service," which do not implicate preemption. *CFNR Operating Co., Inc. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003). Defendants counter that the issue of whether the contemplated project constitutes a spur is ultimately irrelevant, but that the question is before the STB in any event. Defs' Opp. at 17. In fact, on this record, no reasoned determination can be made regarding the whether defendants' intended plans comprise rail-related activities, as the defendants have presented divergent concepts for the parcels—including various track configurations and purposes, from a refrigerated transloading facility to a mini-passenger service for patrons of a non-existent Native

American casino. What can be said with certainty, however, is that the mining of sand from the parcels has been demonstrated to be entirely independent of any rail-related activity.

Finally, even assuming, *arguendo*, that the evidence presented some support for a *bona fide* railroad construction, given the nature of the Town's regulations, and the attenuated connection between the conceptual railroad plan and the mining activities, a serious question would remain as to the merits. As the Second Circuit has observed:

not all state and local regulations are preempted by the Termination Act; local bodies retain certain police powers which protect public health and safety. It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

*Green Mountain R.R. Corp.*, 404 F.3d at 643. Here, the Town's regulations prohibiting sand mining and screening are intended to protect public health and safety through the conservation of natural resources and preservation of drainage patterns, which safeguard drinking water, *see* Brookhaven Town Code 53-1, appear to be clearly defined and non-discriminatory. Thus, there is, at a minimum, a serious question on the merits.

And the balance of hardships tips decidedly in plaintiff's favor: the Town's efforts are aimed at preventing environmental disaster. The only hardship articulated by defendants is the temporary loss of sand mining revenue, as their claims of construction delay, given the absence of any demonstrated effort to implement their rail expansion effort, prove unavailing. This determination is only heightened by proof that defendants made inarguable efforts to conceal their activities from the Town, which has acted with reasonable diligence under the

circumstances. Therefore, the entry of a preliminary injunction is warranted.

### **The Public Interest**

Finally, granting a preliminary injunction, which would avoid further destruction of the site and thereby help ensure protection of a safe drinking water supply, would serve the public interest. The Second Circuit has described the protection of drinking water as “a core municipal function and implicating an unusually compelling public interest.” *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 112 (2d Cir. 2013); *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 354 (S.D.N.Y. 1991) (preliminary injunction issued based upon “the imperative to assure pure drinking water for eight million people”). And while the threat here may not seem as immediate as that identified in cases involving the active introduction of contaminants into the water supply,<sup>3</sup> it is no less compelling. Thus, the public interest further weighs in favor of preliminary relief.

At the same time, the public interest would also be served by the construction of additional railroad facilities, which would bestow the economic and environmental benefits discussed earlier. To be clear, the benefits of increased railroad service, though important, pales in comparison to the interest in safeguarding the drinking water supply. *See United States v. 27.09 Acres of Land*, 760 F. Supp. at 354 (“the imperative to assure pure drinking water for eight million people trumps the convenience of better mail delivery to one million”). To some extent, however, balancing these interests may be achieved through subsequent application by defendants for relief from the injunction if and when that becomes appropriate.

### **Bond Requirement**

Defendants urge that the Court require posting of a bond before a preliminary injunction

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<sup>3</sup> Importantly, the anthropogenic debris on the site has the potential of introducing contaminants, but more testing is required. Tr. 59-63.

may issue. Federal Rule of Civil Procedure 65(c) provides that:

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

“Rule 65(c)’s bond requirement serves a number of functions. It assures the enjoined party that it may readily collect damages from the funds posted in the event that it was wrongfully enjoined, and that it may do so without further litigation and without regard to the possible insolvency of the plaintiff.” *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 557 (2d Cir. 2011).

Notwithstanding the mandatory language of the Rule, a court may, under certain circumstances, dispense with the bond requirement. *See, e.g., Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012). This is particularly true “where there has been no proof of likelihood of harm.” *Doctor’s Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997). In this case, the defendants have failed to make a showing of any substantial harm that could result from granting the injunction. I do not credit the claim that the injunction would impose losses due to delay of any planned railway project, so the only articulable basis for harm would be the loss of “sand business”—yet defendants would remain in possession of the sand, which could, theoretically, be sold at a later date.

“Some courts have considered the strength of a movant’s case in analyzing the likelihood of harm to a potentially wrongfully enjoined nonmovant.” *Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp. 2d 186, 203 (E.D.N.Y. 2013) (citing cases). On this record, this factor weighs strongly in favor of the Town, and militates against the imposition of a bond. Similarly, the important public policy issues at stake weigh against imposition of a bond. *See Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) (citing cases and waiving bond “given the

important potential constitutional issues” in the action).

Lastly, given that one of purpose of the bond requirement under Rule 65(c) is to safeguard the defendant against “possible insolvency” of plaintiff, *Nokia Corp.*, 645 F.3d at 557, a government entity may readily be excused from posting a bond to secure a preliminary injunction. Because such plaintiffs enjoy “the unlimited taxing power of a municipality,” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981), the risk of insolvency and corresponding need for a bond, though not unimaginable, remains small.

Based on these considerations, I decline to require the posting of a bond.

### CONCLUSION

Based on the foregoing:

It is hereby ORDERED, for all the reasons set forth herein, that the defendants are hereby enjoined and restrained from undertaking any further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from parcels B and C, during the pendency of this action and pending further order of the Court.

Further, it is ORDERED that plaintiff and its representatives, agents, employees, consultants and attorneys may, upon reasonable notice to defendants, enter the premises to inspect to ensure compliance with this Order, photograph the site for the purposes of documentation and evidentiary submission and collect samples of debris for the purposes of testing for contaminants.

SO ORDERED.

Dated: Central Islip, New York  
June 23, 2014

/s/ Gary R. Brown  
GARY R. BROWN  
United States Magistrate Judge

# APPENDIX B



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Sills Road Realty LLC *(via overnight service)*  
d/b/a Brookhaven Rail Terminal  
485 Underhill Boulevard, Suite 103  
Syosset, NY 11791

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Sir/Madam:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

Furthermore, Long Island Electric Utility Service LLC (Servco), as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA will hold you responsible for not only the damage to the LIPA Parcel and LIPA's property located thereon as a result of such continued use/interference, but also for any personal injury and/or economic losses, as a direct or indirect result of such use/interference, including without limitation loss of electric service to LIPA's customers. This letter is sent without prejudice to any rights or remedies that Servco and/or LIPA may have with respect to this matter, including equitable relief and/or monetary damages.

Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

  
Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Andrew Kauffman (*via overnight mail*)  
US Rail Corporation  
7846 W. Central Avenue  
Toledo, OH 43617

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Mr. Kauffman;

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

Furthermore, Long Island Electric Utility Servco LLC (Servco), as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA will hold you responsible for not only the damage to the LIPA Parcel and LIPA's property located thereon as a result of such continued use/interference, but also for any personal injury and/or economic losses, as a direct or indirect result of such use/interference, including without limitation loss of electric service to LIPA's customers. This letter is sent without prejudice to any rights or remedies that Servco and/or LIPA may have with respect to this matter, including equitable relief and/or monetary damages.

Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

A handwritten signature in black ink that reads "Linda E. DeSantis".

Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Suffolk & Southern Rail Road LLC  
485 Underhill Boulevard  
Suite 103  
Syosset, NY 11791

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Sir/Madam:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

Furthermore, Long Island Electric Utility Servco LLC (Servco), as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA will hold you responsible for not only the damage to the LIPA Parcel and LIPA's property located thereon as a result of such continued use/interference, but also for any personal injury and/or economic losses, as a direct or indirect result of such use/interference, including without limitation loss of electric service to LIPA's customers. This letter is sent without prejudice to any rights or remedies that Servco and/or LIPA may have with respect to this matter, including equitable relief and/or monetary damages.

Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

A handwritten signature in black ink that reads "Linda E. DeSantis".

Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Ron Cohen *(via overnight service)*  
Brookhaven Rail Terminal  
205 Sills Road  
Yaphank, NY 11980

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Mr. Cohen:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

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Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz

# APPENDIX C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(GRB)

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN  
RAIL LLC f/k/a U S RAIL NEW YORK LLC,  
BROOKHAVEN TERMINAL OPERATIONS,  
OAKLAND TRANSPORTATION HOLDINGS  
LLC, SILLS EXPRESSWAY ASSOCIATES,  
WATRAL BROTHERS, INC., and PRATT  
BROTHERS, INC.,

Defendants.

**DECLARATION OF  
ROY D.HUNT**

-----X  
BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35819

BROOKHAVEN RAIL TERMINAL AND  
BROOKHAVEN RAIL, LLC

-----X

**ROY D. HUNT**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury as follows:

1. I am the manager of the Survey Department of Long Island Electric Utility Servco, LLC ("PSEG LI") which manages and operates the transmission and distribution assets on behalf of the Long Island Power Authority ("LIPA").

2. I am a duly Licensed Surveyor in the State of New York and am employed by PSEG LI.

3. On or about June 6, 2014, I instructed the Survey Department to prepare an "Overlay" depicting LIPA's fee-owned portions of the 93 acre site which are overlaid over the aerial photograph ("Aerial Overlay"). A copy of the Aerial Overlay is attached hereto and made a part hereof as Exhibit A.

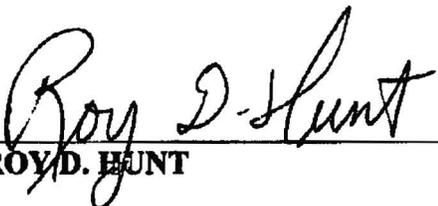
4. It is my understanding, the sections of the property outlined in blue are owned in fee by LIPA and that LIPA's transmission and distribution assets are located on and/or servicing areas identified in Exhibit A.

5. It is my understanding that the areas in Exhibit A have been excavated, sand mined, and the topography and grading radically altered by such excavation and sand mining activities.

6. It is my understanding that LIPA's transmission and distribution assets located on and/or servicing areas identified in Exhibit A have been damaged by such excavation and sand mining activities.

7. It is my understanding that PSEG LI as LIPA's operator is currently exploring LIPA's legal remedies and options with LIPA in light of these circumstances, and are providing this Declaration and documents to the Court and the STB in order to make an accurate legal record of these matters.

Dated: Hicksville, New York  
June 12, 2014

  
\_\_\_\_\_  
ROY D. HUNT

**EXHIBIT A**



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Sills Road Realty LLC  
d/b/a Brookhaven Rail Terminal  
485 Underhill Boulevard, Suite 103  
Syosset, NY 11791

(via overnight service)

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Sir/Madam:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

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Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Andrew Kauffman (*via overnight mail*)  
US Rail Corporation  
7846 W. Central Avenue  
Toledo, OH 43617

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Mr. Kauffman;

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Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

A handwritten signature in black ink, appearing to read "Linda E. DeSantis". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Suffolk & Southern Rail Road LLC  
485 Underhill Boulevard  
Suite 103  
Syosset, NY 11791

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

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Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz



Real Estate Services  
175 East Old Country Road  
Hicksville, New York 11801  
516.545.5074  
Linda.E.DeSantis@pseg.com

June 10, 2014

Ron Cohen (via overnight service)  
Brookhaven Rail Terminal  
205 Sills Road  
Yaphank, NY 11980

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

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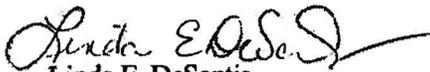
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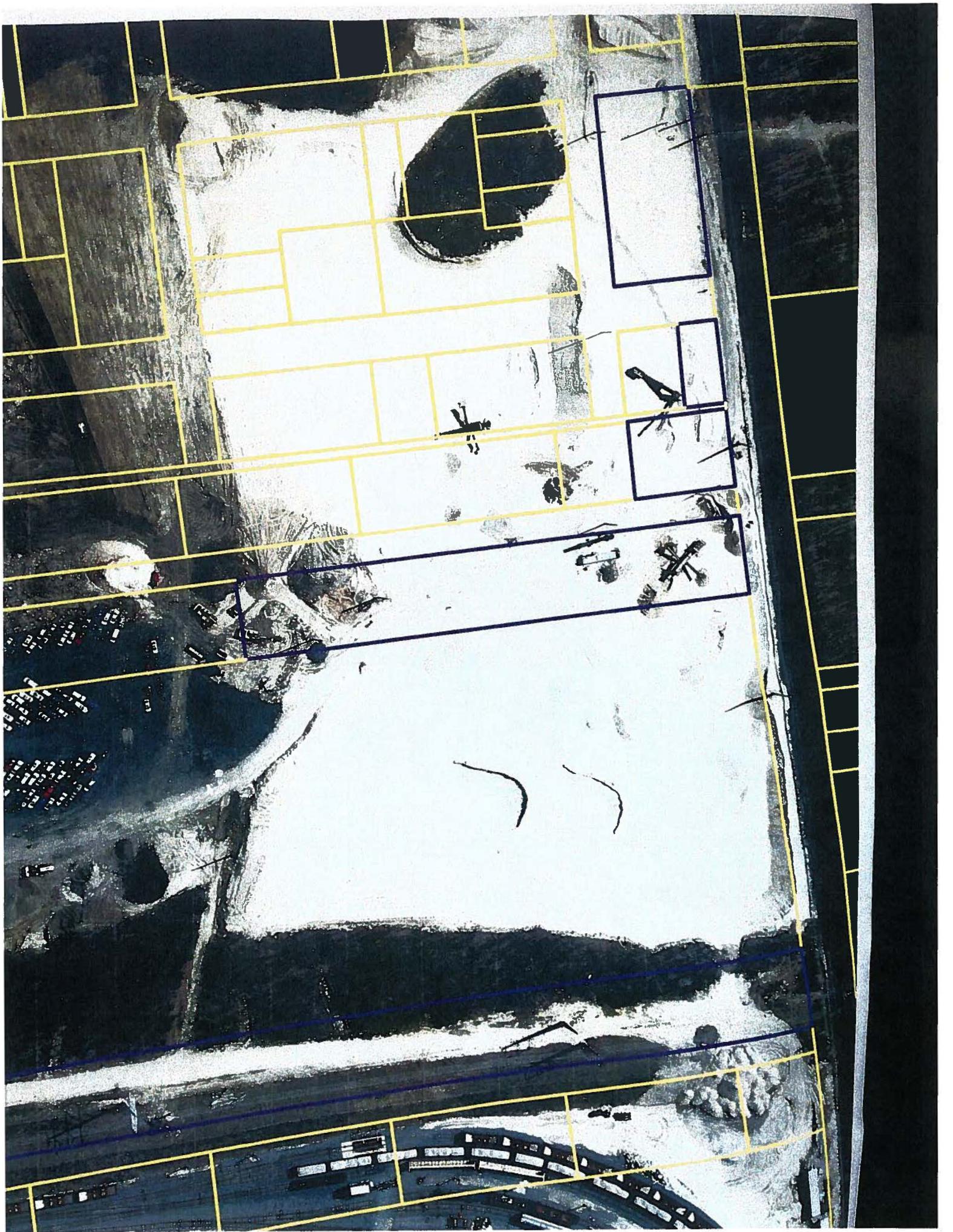
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Linda E. DeSantis  
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz  
Christopher Kent, Farrell Fritz

**EXHIBIT B**



# APPENDIX D



## Long Island Rail Road

Direct Dial: (718) 558-8264

Via email ([dralston@foley.com](mailto:dralston@foley.com))  
and first class mail

June 11, 2014

David T. Ralston, Jr., Esq.  
Foley & Lardner LLP  
3000 K Street NW  
Suite 600  
Washington, DC 20007-5109

Re: Encroachment on LIRR right of way

Dear Mr. Ralston:

It has come to our attention that your client, Brookhaven Rail Terminal ("BRT"), has encroached upon and may have engaged in sand mining on MTA Long Island Rail Road ("LIRR") property. This encroachment and possible mining, which is south of BRT's facility in Yaphank, includes but is not necessarily limited to BRT's placement of a fence, signs, and sand on the LIRR's right of way. At some locations, BRT's fence is more than 20 feet within the LIRR's property line. (Please see attached pictures.)

BRT is advised to cease and desist from any further encroachment and/or mining on LIRR property. BRT should also contact Donna Dill (Telephone 718-558-3218) in the LIRR's Engineering Department within three business days of the date of this letter to discuss the necessary procedures for BRT to remove the items (including but not limited to the fence, signs, and sand) that are currently on LIRR property. Should BRT fail to do so, the LIRR will be required to take appropriate action at BRT's expense.

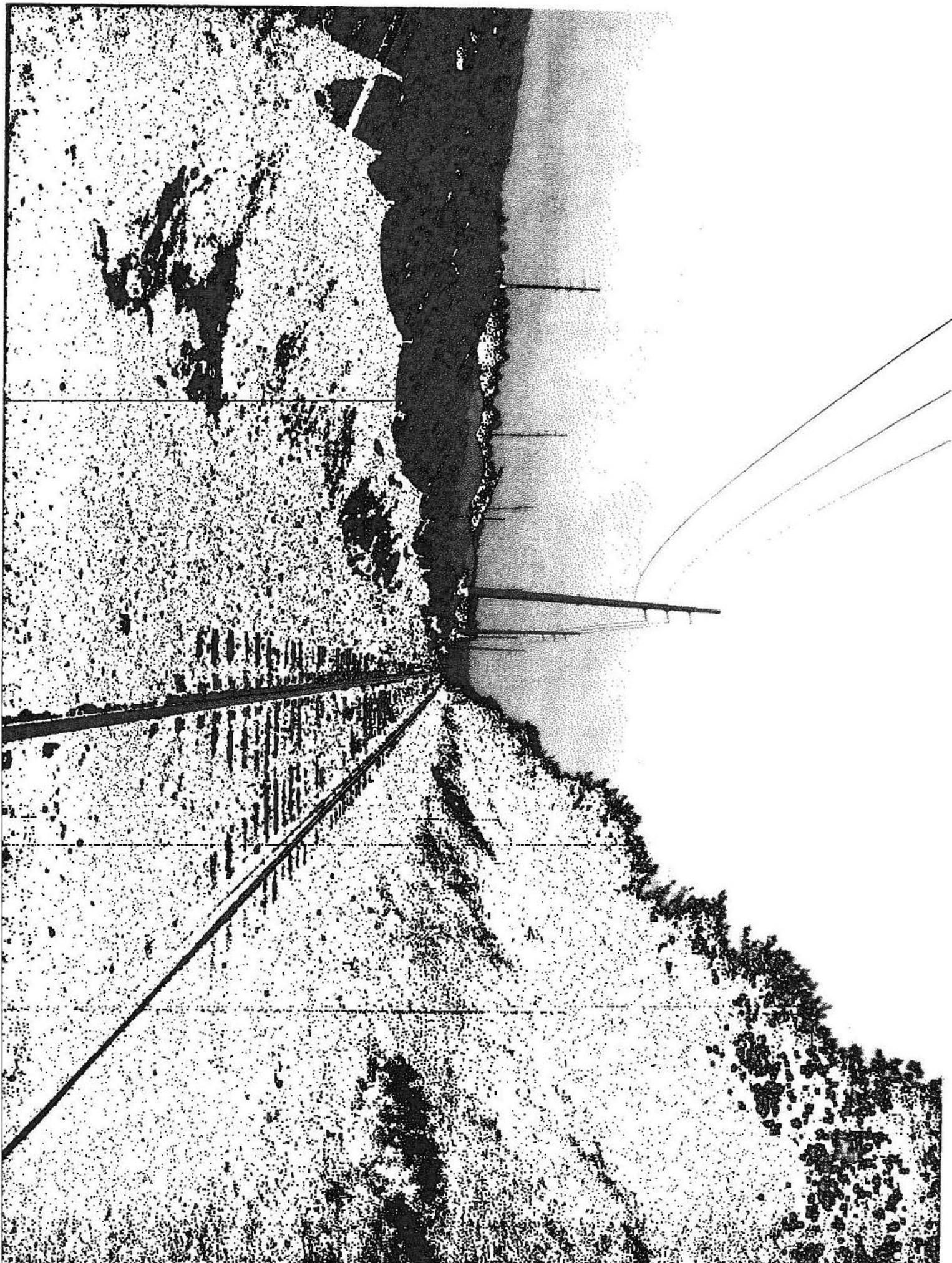
Should you have any questions, please feel free to contact me.

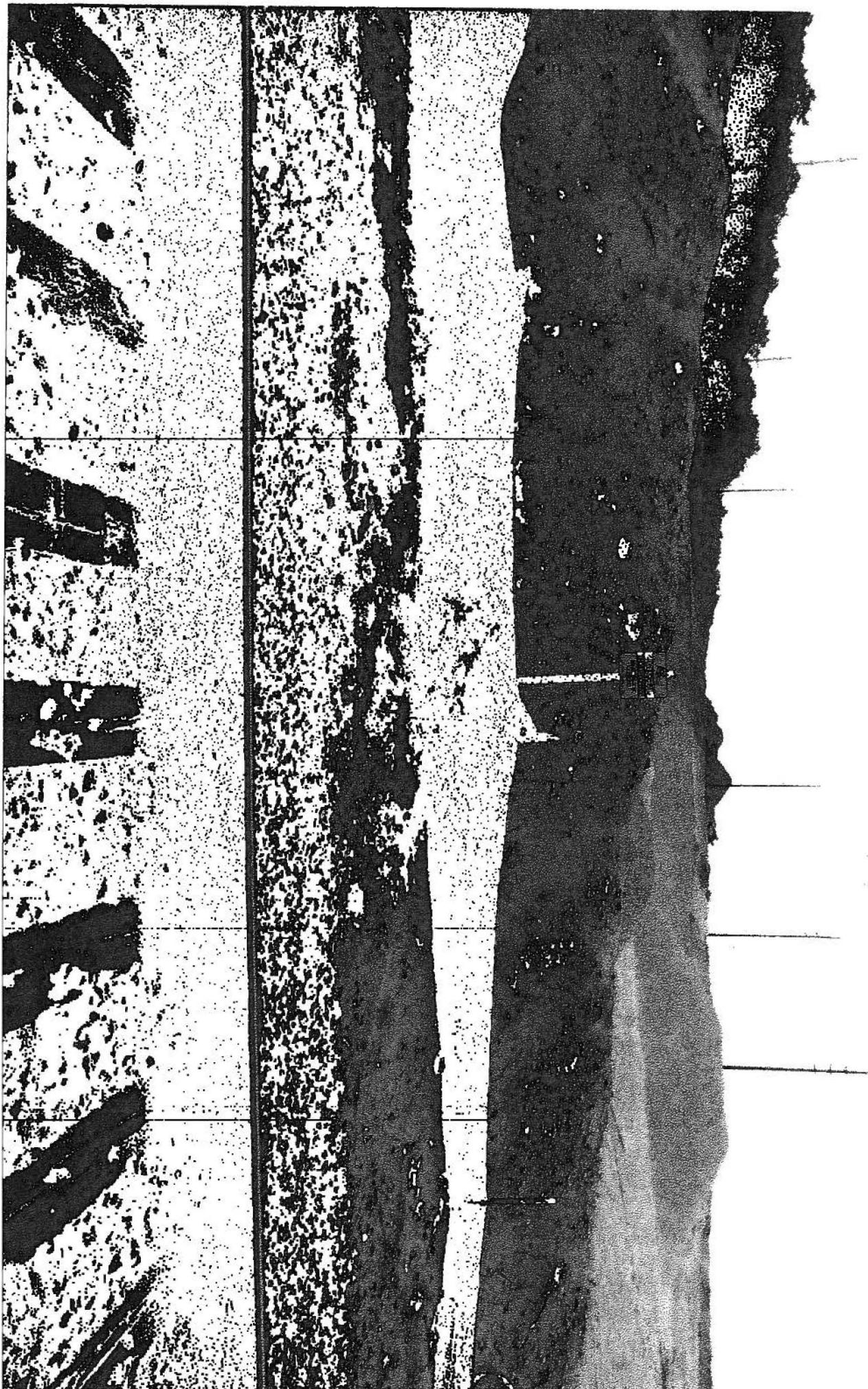
Very truly yours,

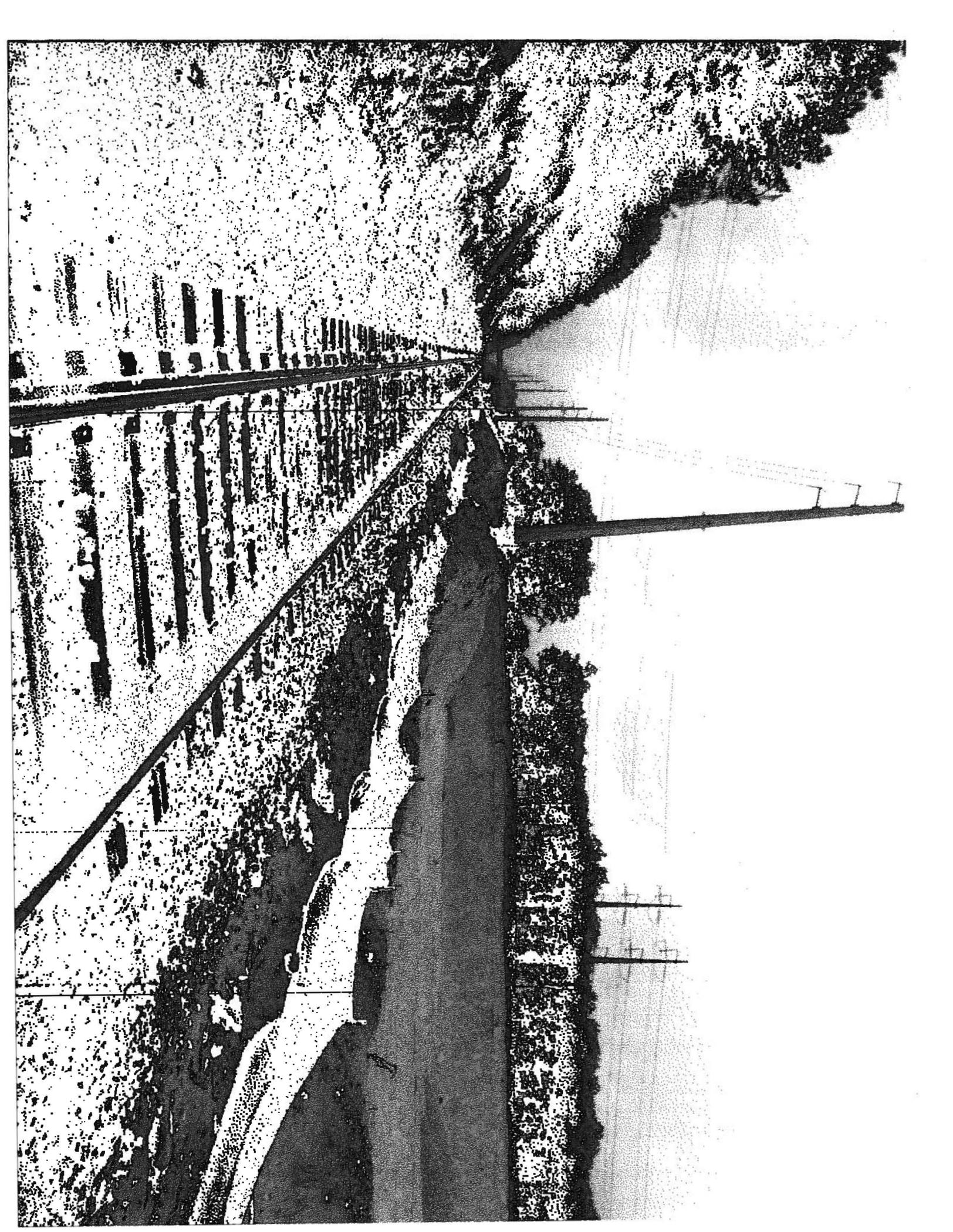
A handwritten signature in black ink, appearing to read "Richard L. Gans", with a stylized flourish at the end.

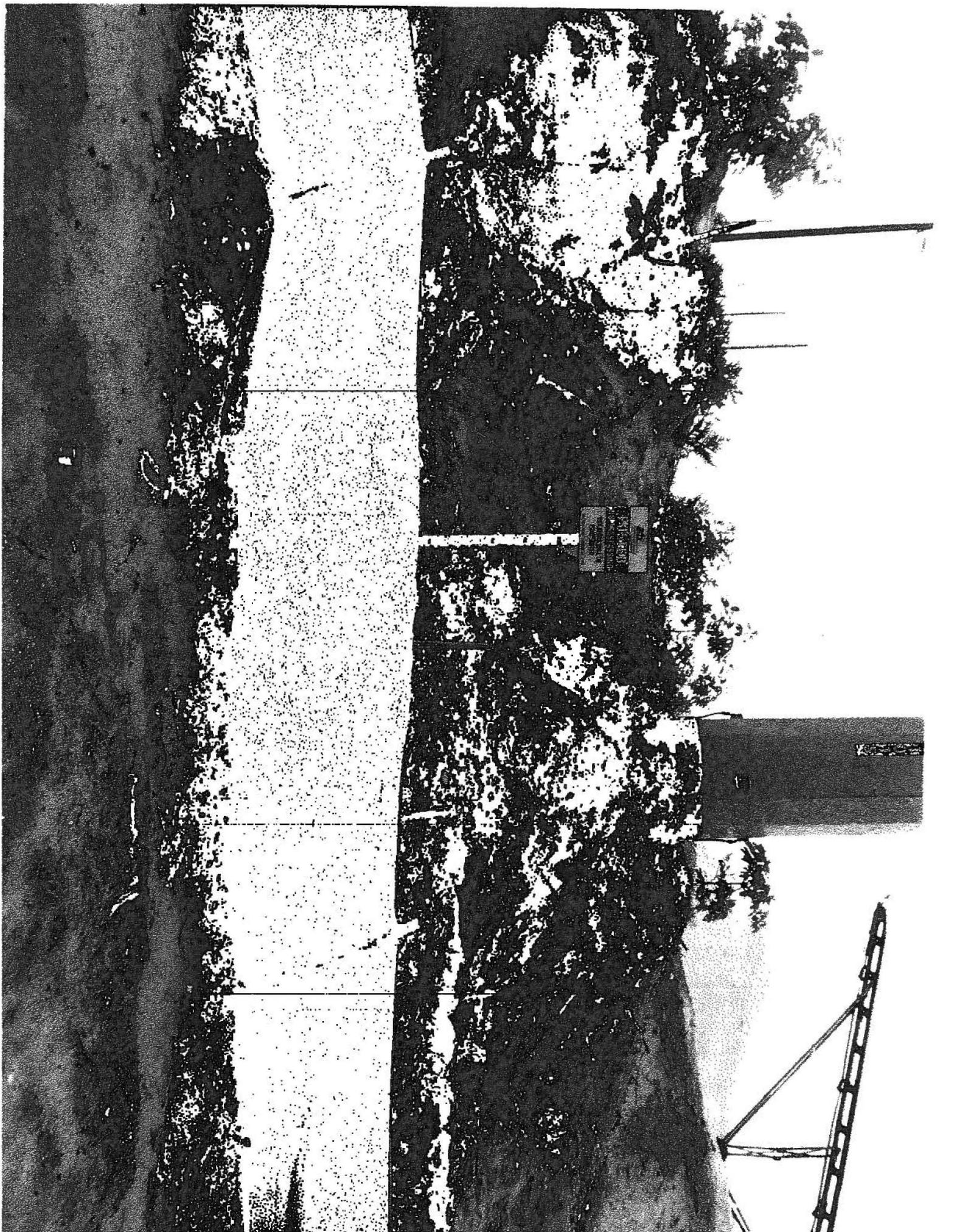
Richard L. Gans  
Vice President/General Counsel & Secretary

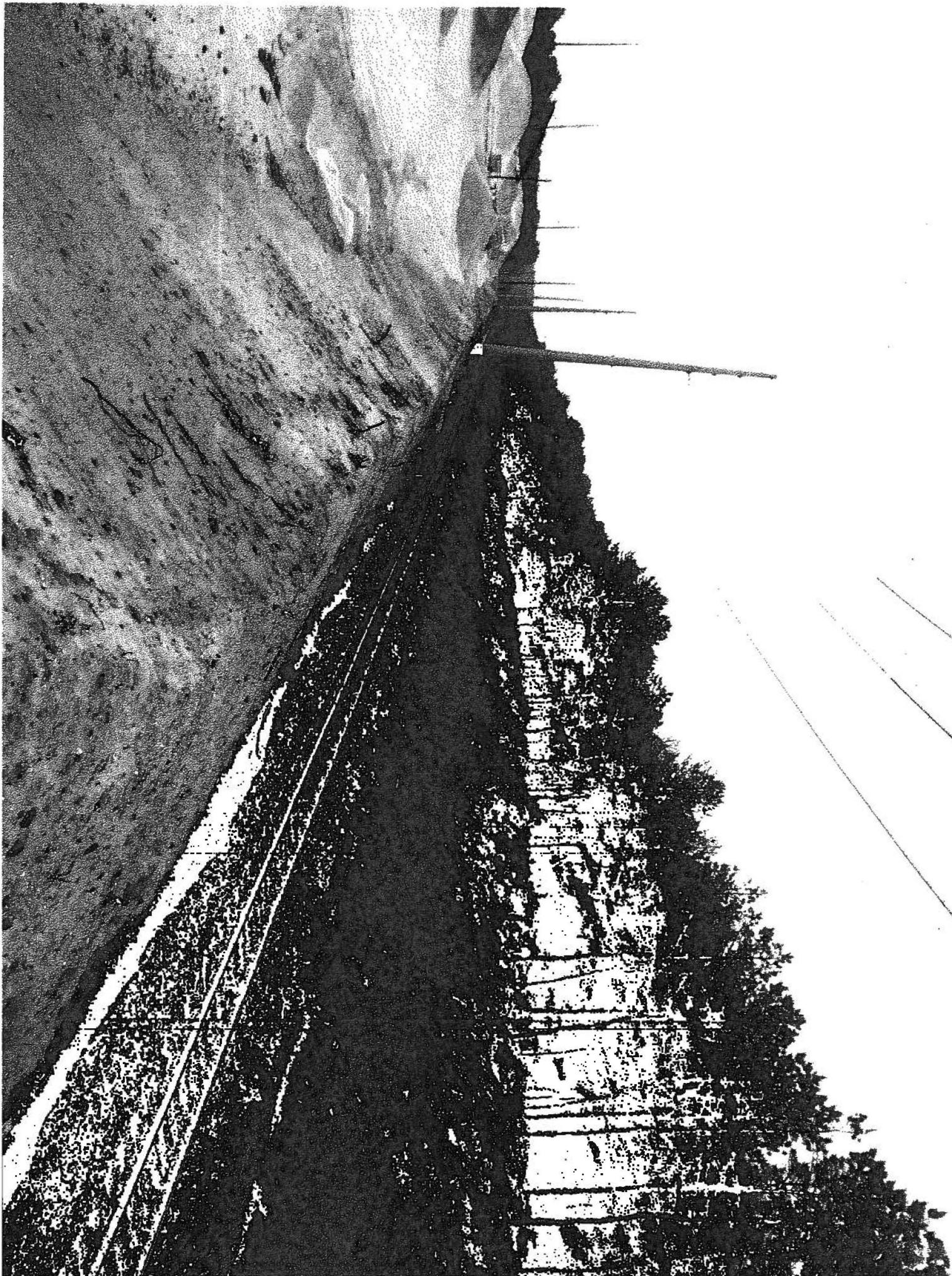
cc: Glenn M. Greenberg  
Hector Garcia

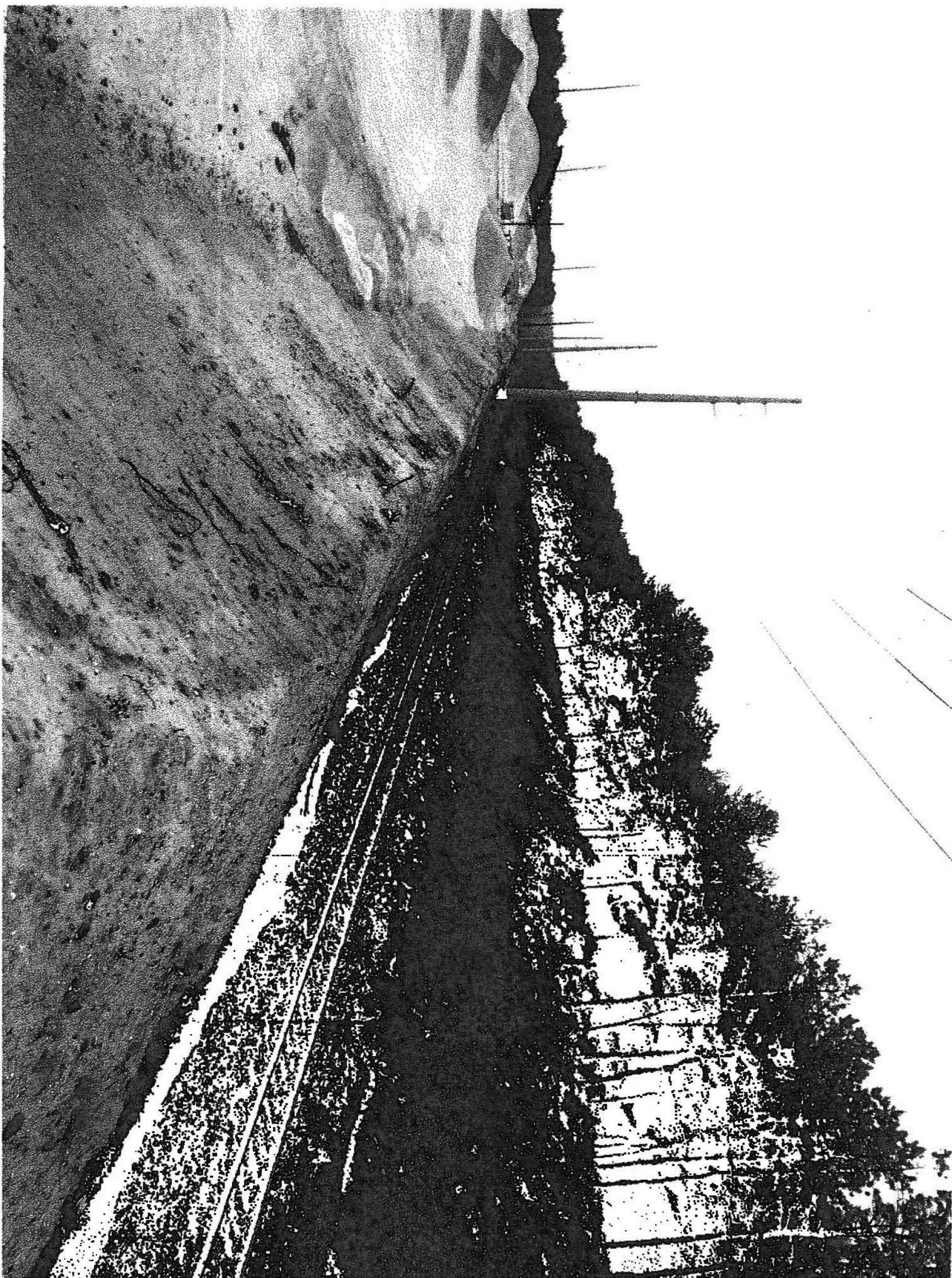


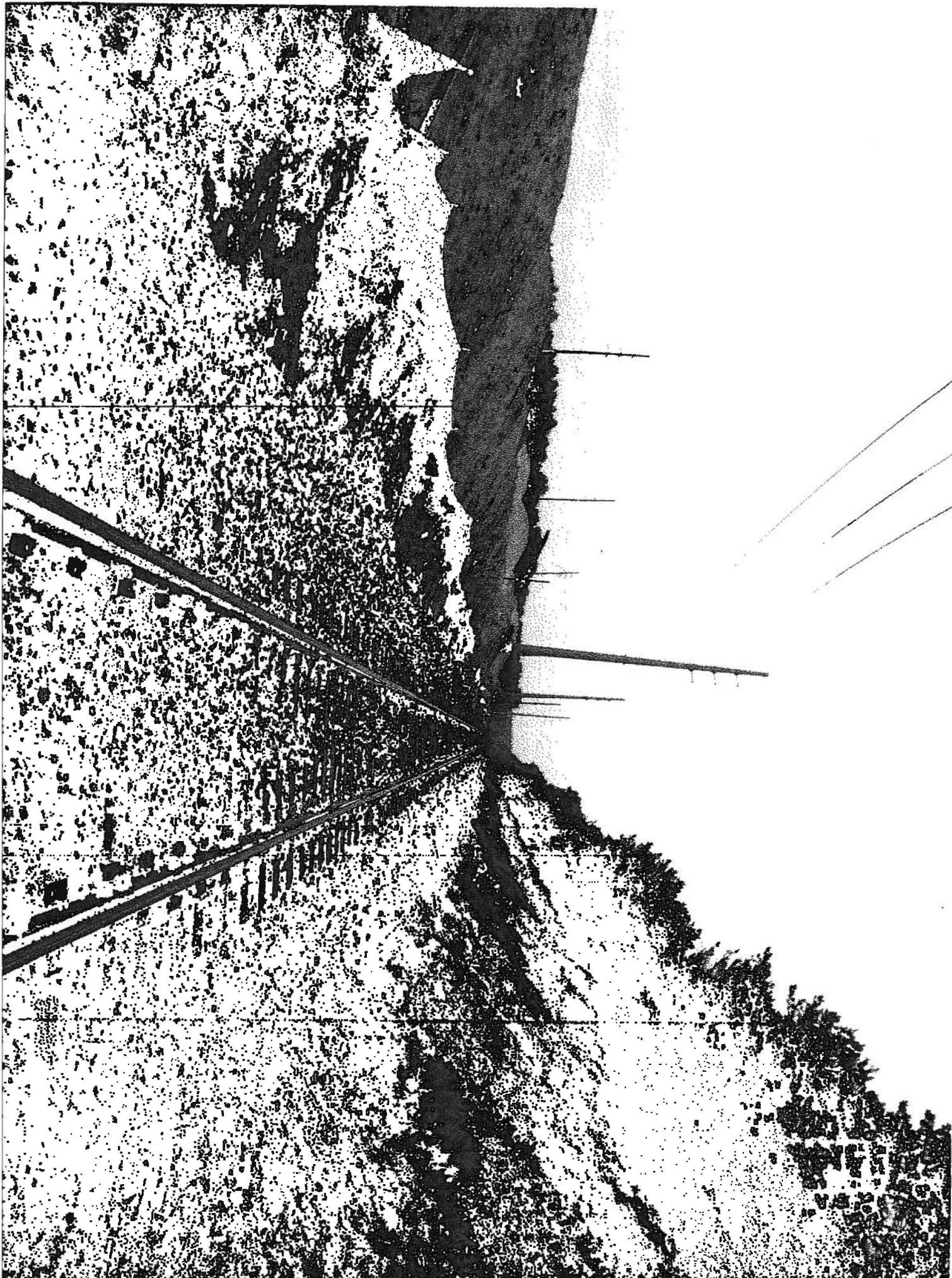


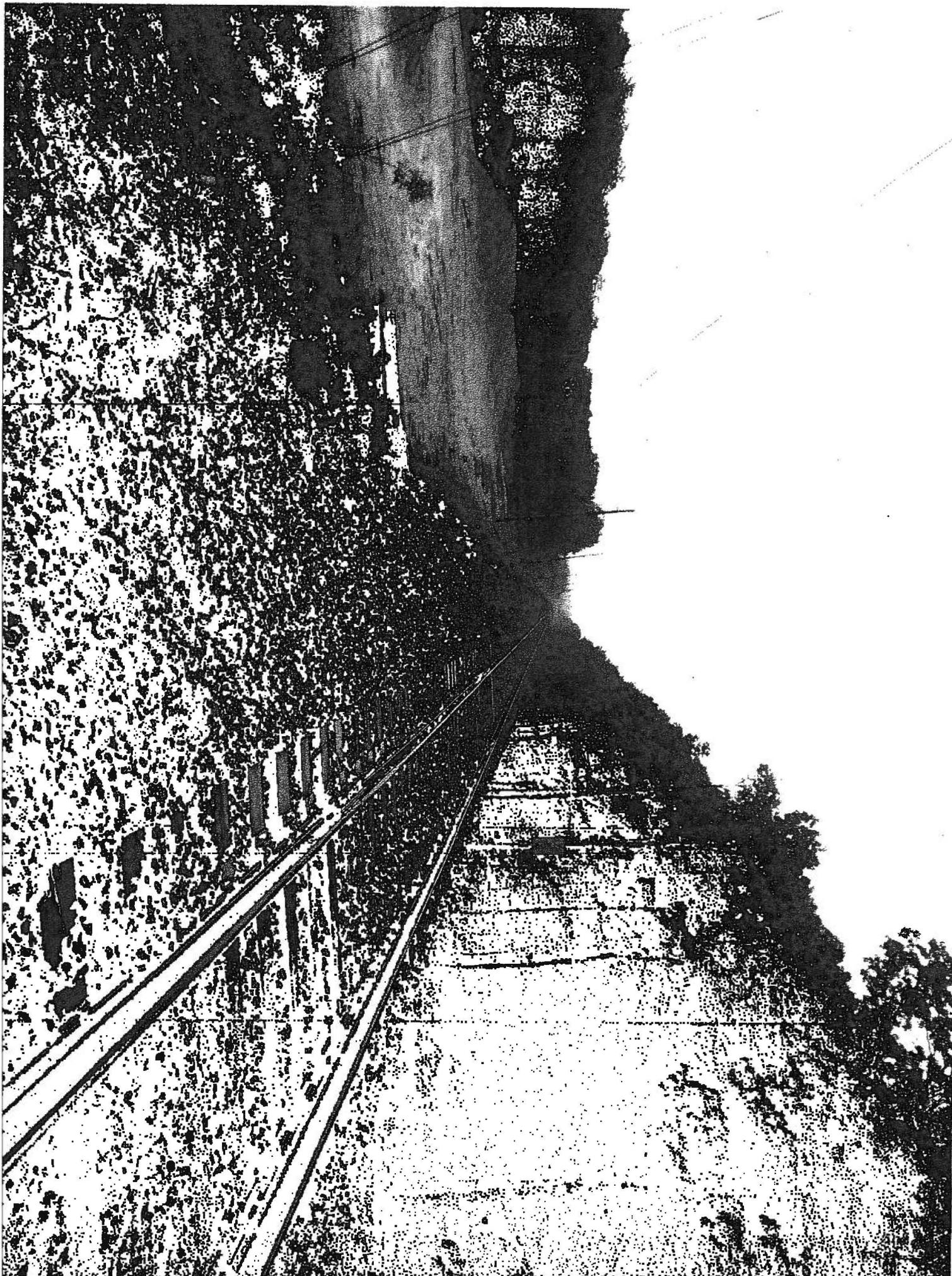


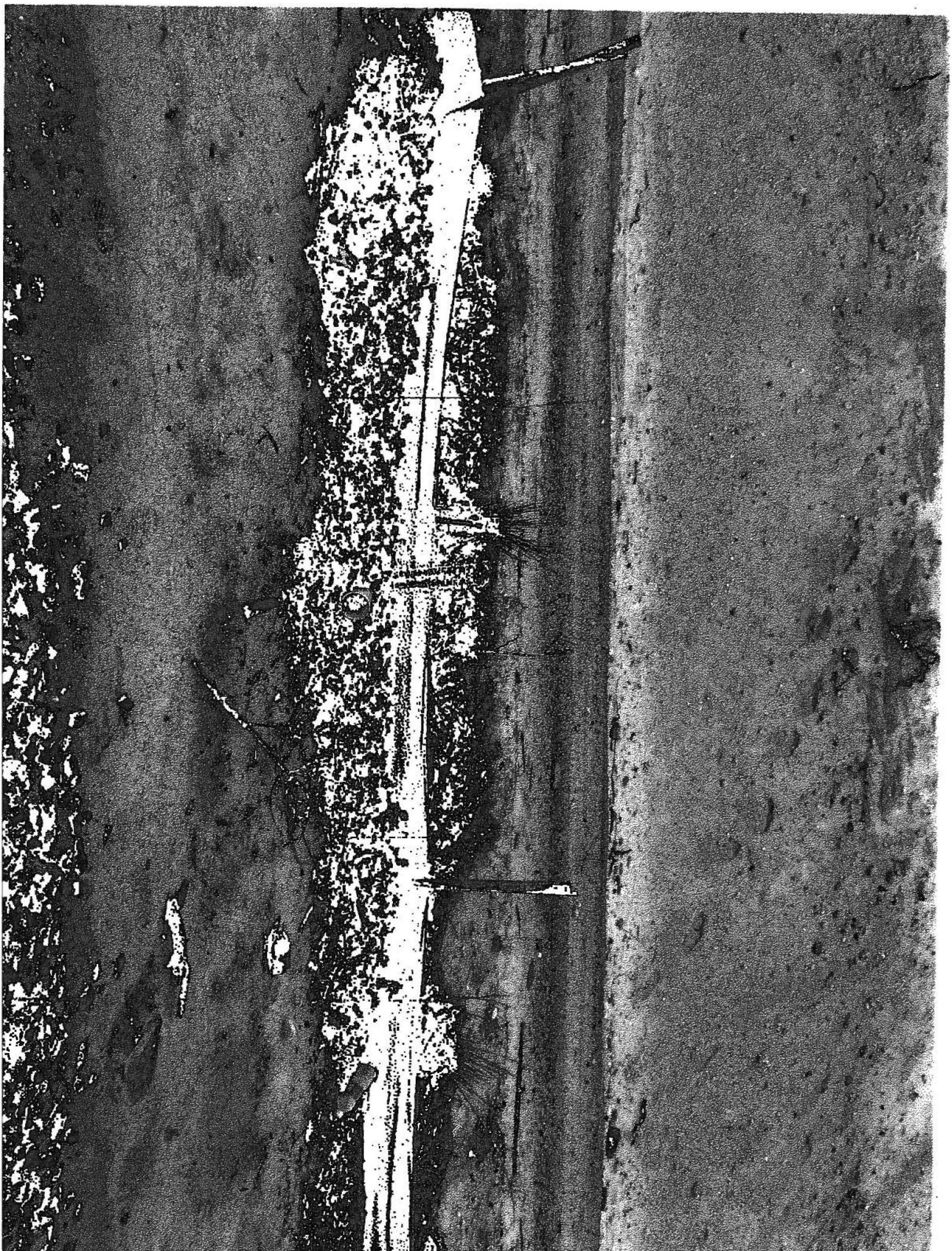












CALL 405-252-2222  
252-2222  
252-2222

# WARRINGTON

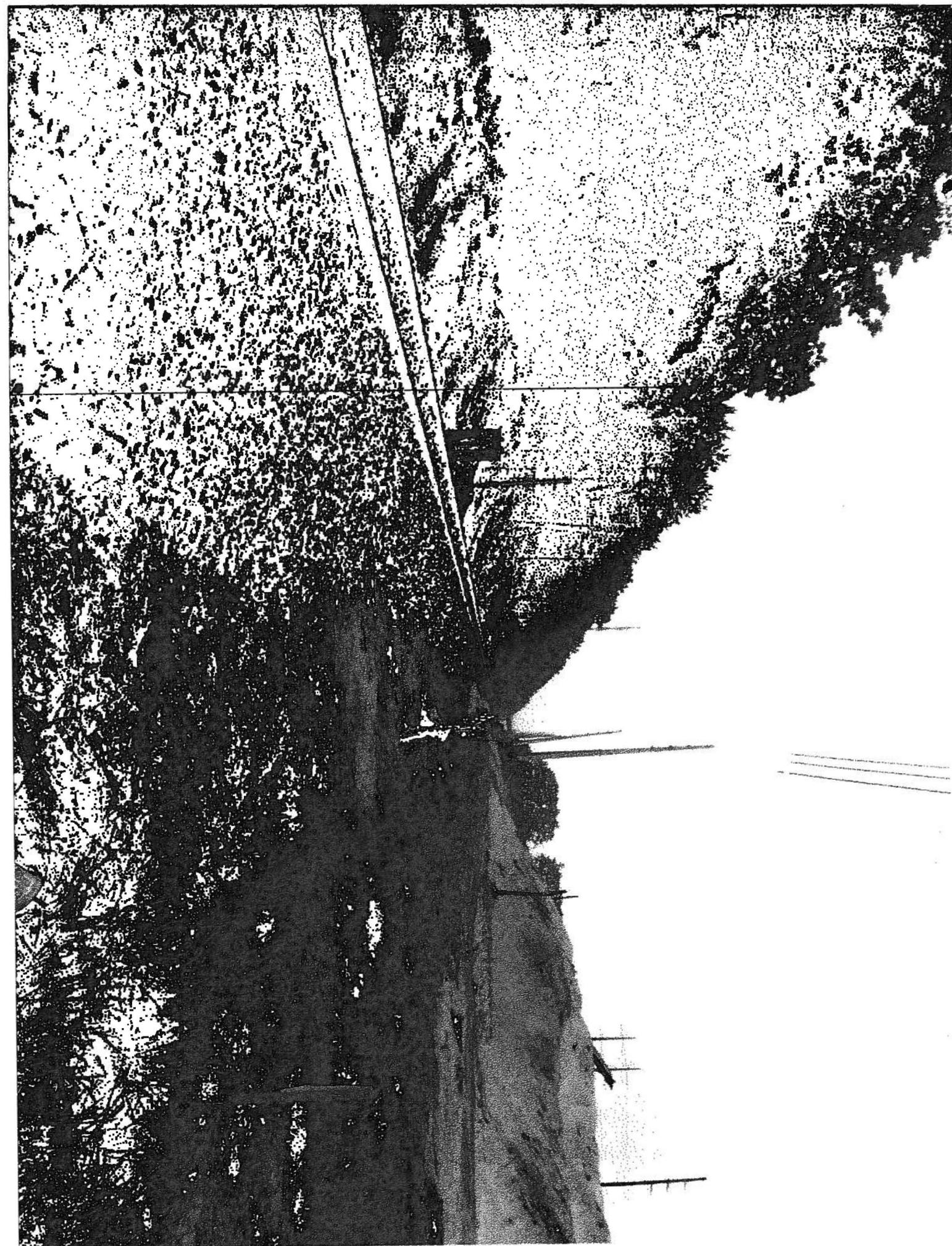
POWER COMMUNICATIONS  
CABLES SIGNAL  
IN THIS VICINITY

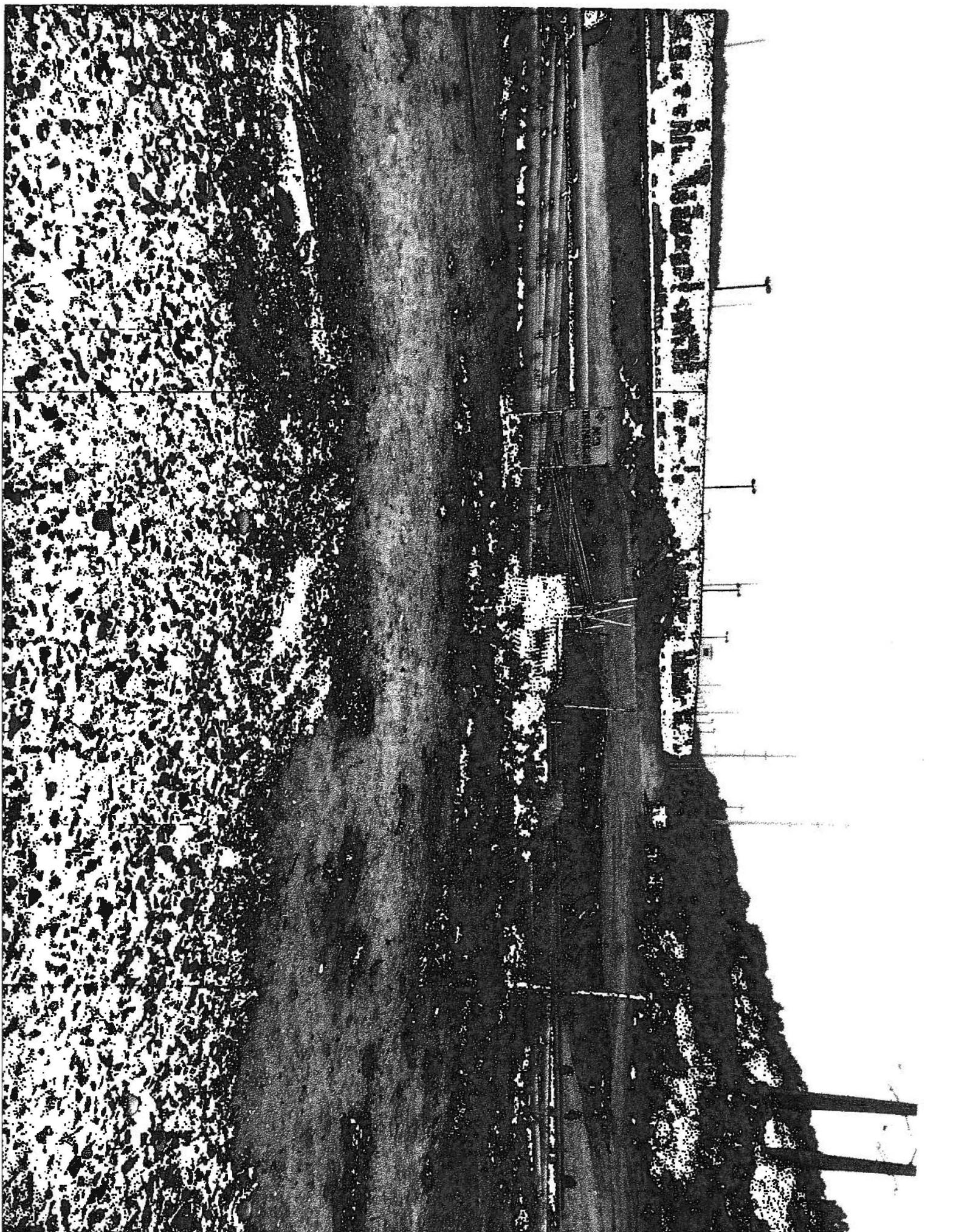


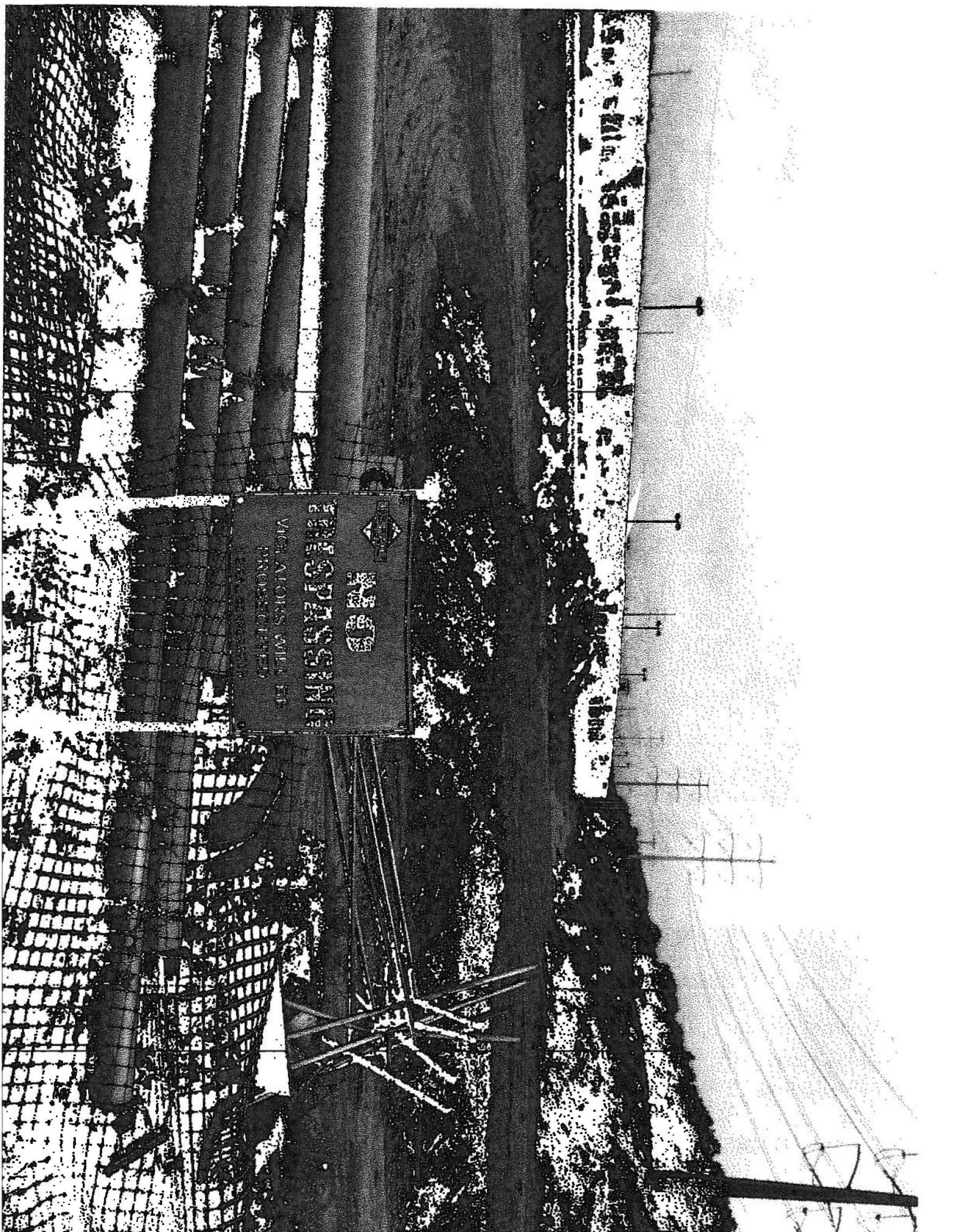
UNDERGROUND  
CABLE  
ROUTE

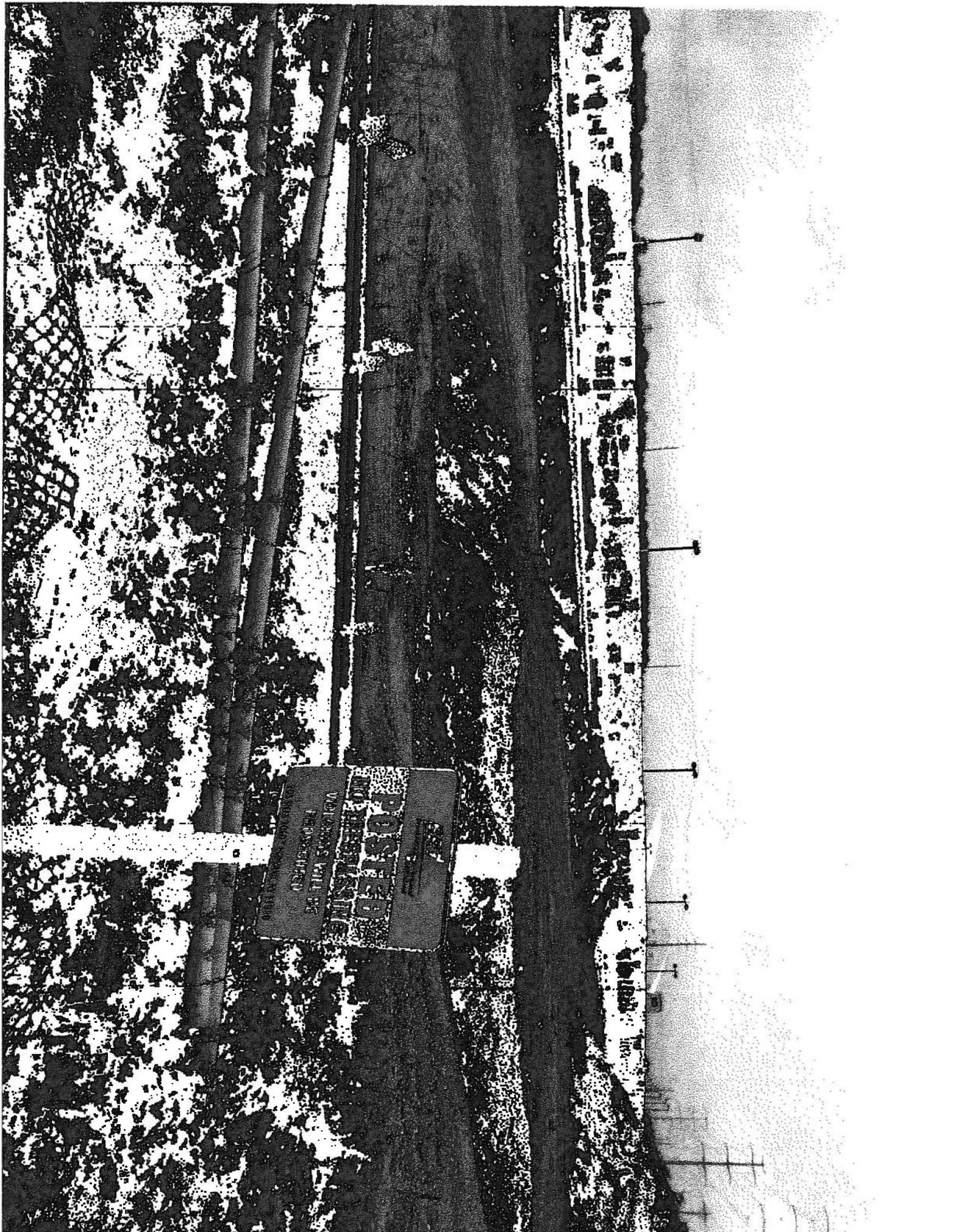
LONG ISLAND  
RAILROAD











DEPARTMENT OF TRANSPORTATION  
STATE ROUTE 100  
MOUNTAIN VIEW