

**Testimony of Harold G. Bailey, Jr.
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Before the U.S. House of Representatives
Subcommittee on Federal Workforce, Postal Service and
The District of Columbia Regarding
The Spring Valley Formerly Used Defense Site**

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This testimony is on behalf of four families who came to live in Spring Valley but who were never told their houses were on or near a dump site for weapons of mass destruction (WMD). The Dudley, Teleki, Hansen and Bohlen Families were each unaware that their children would be playing in soil laced with arsenic from lewisite and other gases, or that those children could be digging up containers that had held poisonous gases. I am holding in my hand one of the containers that held WMD from the Army's American University Experiment Station (AUES) – a container that Frances Hansen's young child found in their backyard in 2002. Neither the Army, nor American University (AU) who rented the house to Ms. Hansen, ever warned her or the other three families about potential exposure to AUES WMD, despite the extensive photographic and physical evidence that both the Army and AU had long possessed.

But the injustices perpetrated by the Army and American University are in the past, and the four families are, to their enduring credit, more interested in protecting future generations of Spring Valley families. Consequently, the primary focus of this testimony is a summary of the evidence that indicates that the Army and AU are still making an insufficient effort to research, locate and remove WMD from six sites in Spring Valley. The second portion of this testimony is a summary of the AUES-related

litigation that has occurred over the past 15 years that Congresswoman Norton has asked me to discuss.

Credible Evidence of AUES WMD Sites Not Yet Identified and Remediated

My law firm assists government officials and private companies trying to assess the nature and extent of environmental contamination at former US military sites. I agree with the Army that this is a technically challenging and expensive task, but with AUES WMD the stakes are very high. The Army's past record of leaving Spring Valley without finishing the job means that this Congress should demand greater assurances before the Army leaves again. The Army cannot be held to an impossible standard of locating and excavating all the WMD materials buried around AU – so many parts of the area around AU were dump sited containing all kinds of AUES materials. Nor can the Army be expected to commit unlimited funds trying to remediate every bit of arsenic-contaminated soil on top of and under the ground in Spring Valley. In my view, the current and future residents of Spring Valley would be best served by a thorough and independent analysis of the sites most likely to contain large amounts of potentially dangerous WMD, followed promptly by a cost-effective excavation and destruction effort at those sites. Crossing these sites off the list of AUES areas of concern would go a long way to restoring trust and confidence in the Army's efforts at Spring Valley.

Based on the evidence I have reviewed over a ten-year period, there are six priority sites in and around AU that merit a new, hard look:

1. The Sergeant Maurer Pit

The Army has in its possession a 1918 photo taken at AUES by Army Sergeant Maurer showing ceramic containers and metal drums near a burial pit whose location can be generally identified as near the current boundary of the AU campus, Glenbrook Road and the Korean Ambassador's Residence. The photo includes a notation that the containers held mustard gas that was being dumped in the pit. There was a criminal investigation of the Army's activities at Spring Valley in 2000, and an EPA investigative report indicated that the Army obtained possession of the Maurer photo in 1993. See attached EPA CID Investigative Activity Report. The Army later acknowledged the existence of the Maurer photo and the general location of the Maurer Pit. See attached 1997 Army Memo. To date, the Army has not found tangible evidence of the Maurer Pit, but these containers could leak and pose a substantial hazard to groundwater and DC drinking water supplies. As pointed out in the District's 1996 Report on AUES (attached), the corrosion of chemical weapons containers and shells poses the continuing danger of a WMD release. On the other hand, if the contents of the Maurer Pit have already leaked out, or if the containers in the photo were emptied rather than buried, then there would be no poisonous residue in the soil.

Regardless of the current physical state of the mustard gas containers, the photographic evidence of metal drums means that advanced geophysical detection devices could locate potential drum locations. However, the past geophysical detection methods employed by the Army did not have the capacity to locate drums at deeper depths or in hard-to-reach locations. Also, additional photos of AUES buildings have

been found to help further identify the location of the Maurer Pit. Until the Army uses all photos of AUES buildings and more advanced geophysical methods to thoroughly investigate the area shown in the Maurer photo, then the Spring Valley residents will be left with the knowing feeling that a WMD site locatable to within several hundred square yards was never found.

I want to note that the Army has been aware for more than ten years of AUES burials in a pit at a residence on Glenbrook Road (Pit 3), and in past pure lewisite, mustard and arsine gas were found in Pit 3. Over the past year the Army has found additional live chemical weapons in Pit 3 that will be destroyed later this summer. According to the EPA CID investigation, there were reports of buried drums during the construction of the residence where Pit 3 was located. It is of course conceivable that the reported drums from the Pit 3 location could be the drums depicted in the Maurer photo, and that Pit 3 and the Maurer Pit are the same or closely-connected. But the discovery of over 200 intact, live WMD that are not mustard weapons at Pit 3 could also indicate that Pit 3 is a WMD disposal pit containing experimental weapons rather than the containers and drums of mustard gas. The intact weapons seem more likely connected with another burial location, the Osborne Pit, described below.

A Spring Valley family that built one of the first residences near these AUES burial locations, the Dudleys, were never told of the former AUES land use and the potential burial sites adjacent to their residence. One child in the Dudley family who frequently played in the dirt in these adjacent areas, experienced acute skin irritation, similar to symptoms of exposure to lewisite. Nor were the Dudleys told of the Maurer photo, Pit 3 and other pits near their residence containing large amounts of AUES-related materials,

including live shells. The only thing the Dudleys were told by the Army was that arsenic hot spots had been found on their former property, which is now the Korean Ambassador's Residence. The question of course is whether these arsenic hot spots are related to the Maurer Pit, Pit 3, or any other AUES burial pits near Glenbrook Road. Only more thorough geophysical testing can answer these key questions, but the expense of further excavation and the potential objections of the Korean Government obviously pose a challenge for the Army. But given the photographic evidence of the WMD, should cost and political concerns really be allowed to stop the search for the Maurer Pit? I urge both the Congress and the Army to re-visit Sergeant Maurer's Pit that will always be the unmistakable image of WMD at AUES.

2. The Osborne Pit

AU has to date refused to release publicly the minutes of its Board of Trustees following closure of the AUES, but the fact is that some of these minutes have been disclosed for many years. Attached to this testimony is the May 22, 1920 Minutes prepared by Trustee Albert Osborne recording AU's acceptance of a "proposition" by the U.S. government to compensate AU for damage by the Army to the AU campus. In addition, several articles in the attached April 1921 edition of the AU Courier newspaper reported an additional proposition regarding buried munitions, and why that proposition was made. The Army had dug a pit "deeper than the one into which Joseph was cast" for the burial of chemical munitions. The Courier states that the munitions were "taken back to the limit of the [American] University acres and there buried..." The Courier article valued the munitions at \$800,000.

The location of this burial pit would most likely be at the western boundary of the AU campus, and indeed there have been numerous AUES burial pits and materials found throughout the entire down-gradient area ringing the current AU campus from Rockwood Parkway to Glenbrook Road. But there are three points that indicate that the Osborne Pit has not yet been located and would be a separate large burial site: 1) no extremely deep AUES pit, especially one dug from 1919 ground-level has been located, and 2) munitions valued at \$800,000 in 1919 dollars have not been found (or at least such finds have not yet been disclosed by the Army); and 3) explosively-configured munitions of the Osborne references and mustard containers of the Maurer photo might not be safe choices for joint burial. As noted above, the munitions described for the Osborne pit could conceivably be those currently being found at Pit 3 or at other Army excavations along Glenbrook Road or Rockwood Parkway, but to date these excavations do not appear to have identified the large amount of munitions referenced by the Courier.

There is a 1919 inventory (attached) of the WMD at AUES that was prepared as part of a request to ship the WMD, and the large amount and variety of weapons could approximate the Courier's valuation of the munitions. For example, the inventory lists 1976 high explosive shells, over 1000 incendiary bombs, and over 100 air burst gas shells. There is much uncertainty whether this inventory is an accurate reflection of what remained at AUES in 1919, and whether any of the listed munitions were indeed transported. What are not in doubt are the multiple sources of credible evidence of large amount of chemical munitions remaining at AUES at the conclusion of WWI, and the fact that the Army has not determined or announced the location of any significant number of these munitions. As with the Maurer Pit, the munitions in the Osborne Pit are

locatable with advanced geophysical techniques, but there is no question that there is a significant challenge in finding the precise location of such a deep pit dug so long ago. But such challenges should not deter the Army from mounting a renewed effort to locate the pit described by the Courier.

What is particularly offensive to the four families is that the Army and AU have known about the possible locations of AUES burial pits since at least 1986 when an EPA Historical Photographic Analysis clearly showed evidence of AUES-related ground scars indicating excavation sites (potential burial pits) on the western edges of the AU campus. The findings of the 1986 EPA report made it clear that there was credible photographic evidence of possible burial sites on or near the property of the four families. But this 1986 EPA report was never disclosed to any Spring Valley residents until many years later. The key point is not that the 1986 EPA report could have conclusively shown exactly where the Maurer, Osborne or any other burial pit was located. Rather, the EPA report should have been immediately disclosed to potentially affected residents so that they could have drawn their own conclusions, and so that these families could have sought assurances from the Army that their residences were not located on or near the burial sites indicated in the photographs.

The nondisclosure of the 1986 report was the first in a series of Army and AU actions that had the apparent intent of withholding material information from Spring Valley residents. Starting in 1986, neither the Army nor AU chose to warn potentially affected residents near potential burial sites, and both the Army and AU failed to be transparent in their subsequent historical, technical and legal investigations. This pattern of failure to

disclose and warn continued for the four families through 2002, and is the prime motivating factor for my testimony today.

3. The Dalecarlia Reservoir Woods (AOC2/Zone 9)

In 1994, the Army conducted a geophysical survey of 14 acres of the woodlands to the east of Dalecarlia Reservoir. The Army found five live rounds and numerous fragments of munitions, but the Army did not perform a complete geophysical survey of the area. The Army is aware of 109 “anomalies” and 2 potential disposal areas in this “Area of Concern 2” (AOC2). One of the reasons that the EPA Criminal Investigative Division conducted an inquiry in 2000 was the allegation that hundreds of flags indicating potential magnetic anomalies in this area had been removed prior to excavating the anomalies. Regardless of whether the flags were actually removed, or why, a thorough geophysical survey of this area has not been accomplished to date. Four acres in the center of AOC2 where anomalies were identified have never been investigated.

More recently, in response to television new coverage, an individual has come forward with information that he had removed 55 experimental rounds from a shallow burial at the end of a ravine in the Dalecarlia woods. The Army was given approximately 20 of these rounds in 1984, but the Army failed to follow up on this information.

Given the close proximity to the DC water supply, and the past concerns about the completeness and credibility of the Army effort at this location, the Army’s effort at Dalecarlia woods is another example of early-identified and critical potential AUES disposal locations that has not been thoroughly investigated or remediated. The previous excavations at Dalecarlia woods uncovered relatively few munitions, so completing a

thorough survey with similarly-few finds would help to restore confidence in the safety of the DC water supply and in the Army.

4. 52nd Court

In 1993, during construction of residential properties on 52nd Court by the Miller development company, a number of AUES munitions were discovered. As described below, Miller sued the Army for the expenses incurred in construction delays and disposing these munitions, but it is significant that the Miller company had a very long history in Spring Valley. The Millers had been purchasing property in the Spring Valley area since 1924, only four years after AUES was closed. There are reports that the Army left fences and signs regarding its activities after the Army left AUES, and many of the landowners adjacent to the borders of American University were personally aware of the Army's activities at AUES. Attached is a 1918 Army memo recording AUES use of private properties. So it seems implausible that the Millers would have no knowledge of AUES burial sites around the borders of American University. Yet the Millers have maintained in past congressional testimony that their family knew nothing of AUES munition burials until 1993.

More recently, the Army has been trying to obtain landowner consent to the placement of monitoring wells on 52nd Court. After an extended period when landowners refused to provide the Army with access for groundwater monitoring (and after it was clear that EPA would seek a court order to force access), the monitoring will apparently proceed. The failure of private parties to provide the Army with access to their land has been another challenge that the Army did not need. The excavation of Pit 3 as described above was significantly delayed by a refusal to grant access (and related litigation). The

lesson from these access refusals seems clear – given the manifest need to protect public safety from AUES WMD, the Army and EPA should make it plain to any resident of Spring Valley that access for investigational purposes is consistent with, and required by, federal environmental statutes. If any resident continues to refuse access for investigational purposes, then EPA should promptly utilize its legal authorities to obtain access.

52nd Court was one of the earliest significant AUES-related sites to be investigated by the Army. It would be another boost to the confidence of the community if the Army follows through on its newly-granted access and determines that groundwater has not been impacted by AUES contaminants. The large number of live and potentially live rounds found at 52nd Court (well over 140 munitions), and the extensive number of containers and loose contaminants found (approximately 95), have created significant concern about potential groundwater contamination.

5. The American University Public Safety Building

In late February 2009, mercury was found in a debris field behind the AU Public Safety Building. This should be no surprise, because a wide variety of AUES debris has been found at other locations near that Building, and mercury was used for shell fuzes at AUES. What would be a very unpleasant surprise is the possibility that AUES-related mercury is still present in the ground near or under the Public Safety Building. Beyond the significant technical challenges and financial costs associated with dealing with such a possibility, the threat to student safety and groundwater from such a scenario would be serious. AU's reluctance to inform its student body of the mercury contamination

continues the pattern stretching back to 1986 of failing to disclose/warn residents and students of credible evidence of AUES-related health and environmental risks.

6. The American University Parking Lot Adjacent to Nebraska Ave

Aerial photos show an additional potential AUES-related burial site on what is now the AU parking lot adjacent to Nebraska Avenue. I understand that the Army is considering an investigation of this site. Following up on aerial photo evidence is a tangible indication that the Army is being more pro-active on potential AUES-related burial sites. If nothing is found at this site, then the Army will have demonstrated that it has investigated this area.

There is one other point that I want to make that is not specific to any particular residence in Spring Valley. Because many of the AUES poisonous gas such as arsine, lewisite, phosgene and mustard are heavier than air, the air quality in the lower basement areas of several houses in the Glenbrook Road and Rockwood Parkway area should be tested. Good air quality findings from such testing would significantly address residents' concerns about exposure to these heavier-than-air AUES poisonous gases.

AUES-Related Litigation

Congresswoman Norton has requested that I address the various AUES-related lawsuits that have occurred over the past 15 years. There are several common factors in these cases:

- (1) Recovering financial compensation from the US government for the acts of the Army at AUES is very unlikely under the current judicial interpretations of the Federal Tort Claims Act; the burials by the Army at AUES are considered non-

compensable “discretionary” acts, regardless of the dangers the Army created by burying AUES WMD.

- (2) AU is not protected by the “discretionary act” exemption to the Federal Tort Claims Act; AU settled a lawsuit by a resident who bought a house near Pit 3, after a federal judge found that AU failed to warn/disclose information AU possessed about AUES-related burials near the residence.
- (3) The parties to the lawsuits have sought to seal the court filings associated with these cases as part of the settlements; the actions sealing the court filings have prevented the public disclosure of material (and perhaps embarrassing) information about the actions, inactions or knowledge of the litigants regarding AUES activities and burial sites.
- (4) The lawsuits to date reflect a “blame game” where the protection of public health and environment of Spring Valley is not addressed; the litigation to date has focused on individual claims for monetary compensation, rather than claims against the Army or EPA for failure to comply with federal environmental statutes governing cleanups at formerly used defense sites.

The litigation to date has had relatively little impact on the priorities or pace of the Army’s investigations at Spring Valley. In the 1990’s, the Miller Company sued the Army for expenses Miller incurred in connection with the 1993 discovery of AUES

munitions at 52nd Court. Miller obtained compensation from the Army after a federal judge found that the Army had “booby-trapped” 52nd Court. However, the Army still decided that no further response action was needed in Spring Valley, and declared its investigation over in 1995.

In July 2001, AU sued the Army for \$86 million, claiming that this sum would be necessary to indemnify AU from the costs and liabilities associated with AUES contamination. Then and now, this lawsuit appeared to be a transparent effort to shift blame from AU to the Army, but the facts are that AU had long known about the AUES burials and accepted the government’s 1920 “propositions” regarding those burials. In any case, the Army did not indemnify AU for \$86 million, but the Army has continued to investigate AUES burials on and near the AU campus.

In 2002, the owner of a house on Glenbrook Road sued AU and the developer for failing to warn the homeowner of the existence of AUES-related contamination. After lengthy litigation in the federal and DC Superior Court, AU settled the case and sealed the court filings. This lawsuit did delay the excavation of Pit 3, where live WMD requiring destruction has been found because the Army could not obtain access.

At this point, I am not aware of any further significant litigation involving the Army, AU or Spring Valley developers. I am attaching one of the key opinions in the 2002 litigation against AU, as it states the key facts relating to AU’s knowledge of AUES burials near Glenbrook Road.

Conclusion

We have frequently heard the Army and AU say that they are doing what they can to investigate AUES sites, but the real issue for this Subcommittee is whether they have

done what they should. From a legal and public policy perspective, the key question is whether there is credible documentary, photographic, technical or eyewitness evidence that would lead a person concerned about public safety and the environment to investigate these sites more thoroughly using advanced scientific techniques?

Unfortunately, the past history I have related regarding the four families has often demonstrated that neither the Army nor AU has acted as if public safety were their predominant concern. Both the Army and AU have spent years trying to minimize the financial and public relations impacts of the AUES cleanup, and they must live with those decisions. But the Congress has a broader responsibility and authority to demand that all credible evidence be gathered and reviewed by unbiased experts, and that the WMD sites of greatest scientific probability be located and remediated. If this Congress does not ensure that these steps are taken before the Army ceases its investigational and remedial activities in Spring Valley, then I sadly foresee another family some day in the future paying a terrible price.

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A number of public servants and public-minded individuals have assisted me over the years in understanding the facts about AUES, and providing written materials. Chief among those individuals who can be recognized by name is Charlie Bermphol, the local reporter and writer who has worked tirelessly to uncover and disclose to the public the most important facets of the shrouded history of AUES. Another key contributor has been Ginny Durrin, whose video documentary is the most compelling visual record of

AUES. I believe that the information and records I am providing to the Committee are just a tiny portion of the credible evidence that exists on the six sites referenced in this testimony.

In closing I want to thank this Subcommittee for its aggressive oversight of the Spring Valley situation, and encourage the Subcommittee to inquire about the level of independent oversight being conducted by the District of Columbia and US EPA.

Documents for the record:

- EPA Criminal Investigation Division Investigative Activity Report, 9/19/00
- Army Memo discussing Maurer 1918 Photo, 3/20/97
- District of Columbia Dept. of Consumer and Reg. Affairs Report, July 1996
- American University Board of Trustee May 22, 1920 Minutes
- American University Courier 1919 Articles
- War Department Inventory for AUES February 10, 1919
- Memo and Map of Army use of private property for AUES, 1918
- Copies of Judicial Opinion