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*If Veterans don't help Veterans, who will?*

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# Legal Alert

## A Newsletter by Weitz Morgan PLLC Attorneys

### Special Edition

#### Lost at Sea: The Vietnam "Blue Water Navy" Vets Case"

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For ten years, between 1965 and 1975, three million young Americans, many of them still boys, answered their country's call and served as soldiers, sailors, airman, and marines in Vietnam. Some were drafted, but many volunteered, and at the time the cause seemed clear: stop the spread of communism. By the late 1960's the goal became obscure. The war fell out of favor as Americans began to question our involvement in a conflict that drained both human and financial resources and seemed to bring few tangible results. In the end Vietnam became a symbol of the limits of American power and influence. Sadly, a foreign policy and military set back became a national tragedy as the denunciation of the war at home evolved into a rejection of those who fought. Over fifty-eight thousand never returned and those who did brought back scars, both physical and emotional, that never healed. Overt ridicule gradually dissipated, only to be replaced with a callous indifference to the sacrifice these men made. It would only get worse for many of these veterans because what no one knew at the time was that they had carried back the seeds of their own destruction, seeds sown not by their enemy, but by their own country.

Known as "Operation Ranch Hand" the defoliation of Vietnam's jungles exposed American servicemen to a toxic and deadly chemical. Spread over 3.6 million acres, Agent Orange not only killed the jungle down to the root, but by the 1980's it was permanently disabling and killing Vietnam veterans by the tens of thousands. In 1984 Dow Chemical, Monsanto, and other chemical companies involved in the manufacture of Agent Orange agreed to a 180 million dollar class action settlement to be paid to Vietnam Veterans. However, when spread out over the hundreds of thousands of eligible vets the amount was woefully inadequate. In many cases, the money provided the means to bury them as they succumbed to the diseases caused by the toxin. In 1995 this author's uncle, William P. Weitz, was laid to rest in Phoenix, Arizona after losing his battle with lung cancer. His part of the settlement afforded him a small box in which his cremated remains were placed and then interned in a barren, sun scorched portion of a cemetery close to his home, leaving only a few thousand dollars for his widow.

In an effort to address this deadly legacy of the war that had become an epidemic, the United States Congress passed the Agent Orange Act of 1991. Section 2 of the Act contains one of the most important aspects of the legislation. It provides for a presumption of a service related connection between the diseases and conditions identified in the Act and the spraying of Agent Orange. In other words, if one served in Vietnam, it is presumed that the cancer or other condition he or she suffered from was caused by Agent Orange. Legally this presumption is crucial. Without it, the veteran bears the burden of proving his or her condition was caused by Agent Orange. The cost alone would destroy a vet's ability to prove his claim. Even if he or she could afford to pay the experts necessary to argue the claim, showing the direct connection would in many cases be impossible.

The Veterans Administration (VA) was directed to implement a program under the Act whereby veterans would be compensated for the effects of exposure. The VA directed that any service man or woman who "served in Vietnam" would be presumed to have been exposed for purposes of receiving compensation. In many cases the receipt of a Vietnam Service Medal was all that was required. As one might expect hundreds of thousands of claims poured in, and the VA began paying. Among those who filed claims were the sailors of the United States "Blue Water Navy."

There were essentially two navies serving in Vietnam. The "Brown Water Navy" patrolled the rivers and inlet waterways of Vietnam, while the "Blue Water Navy" served offshore, both inside and beyond Vietnam's twelve mile territorial limit. Many of the countless air strikes both on North Vietnam and in close air support of U.S. soldiers fighting in the south and the DMZ came from carrier based aircraft. U.S. Destroyers provided myriads of combat related services, including close artillery support for land-based operations, and transporting troops and supplies, often close to shore and under enemy fire. It is virtually inconceivable that anyone could ever doubt that the men who served in the "Blue Water Navy" fought in Vietnam. In addition to receiving the Vietnam Service Medal, many were decorated for valor. Sadly, the inconceivable occurred.

Shortly after George W. Bush took office in 2001 the VA redefined "serving in Vietnam." In a directive issued in 2001 the VA took the position that service in Vietnam now required "foot on land." If a veteran could not show that he or she actually set foot in-country, they would not be afforded the presumption that their medical condition or disease was caused by Agent Orange. In one bold stroke the sailors of the "Blue Water Navy" lost their ability to successfully prosecute their claims for benefits. The VA offered no study or empirical evidence for this complete reversal of policy other than the assertion that direct exposure to Agent Orange required being on land.

Not only did the VA alter its policy without any reasonable basis, but it also ignored the fact that "Blue Water" sailors were suffering and dying from the same diseases that their land-based comrades experienced. However, without the presumption afforded by the Agent Orange Act they could not prove their claims for benefits. By 2003 the benefits that "Blue Water" sailors had been receiving stopped completely. Today many are owed almost five years of back benefits that for many vets totals well into the six-figure range. The goal of the 1991 Act was to make it easier for veterans to prove their claims and receive compensation. The VA's position flies directly in the face of that goal. But while the U.S. government found a way to punish its sailors for their service, other nations took a closer look, and their approach makes the VA's actions toward the "Blue Water Navy" all the more disgraceful.

Sailors from Australia also served in Vietnam. As time passed Australia began to notice that veterans of its Royal Australian Navy (RAN) were dying at a rate greater than the land-based Aussies who fought in Vietnam. The conditions that were killing these men were the diseases associated with Agent Orange. Food for the RAN came directly from Australia, there was no record of a RAN ship ever being directly sprayed, and few of the sailors ever set foot on land. However, rather than conclude that members of the RAN were not exposed and thus were not entitled to benefits, the Australian government probed deeper. Australia's investigation generated a report that explained how its sailors were exposed.

Warships require a constant supply of freshwater and that supply is replenished by distilling sea water. The sea water is fed into an evaporator where it is boiled, condensed, and then fed into holding tanks. While the process removed the salt from the water, it did not filter out the toxins associated with Agent Orange. This process routinely took place within close proximity to shore as military operations did not allow a ship to cease its mission, travel out to sea, replenish its water supply, and then return. The Australian study concluded that Agent Orange sprayed in the jungles close to shore found its way into the ocean and that when the RAN ships replenished their water supply, they unknowingly contaminated their sailors and exposed them to Agent Orange.

The VA is aware of this study, but rather than use it as a basis to help the "Blue Water Navy" sailors, it has chosen to discount the findings and deny that these men served in Vietnam for purposes of the 1991 Act. In August 2001, Jonathan Haas, a veteran who served on the U.S.S. Katmai, filed his claim for benefits under the 1991 Agent Orange Act. Consistent with their change in policy the VA rejected his claims because it was undisputed that Haas never set foot in Vietnam. Mr. Haas appealed to the Veterans Court where a three-judge panel reversed the Veterans Board decision, holding that the VA definition of service that required "foot on land" was too restrictive and was unreasonable. The Court concluded that Mr. Haas was entitled to the presumption. In most instances that would have ended the debate; Mr. Haas and the

other veterans could have advanced their claims with the benefit of the presumption they were rightfully entitled to claim.

However, that is not what happened. On May 8, 2008, in a 2-1 decision, the U.S. Court of Appeals for the Federal Circuit reversed the Veterans Court and upheld the VA's definition that "service in Vietnam" required foot on land. Admitting that they "ordinarily will not hear appeals from the Veterans Court in cases the Veterans Court remands to the Board of Veteran's Appeals," the Court not only made an exception, but used the exception to destroy the ability of the "Blue Water Navy" veterans to prove their Agent Orange claims. In holding that the VA's definition was "reasonable" the Federal Circuit in effect completely discounted the sacrifices made by this branch of the U.S. military, sacrifices that they continue to suffer for today.

The "Blue Water Navy" vets are literally lost at sea, adrift on an ocean of legal technicalities and administrative burden that most if not all will never overcome if this situation is allowed to stand. Recently these veterans began to return their Vietnam Service Medals in protest of the treatment they are receiving at the hands of the very government that sent them off to war. Mr. Haas has requested an en banc review of his case before the entire panel of the Federal Circuit. That request is pending. If denied it is contemplated he will appeal to the Supreme Court. Right now the most important thing that can be done for these men is to publicize the details of their plight. At this juncture access to media outlets is crucial to educating the public as to what is transpiring, which is one reason we chose to publish this edition of the newsletter solely on this topic. Time is running out for these Vietnam veterans. Many are dying from their diseases, while others are taking their own lives as their conditions worsen and any hope for a favorable resolution diminishes. There is still a chance for America to meet its obligations to its veterans. Remember, all that is needed for wrong to prevail is for righteous people to do nothing.