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Document Control Office
Office of Pollution Prevention and Toxics
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-00001

Submitted Electronically to: Docket ID OPPT-2005-0049

Re: Comments on EPA's Proposed Rule to Amend the Opt-Out and Recordkeeping Provisions in the Lead Renovation, Repair, and Painting Program, Docket No. EPA-HQ-OPPT-2005-0049

Dear Sir or Madam:

The Hearth, Patio & Barbecue Association (HPBA)[1] appreciates the opportunity to comment on EPA's proposed rule to amend the opt-out and recordkeeping provisions found in the Lead Renovation, Repair, and Painting Rule (RRP rule) (40 C.F.R. § 745.80 *et seq.*). The proposal appears at 74 Fed. Reg. 55506 (October 28, 2009).

HPBA strongly supports the broad principle behind EPA's proposed rulemaking – that of protecting occupants of residential dwellings from lead hazard exposure, especially pregnant women and children under the age of six. However, HPBA has a number of concerns regarding the removal of the opt-out provision from the RRP rule. Our comments on the proposed amendment focus primarily on: 1) the agency's concerns surrounding lead exposure from exterior renovation activities; 2) the issue of lead hazards related to renovations conducted prior to a home sale; 3) delaying the effective date of the amendments to the RRP rule ; and 4) the proposed alternatives to the opt-out provision.

I. Background

The agency's authority to promulgate the RRP rule arises from the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2681 *et seq.* TSCA requires EPA to establish regulations that apply to renovation or remodeling activities in target housing that create lead-based paint hazards. *See* 15 U.S.C. 2682(c)(3). A lead-based paint hazard includes "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is

[1] HPBA is an international trade association first established in 1980 to represent and promote the interests of the hearth products industry in North America. The Association includes manufacturers, retailers, distributors, manufacturers' representatives, service and installation firms, and other companies and individuals – all having business interests in and related to the hearth, patio, and barbecue products industry. HPBA's members manufacture, import, distribute, sell, service, install, and represent products that include: (1) factory-built fireplaces, gas logs, inserts, and accessories; (2) wood, pellet, coal, and gas stoves; (3) barbecues, grills, and accessories; and (4) patio furniture and accessories. All but a few of our member companies are small businesses.

deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects…" *Id.* at § 2681(10). Target housing includes, with several exceptions, any housing constructed prior to 1978. *See id*. at § 2681(17). The statute calls on EPA to craft regulations in a reasonable and prudent manner and to consider the economic impact of any regulatory action.[2]

On April 22, 2008, EPA promulgated the final rule on Lead Renovation, Repair and Painting pursuant to TSCA.[3] 73 Fed. Reg. 21692. The 2008 final rule included an opt-out provision that allowed renovators to avoid certain requirements of the rule if they obtained certification from the owner of target housing that no children under the age of six resided there, no pregnant women resided there, and the housing was not a child-occupied facility. *See* 40 C.F.R. § 745.82(c).

After the issuance of the final RRP rule, several advocacy groups challenged the rule. As a result of these challenges, EPA signed a settlement obligating the agency to propose several changes to the rule. The agency's October 28, 2009 proposal embodies these changes, including removal of the opt-out provision and changes to the recordkeeping provisions.

HPBA's chief concerns lie with the removal of the opt-out provision. First, while HPBA members do engage in construction activities in homes, they do so only for the narrow purpose of installing or servicing hearth appliances such as gas fireplaces or wood stoves.[4] They do not engage in what normally would be seen as home renovation. For example, to install a new gas fireplace in a home, it is often necessary to cut a single hole in both the inside and outside wall in order to install the appliance. This process is typically accomplished quickly (in four hours or less) and the portions of the wall are typically removed in 2 or 3 large pieces in the interests of speed and efficiency. Such construction constitutes a minimal potential disturbance to whatever lead-bearing materials may be present. Yet the regulations treat that construction as a form of renovation.[5] As a result, removal of the opt-out provision in its entirety has the potential to trigger training and paperwork burdens for installers of hearth appliances that are greatly out of proportion to the minimal lead-related risks presented by their activities. This result does not represent the reasonable balancing of risk and cost required by TSCA. In addition, as described below, installation activities at the typical HPBA member customer's home do not pose a substantial lead-based paint hazard to the occupants or occupants of neighboring homes. As a result, we recommend that the agency narrowly tailor the opt-out provision instead of removing it entirely.

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[2] Specifically the statute states: "It is the intent of Congress that the Administrator shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter." 15 U.S.C. § 2601(c).

[3] The regulations define renovation as: "…the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 C.F.R. 745.223). The term renovation includes (but is not limited to): The removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather-stripping), and interim controls that disturb painted surfaces. A renovation performed for the purpose of converting a building, or part of a building, into target housing or a child-occupied facility is a renovation under this subpart. The term renovation does not include minor repair and maintenance activities." 40 C.F.R. § 745.83.

[4] The term "hearth appliances" includes wood-burning, natural gas-fired, and pellet-fired fireplaces and stoves that are used for heating purposes.

[5] That is, unless the hole is small enough that it falls within the "minor repair and maintenance activities" exemption located at 40 C.F.R. § 745.83.

II. EPA Should Establish a Proximity Threshold for Exterior Renovations Rather Than Subjecting All Exterior Renovations to the Requirements of the RRP Rule

The agency solicits comments in its proposal on the possibility of maintaining an opt-out provision for interior renovations, but requiring all exterior renovations to be subject to work practice standards. The agency is concerned that exterior renovations conducted without applying work practice standards in one home can result in lead exposures in attached homes or homes in close physical proximity to the renovation site. HPBA urges the agency to consider creating a modified opt-out provision that applies to interior renovations and certain exterior renovations that occur at homes not in close physical proximity to other homes. Requiring the application of work practice standards to all outdoor work situations is unnecessary and would impose substantial cost on the regulated community.

HPBA requests that EPA conduct an exposure assessment to determine the lead-dust dangers posed to neighboring homes at varying distances – thereby establishing a "safe" distance, beyond which neighboring homes bear little or no risk of exposure. The proposal only speaks in general terms, stating that the exterior work practice standards in the RRP rule are "generally effective at reducing lead dust levels generated by exterior renovation activities, which the Dust Study showed can travel far enough from the work site to create lead hazards on or in attached homes or homes in close physical proximity"; and that "[R]enovations on the exterior of a residence can spread leaded dust and debris some distance from the renovation activity…" 74 Fed. Reg. at 55509. The agency, however, has provided no definition of the vague terms "close… proximity" and "some distance", nor any data in the record from which one might fashion a suitable definition. The agency must fit its policies rationally to the facts. Here, it has failed to develop the facts adequately so as to fashion a rational policy.

In considering the possibility of limiting the opt-out provision to interior renovations, the agency is clearly concerned about the impacts on the homes that are in close proximity to the worksite. Therefore, it would be logical for such an opt-provision to contain a proximity threshold or nexus. Incorporating a threshold that applies a minimum distance to adjacent homes for exterior renovations would still protect occupants of homes in close proximity to the renovation activity without unnecessarily subjecting all exterior renovations to the requirements of the RRP rule. By way of example, the opt-out provision we contemplate would apply only to exterior renovations at homes that are situated at least "x" feet from other homes. EPA could generate this proximity threshold from an exposure study, or alternatively, the agency could rely on the record behind an existing proximity threshold in another comparable regulatory regime that establishes "safe" distances from renovation activities.

HPBA members frequently install hearth appliances in customer homes. These installations often amount to exterior "renovations" due to the size of cut-through holes needed for gas fireplace installation. However, a consumer research study that HPBA conducted in 2008 indicated that approximately 84% of hearth appliance owners reside in areas designated as suburban or rural.[6] Only 16% of hearth appliance owners reside in urban areas. Additionally, 83% of hearth appliance owners live in a single family home, as opposed to a high-rise, townhouse, apartment house, condominium or mobile home. Therefore, the vast majority of residences where these installations occur are stand-alone homes that likely have adequate buffer zones to ensure that

[6] HPBA's 2008 Consumer Research: see attached copy.

neighboring residents will not be exposed significantly to lead dust hazards possibly associated with the renovation activity.

Also, homes in suburban and rural areas tend to be of more recent vintage than homes located in urban areas. It follows that newer homes will likely have fewer coats of paint on the exterior. Additionally, newer homes have a decreased probability of containing lead paint. Only 24% of housing built in the roughly 20 year period preceding the 1978 cut-off date set by TSCA's definition of target housing contains lead paint.[7] HPBA recognizes that the 1978 cut-off date has been mandated by Congress, and that the agency has little discretion on this issue. However, we make this point to further illustrate that a carefully crafted opt-out provision for exterior renovations can still protect the public health without resorting to broadly including all exterior renovations within the purview of the RRP rule.

HPBA encourages EPA to design the amended rule with an opt-out provision that appropriately considers adjacent home proximity for exterior renovations. This type of opt-out provision would serve to protect occupants of closely situated homes – a legitimate objective of the current proposed rule – yet it would avoid imposing the compliance burdens associated with the RRP rule on hearth appliance firms performing low-risk activities.

III. EPA Should Require Additional Stipulations in the Opt-Out Certification to Protect Future Homeowners Rather Than Removing the Opt-Out Provision Entirely

In the preamble to the proposed amendment to the RRP rule, the agency points out that the current opt-out provision does not adequately protect prospective purchasers of recently renovated homes from lead dust hazards. Its logic is that the opt-out certification only applies to current occupants of a home, and the lead dust hazards created by a renovation could carry over into the next homeowner's occupancy. HPBA recognizes that this shortcoming of the current opt-out provision creates a population of individuals that may not be adequately protected by the RRP rule. However, HPBA believes that this shortcoming need not be addressed by removing the opt-out provision entirely, an extreme solution, but rather by requiring a combination of additional stipulations in the opt-out certification, record-keeping, and disclosure.

The opt-out provision certification currently only requires the home owner to make stipulations regarding the current occupancy and use of a home. The agency should consider bolstering the opt-out provision to require the homeowner to make a certification that the sale of the home is not imminent. By way of example, the opt-out provision could be revised to require a homeowner to make a certification that the home is not currently in escrow, listed for sale, or that the owner has no immediate plans to sell the home. This type of certification would help ensure that renovations performed in contemplation of the sale of a home adhered to the work practice requirements of the RRP rule. A useful counterpart to such certification would be a requirement that anyone who does sell a home after an RRP-exempt renovation occurs, must so disclose the renovation to the buyer. This disclosure would effectively put the new homeowner on notice that there is a possibility that the home contains a lead dust hazard.

Approximately 72% of hearth appliance owners reside in their "lifelong" home, or a home in which they have chosen to retire.[8] Only 11% of hearth appliance owners reside in their first home. These data indicate that the average home on which a hearth appliance installer works does

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[7] BATTELLE, Draft Final Report on Characterization of Dust Lead Levels After Renovation, Repair, and Painting Activities, 1-1 (2007).

[8] HPBA's 2008 Consumer Research: see attached copy.

not have a high turn-over rate – meaning that hearth appliance installation activities do not pose a high risk of contributing to increased lead exposure for future homeowners. HPBA suspects that there are numerous other low-risk niche industries that would be subject to the RRP requirements if the opt-out provision were removed. Instead of taking the drastic measure of removing the opt-out provision entirely, EPA should carefully consider how it could narrow the opt-out provision so that these types of firms are not subject to unnecessarily increased regulatory requirements.

HPBA also urges the agency to provide data supporting the conclusion that lead dust from renovations performed prior to a home sale can persist in a home in quantities that rise to the level of a lead dust hazard. Inherent in this analysis would be whether typical renovation contractor clean-up not performed pursuant to the RRP rule and routine cleaning and vacuuming by a homeowner could sufficiently mitigate dust hazards over time such that the sale of target housing does not pose a substantial lead dust hazard. The proposal does not offer anything in the way of data regarding this issue.

IV. HPBA Requests That EPA Delay the Effective Date of the Proposed RRP Rule Amendments for at Least One Year

HPBA estimates that anywhere from 2,000 – 3,000 of its members would need to become certified pursuant to the RRP rule if the opt-out provision were removed entirely. EPA estimates in its Regulatory Flexibility Act analysis for the proposed amendment that removal of the opt-out provision would require 101,000 small residential contractors to seek certification. HPBA believes that the actual number of contractors who would require certification if the opt-out provision were removed is higher.

EPA also estimates in the preamble to the proposed rule that the capacity exists for over 370,000 renovators to be certified by July 1, 2010 given the current number of certified trainers and trainers who have applied for certification. This certification capacity estimate is based on a number of potentially unrealistic assumptions: 1) the estimate is contingent on 91 trainers becoming certified; 2) it assumes that each trainer will offer 3 classes per week; and 3) it assumes that each class will include an average of 25 participants. These assumptions ignore logistical realities related to scheduling and travel time for both instructors and contractors. Contractors are a relatively diffuse sub-population with many located in rural areas – meaning that many contractors will need to travel substantial distances to obtain certification. For these reasons, HPBA requests that EPA delay the effective date of the proposed RRP rule amendments for at least one year.

V. Maintaining an Opt-Out Provision for Interior Renovations Only Is Preferable to Removing the Opt-Out Provision Entirely

As mentioned above in Section II, HPBA is confident that factoring an adjacent home proximity nexus into the current opt-out provision is a better alternative than removing exterior renovations from opt-out provisions altogether. However, in the event that EPA does not retain the opt-out provision with a proximity nexus or threshold, HPBA urges the agency to retain an opt-out provision that applies only to interior renovations. Such an opt-out provision would nearly eliminate the possibility of exposure for neighboring residents, a driving factor behind the proposed amendment. With respect to exposure to visitors to the interior of the home, HPBA suspects that the average exposure risk during visits for non-residents is not significant enough to warrant the costs and compliance burdens associated with removing the opt-out provision for interior renovations.

VI. HPBA Supports the Alternative of Applying Only Limited Work Practice Standards to Homes That Are Currently Subject to the Opt-Out Provision

HPBA supports the alternative of applying only limited work practice standards to homes that are currently subject to the opt-out provision. The three practices that EPA suggests prohibiting under this option – open-flame burning or torching, the use of machines to remove lead-based paint, and operation of heat guns on lead-based paint at certain temperatures – are all high-risk activities that result in much higher lead exposure levels than other activities associated with renovation. HPBA members would only utilize these practices in very rare circumstances when conducting a hearth appliance installation. HPBA assumes that there are numerous other groups of niche contractors who also rarely use these practices. Thus, this alternative would likely prove financially tolerable for numerous constituencies while still protecting home occupants from renovation activities that create the highest incidence of lead hazard exposure.

HPBA appreciates the opportunity to provide input on EPA's proposed amendment to the RRP rule. We urge the agency to issue a final rule that is protective of the public health, without being overly protective and needlessly costly for small contractors. We hope you will give these comments careful consideration.

Sincerely,

W. Allan Cagnoli

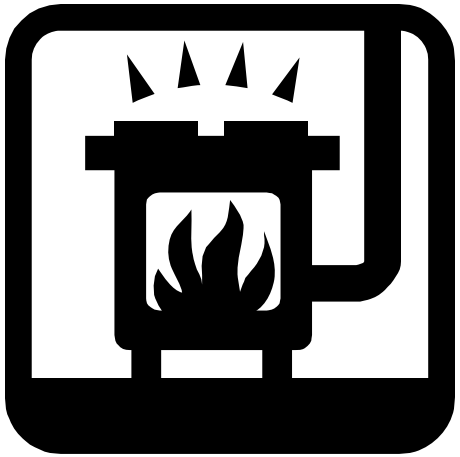
W. Allan Cagnoli
Director, Governmental Affairs

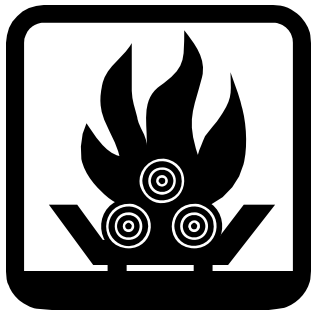
Attachment
Cc (w/att.):

Jack H. Goldman, Ph.D. (HPBA)
John Crouch (HPBA)
Peter H. Wyckoff (Pillsbury Winthrop Shaw Pittman LLP)
David Menotti (Pillsbury Winthrop Shaw Pittman LLP)

ATTACHMENT

HPBA's 2008 Hearth Consumer Research

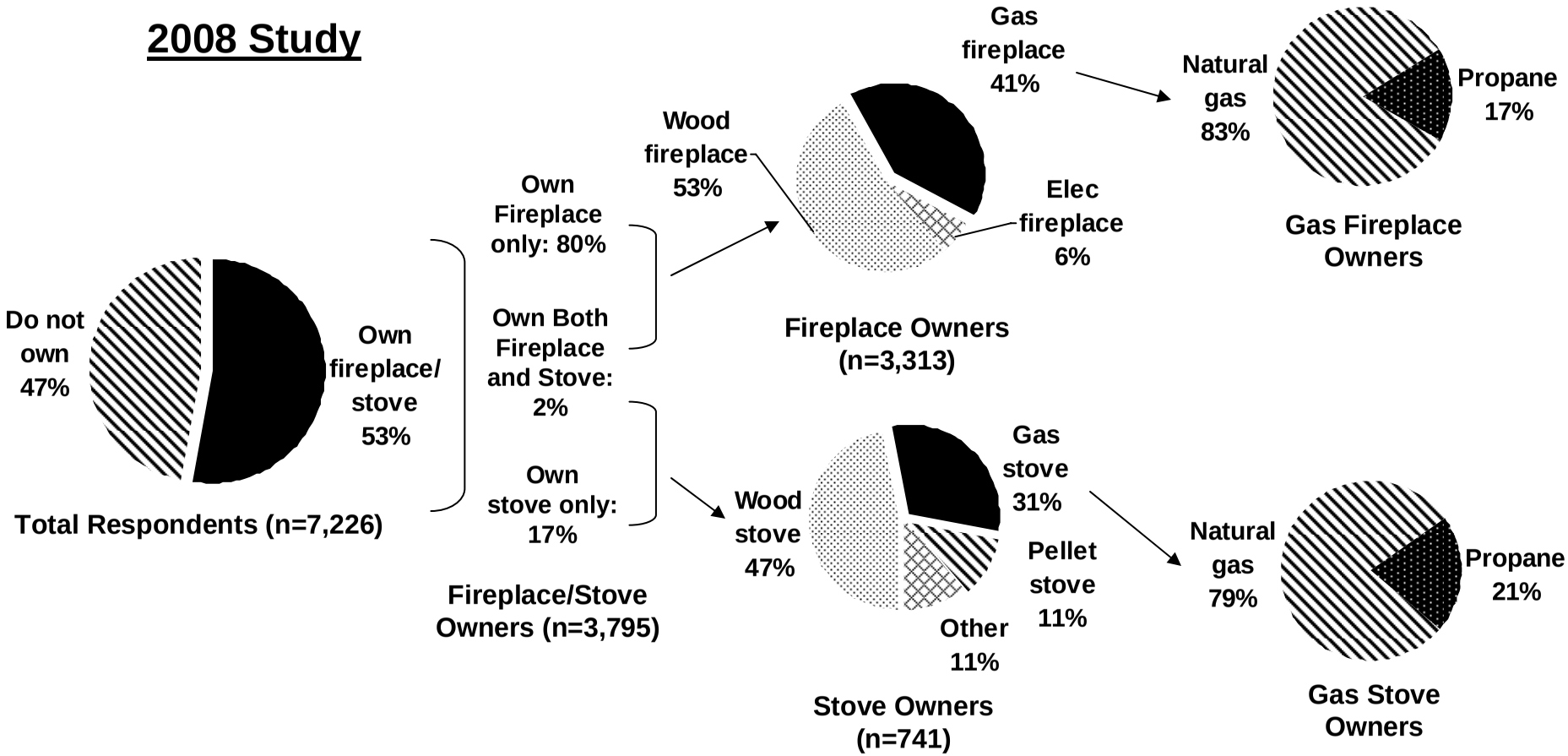




Don Johnson

HPBA Director of Market Research

Own Fireplace/Stove in Primary Residence

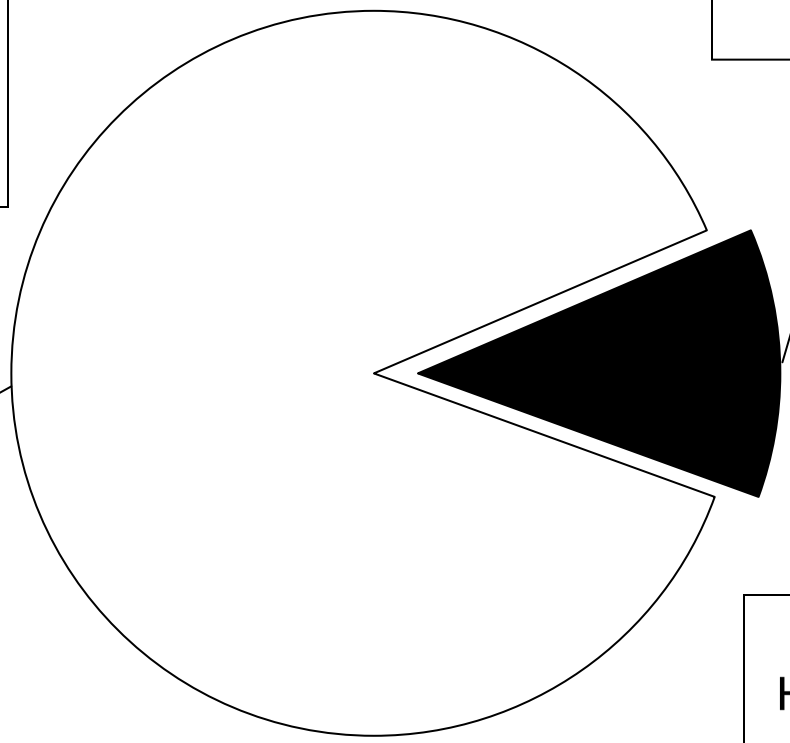


8% of Fireplace Owners Have an Insert

Almost 9 out of 10 Hearth Appliance Owners Own Their Own Home

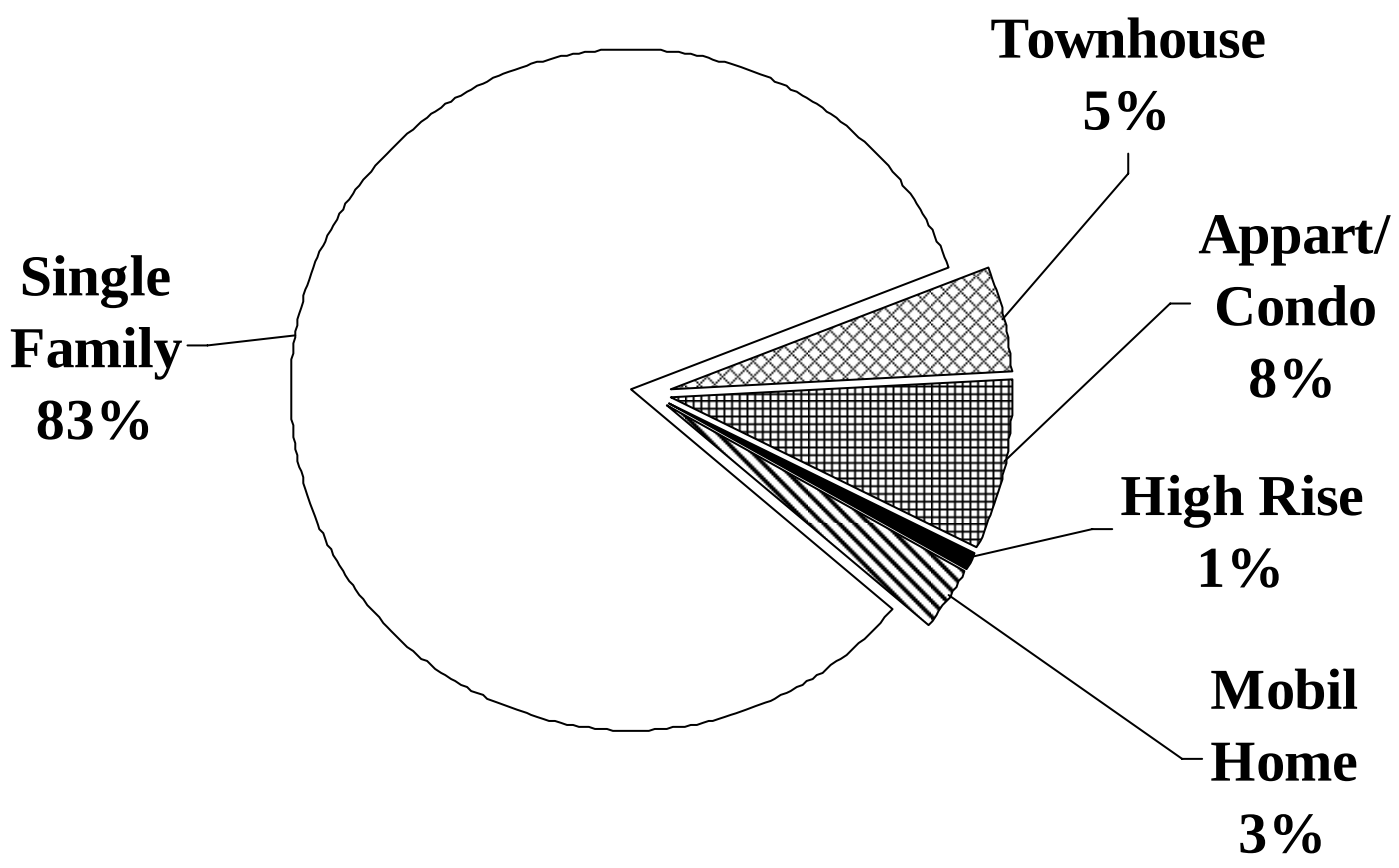
Average Annual Household Income of Hearth Appliance Owners – $74,300

Average Size of Household – 2.5

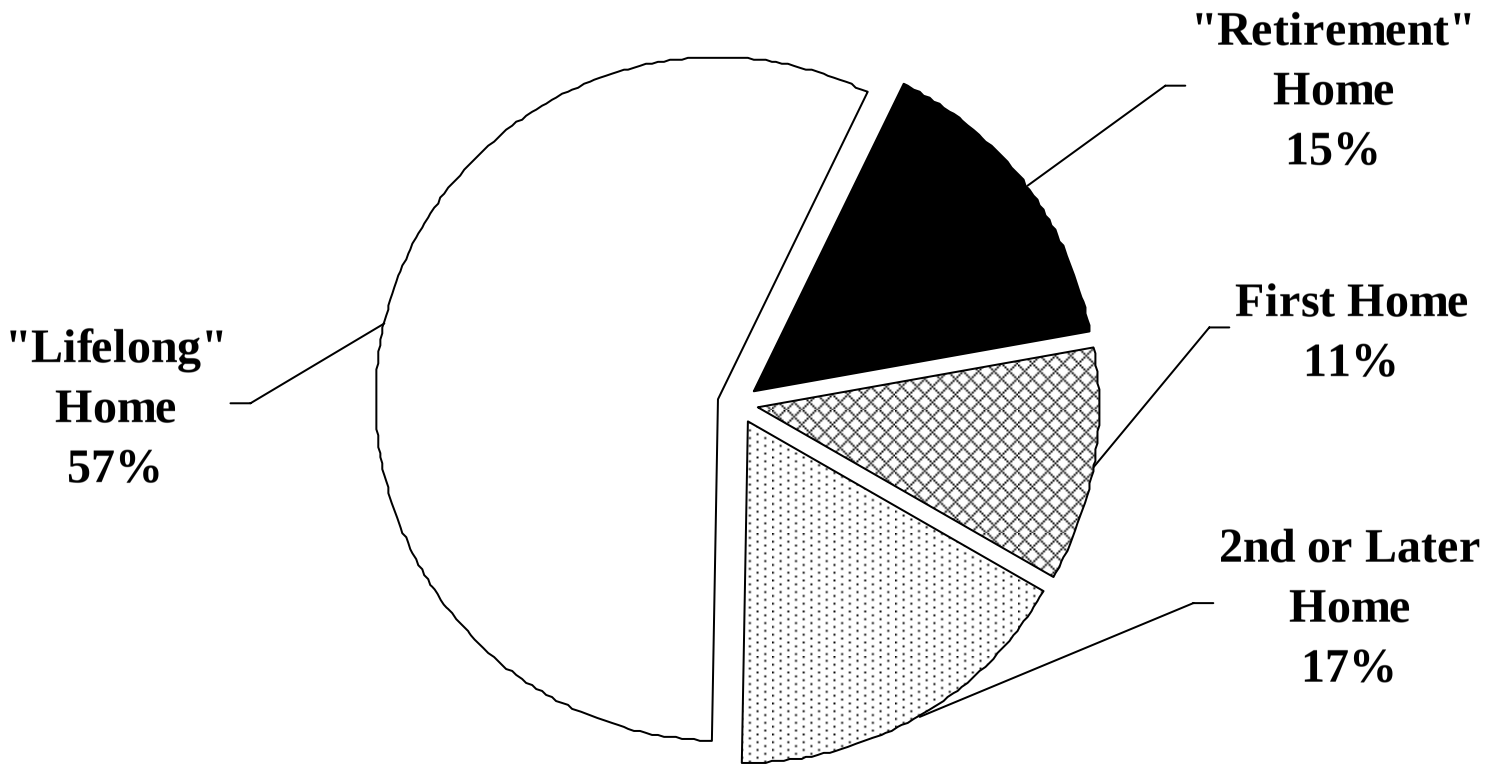


Average Age of Hearth Appliance Owners – 52 Years

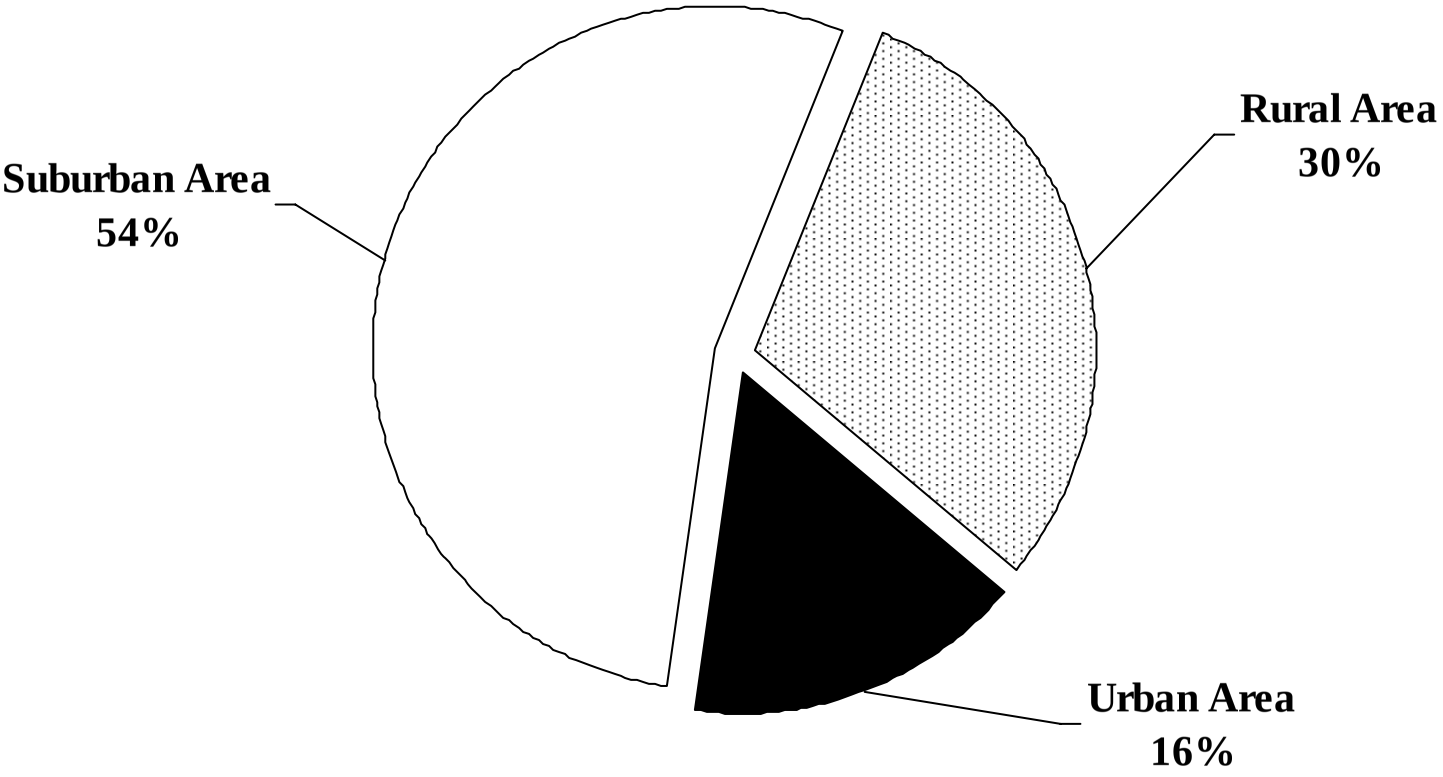
More Than 8 out of 10 Hearth Appliance Owners Live in a Single Family Home



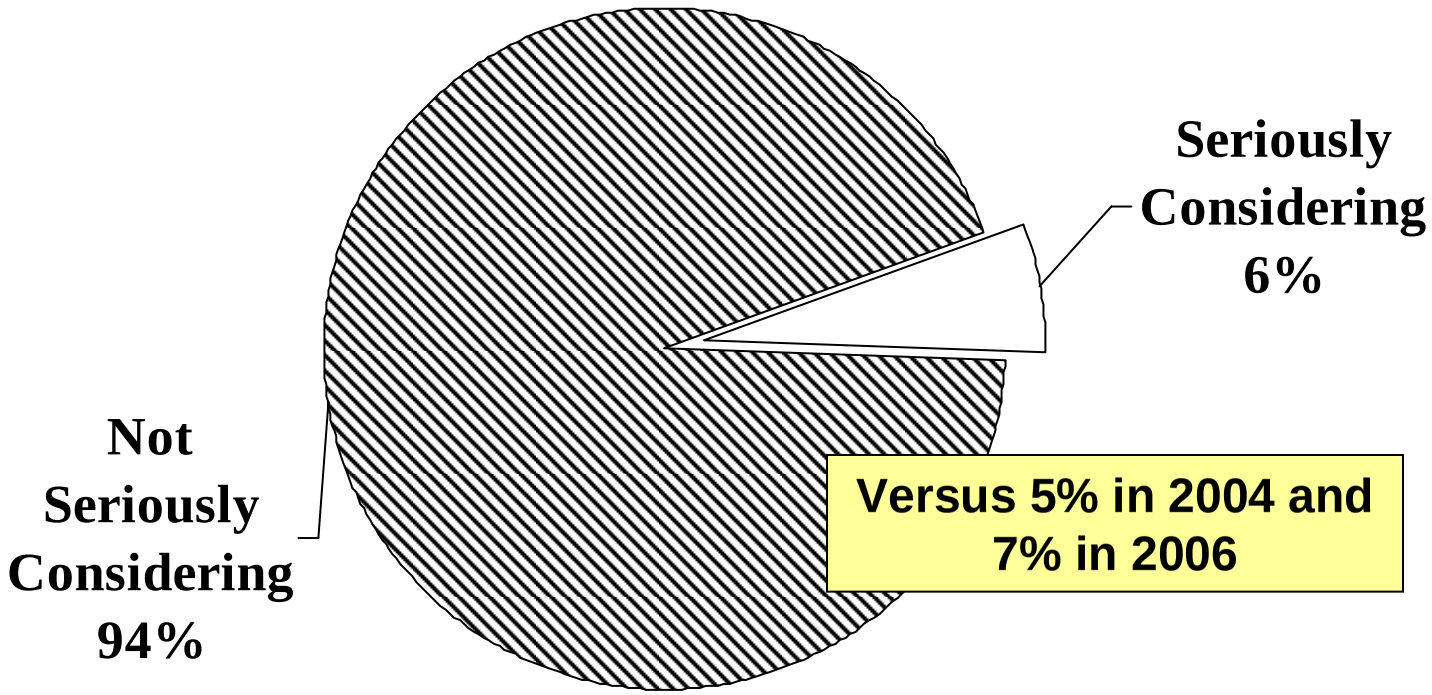
Almost 6 out of 10 Hearth Appliance Owners Are Living In Their “Lifelong” Home



Residence Location of Hearth Appliance Owners



Intent to Install a Hearth Product for Those that Do Not Have a Hearth Product in Their Residence



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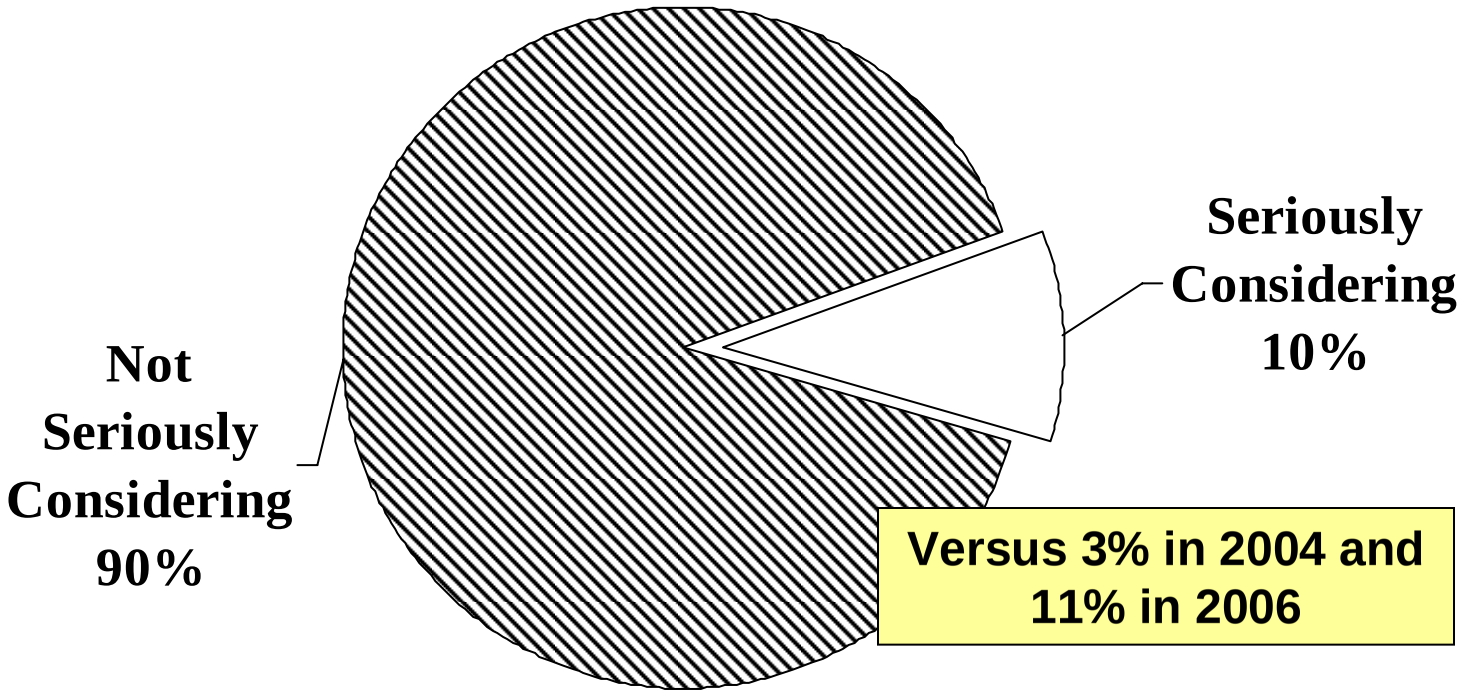
Intent to Install a Hearth Product for Those that Already Have a Hearth Product in Their Residence



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