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May 1, 2019

The Honorable Troy D. Jackson, President  
MAINE STATE SENATE  
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Augusta, Maine 04333

The Honorable Sara Gideon, Speaker  
MAINE HOUSE OF REPRESENTATIVES  
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Augusta, Maine 04333

The Honorable Erin Herbig, Senate Chair  
The Honorable Matthea Daughtry, House Chair  
COMMITTEE ON INNOVATION, DEVELOPMENT, ECONOMIC ADVANCEMENT AND  
BUSINESS  
100 State House Station  
Augusta, Maine 04333

The Honorable Mark Lawrence, Senate Chair  
The Honorable Seth Berry, House Chair  
COMMITTEE ON ENERGY, UTILITIES AND TECHNOLOGY  
100 State House Station  
Augusta, Maine 04333

Re: *2017/2018 Attorney General Report to the Legislature  
Under the Petroleum Market Share Act*

Dear President Jackson, Speaker Gideon, Senators Herbig and Lawrence, and Representatives Daughtry and Berry:

I am pleased to submit this report in accordance with the Petroleum Market Share Act (PMSA), 10 M.R.S.A § 1677. The PMSA requires the Attorney General to make a report to the Legislature describing the concentration of retail outlets in the State, including a recommendation as to whether additional legislation is needed to further limit or curtail the activity of refiners operating retail outlets.

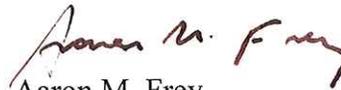
Letter from Attorney General Frey to Legislature  
May 1, 2019  
Page Two

Enclosed is a report describing concentration of retail outlets in the State. The report, which is based on data collected from wholesalers of both motor fuel oil and home heating oil, includes maps depicting relative concentration in designated markets throughout the State. This report is also available on the Attorney General's website at:  
<http://www.maine.gov/ag/docs/PMSA%20Report%202017-2018.pdf>.

Since no refiners of petroleum products operate retail outlets in this State, we recommend no legislation to limit or curtail such operations.

I appreciate this opportunity to provide this information and hope it is useful.

Sincerely,

  
Aaron M. Frey  
ATTORNEY GENERAL

Enclosure

cc: Grant T. Pennoyer, Executive Director, Maine State Legislature  
John R. Barden, Director, Maine State Law and Legis. Reference Library  
Jamie Py, President, Maine Energy Marketers Association

**STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL**

**Aaron M. Frey, Attorney General**



**PETROLEUM MARKET SHARE ACT**

**REPORT OF THE ATTORNEY GENERAL  
TO THE MAINE LEGISLATURE  
PURSUANT TO 10 M.R.S. § 1677**

**FOR THE REPORTING PERIOD  
2017 – 2018**

**May 2019**

**Retail Petroleum Outlets Concentration**  
**10 M.R.S.A. § 1677**  
**April 2019**

**I. INTRODUCTION**

This report is provided by the Attorney General to the Legislature pursuant to Maine’s Petroleum Market Share Act (“PMSA”), 10 M.R.S.A. § 1677. As required by the statute, the report describes the concentration of retail petroleum outlets. The concentration levels described in this report reflect conditions in Maine as of the end of May 2018. The statute also requires the Attorney General to make “a recommendation to the Legislature as to whether additional legislation is needed to further limit or curtail the activity of refiners operating retail outlets.” The Attorney General does not recommend any legislative changes at this point.

The report focusses on markets for home heating oil and motor fuel oil. In general, the geography of petroleum markets is local. In the case of home heating oil, the market may encompass an urban area or a segment of a county. Motor fuel markets tend to be smaller, in some instances limited to a single neighborhood or one side of a busy street. For continuity purposes, our analyses retain the longstanding geographic markets developed by the Attorney General in the 1990s, when the PMSA reporting first began. The state is divided into 33 home heating oil (“HHO”) markets and Maine’s 16 counties are used as the motor fuel oil (“MFO”) markets.

As required by the PMSA, home heating oil and motor fuel oil wholesalers submit data annually to the Maine Attorney General indicating the annual

gallons supplied to each home heating oil and motor fuel retailer located in Maine. Using this data, the Maine Attorney General is able to determine the number of retail competitors and their percentage market shares within the pre-defined geographic markets.<sup>1</sup> 10 M.R.S.A. § 1673. Those figures, in turn, allow us to calculate where each of the HHO and MFO markets falls on a concentration index widely used by federal and state antitrust agencies to assess competitive conditions (usually in the context of proposed mergers and acquisitions). The Appendices to the Report show the concentration levels, and corresponding maps depicting those levels, for each pre-defined market. The tables in the Appendices also show concentration numbers for the same markets for the past ten years for comparison purposes.

## **II. LEVELS OF CONCENTRATION**

### **A. Methodology**

The methodology employed by the Maine Attorney General to assess levels of concentration in Maine's retail petroleum markets, as reflected in this report, is essentially the same methodology used by the U.S. Department of Justice, the Federal Trade Commission, and other state Attorneys General in evaluating the legality of a given merger or acquisition under applicable antitrust law. The Maine Attorney General has employed a similar analysis

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<sup>1</sup> It should be noted that the Attorney General collects neither retail nor wholesale price information under the PMSA. Moreover, the data collected from individual wholesalers, which is confidential by statute, is aggregated and not identifiable by wholesaler or retailer in this report. 10 M.R.S.A. § 1675.

enforcing Maine's merger law for more than thirty years. 10 M.R.S.A. § 1102-A.

The most important factor affecting competition in a particular market is the level of concentration (how many sellers and the size of their market shares). The retail level sales volume data the Maine Attorney General receives annually from home heating oil and motor fuel oil wholesalers allow us to calculate market shares of retailers within a defined geographic area.

**1. Market Definition.** The first step in a concentration analysis is to determine the relevant product and geographic markets. This report focusses on two product markets, home heating oil and motor fuel oil. Home heating oil is defined as “#2 fuel oil sold for heating residential, industrial or commercial space or water.” 10 M.R.S.A. § 1672(3). Motor fuel “means internal combustion fuel sold for use in motor vehicles,” as more fully defined in 29 M.R.S.A. § 101(42). 10 M.R.S.A. § 1672(4).

Determining geographic markets for this report is less straightforward. For the purposes of this report, we are not looking to identify the geographic area within which two merging companies operate, as we would if we were reviewing a proposed merger. Rather, we are dividing the state into a series of geographic markets to obtain a very broad snapshot of competition in the petroleum industry and trends across the entire state.

The Maine Attorney General has taken different approaches to defining geographic markets for home heating oil and for motor fuel oil. At the time the Attorney General initially began preparing these reports, we conducted a series

of interviews with a number of persons knowledgeable in the petroleum industry in Maine. On that basis, we divided the state into 33 separate geographic markets intended to approximate economic and competitive circumstances relative to home heating oil sales. Motor fuel markets are generally more localized than home heating fuel markets. However, since our task is not to analyze a specific local merger, but rather to portray broad trends in levels of concentration across the state, we use county-wide markets. Markets are not static, of course, and economic and competitive factors over time might lead to slightly different geographic market selections today. Nonetheless, we have retained the original geographic markets to be able to compare concentration trends over time within consistent geographic areas.

Importantly, these geographic market depictions are not used to analyze individual mergers or acquisitions in Maine. Each individual merger or acquisition proposal will require an evaluation of the unique competitive and economic circumstances in the areas within which both companies operate.

**2. Herfindahl-Hirschman Index.** Market concentration is a well-accepted tool for evaluating competitiveness within identified markets. As a general rule, the fewer the competitors, and the higher those competitors' market shares, the more concentrated (and less competitive) the market. Federal and state antitrust agencies (including the Maine Attorney General) employ the Herfindahl-Hirschman Index ("HHI") to measure market concentration.<sup>2</sup> The

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<sup>2</sup> DOJ/FTC Horizontal Merger Guidelines (rev. ed. 2010)(available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>).

HHI concentration index is arrived at by squaring the market shares of all the competitors in a given market. This simple mathematical device expresses the insight that market power increases exponentially in proportion to market share. Federal antitrust guidelines used by the Maine Attorney General in merger enforcement indicate that a market with an index of 1000 or less should be viewed as unconcentrated (and therefore likely to function competitively).<sup>3</sup> A market with an index between 1000 and 1800 is described as moderately concentrated; while any index over 1800 is termed highly concentrated.<sup>4</sup> A market in the highly concentrated category is subject to a high degree of market power, unless the effects of high concentration are mitigated by other factors, such as ease of entry for a new competitor.

Our analysis of levels of concentration in home heating oil markets tracks the categories reflected in federal guidelines. Thus, a home heating oil market with an index below 1000 is “unconcentrated,” 1000-1800 is “moderately concentrated,” and 1800-2500 is “highly concentrated.” Markets above 2500 points are referred to as “extremely concentrated.”

For our designated motor fuel markets, we have adjusted the concentration index to reflect the fact that the large, county-level geographic markets inevitably understate levels of concentration. Thus, for motor fuel, an index below 500 is “unconcentrated,” 500-1000 is “moderately concentrated,”

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<sup>3</sup> For example, ten firms with market shares of 10% each would yield an index of 1000 (10 squared x 10).

<sup>4</sup> For example, a market comprising five firms with market shares of 20% each would yield an index of 2000 (20 squared x 5).

and 1000-1800 is “highly concentrated.” Markets above 1800 points are referred to as “extremely concentrated.”

Appendix A lists the geographic markets within which we measure concentration at the retail sales level for both home heating oil and motor fuel oil. The HHO markets map depicts the relative concentrations in the 33 designated home heating oil geographic markets, based on the latest analysis of data from wholesalers. The MFO markets map depicts the relative concentrations based on the latest analysis of county-wide retail motor fuel markets. Again, these geographic market depictions are not used to analyze individual mergers or acquisitions in Maine. The tables in Appendix B contain the latest HHI concentration analyses within both home heating oil and motor fuel markets, as well as concentration comparisons in those markets over the last ten reporting years.

## **B. Overview - Retail Home Heating Oil Markets.**

Overall, concentration levels in Maine’s home heating oil markets have remained relatively consistent. We note that some variations from last year are due to refinement/corrections made to the database compilation process (*e.g.* the higher concentration in Market 19 for this report as compared to the last report is due not to a substantive change in concentration but rather due primarily to a wrong address for a retailer in the prior reporting period).

As was the case for the last reporting period, only one market achieved the unconcentrated designation - this time in southern coastal Maine between Kennebunk and Old Orchard Beach. The greater Augusta area saw a slight

decrease in competition, moving from unconcentrated to moderately concentrated. Generally speaking, the more competitive home heating oil markets (either unconcentrated or moderately concentrated) are located in the more densely populated areas of the state, such as those in reasonable proximity to the state's major north-south highway (south of Waterville, at least), including greater Portland, Lewiston/Auburn, Biddeford/Saco, and Augusta. The greater Belfast coastal area is also among the more competitive markets in the state, as is central Penobscot County.

The markets stretching from Waterville - Pittsfield - Bangor - Ellsworth to the coast, as well as the southern Penobscot and Hancock County areas, are moderately concentrated. These areas roughly follow the turnpike from Waterville through Bangor/Old Town then southeast (through Ellsworth to the coast). Similar to last year's report, the least densely populated regions of the state, such as Northern and Downeast Maine, generally fall into the least competitive, extremely concentrated designation.

Multiple home heating oil markets bordering or in reasonable proximity to New Hampshire remain depicted as among the most concentrated, or least competitive. However, since we don't collect data pertaining to retailers based in New Hampshire who deliver in Maine, those regions may be more competitive than our maps depict.

While, in general, concentration levels have remained relatively consistent, there are several markets that have shifted noticeably. The most notable shifts were improvements in two markets experiencing 2,000+ point

reductions in concentration levels, namely Market 7 (around Old Town and Orono), and Market 24 in the Gray/New Gloucester area.

### **C. Overview - Retail Motor Fuel Oil Markets.**

The concentration levels for the county-wide motor fuel markets have not shifted significantly since the last report. Three counties remain extremely concentrated (Knox, Oxford, and Piscataquis), though Lincoln County improved from extremely to highly concentrated. Piscataquis County bears note in that it experienced a dramatic 2,500-point decline in concentration level, even though it is still extremely concentrated.

All three southernmost coastal counties, namely, Cumberland, Sagadahoc, and York became more competitive shifting from highly to moderately concentrated since the last reporting period. Franklin and Hancock Counties retain their relatively competitive moderately concentrated levels.

## **III. RECOMMENDATION**

The Attorney General is required to recommend whether additional legislation is needed to further limit or curtail the activity of refiners operating retail outlets. We do not recommend any changes on that basis, since there are no refiner retail operations in Maine in either home heating oil or motor fuel oil. Further, we recommend no changes to the law because it works relatively well for the Office as a starting point in merger enforcement. The ready availability of sales data from wholesalers enables the Attorney General to evaluate competitive conditions surrounding proposed mergers and

acquisitions in the petroleum industry much more quickly than we would be able to if the data were not required under the PMSA. This makes merger enforcement in this area more nimble for the Attorney General, and less burdensome for companies wishing to engage in merger or acquisition transactions in the Maine petroleum industry.

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## APPENDIX A

### HHO MARKETS

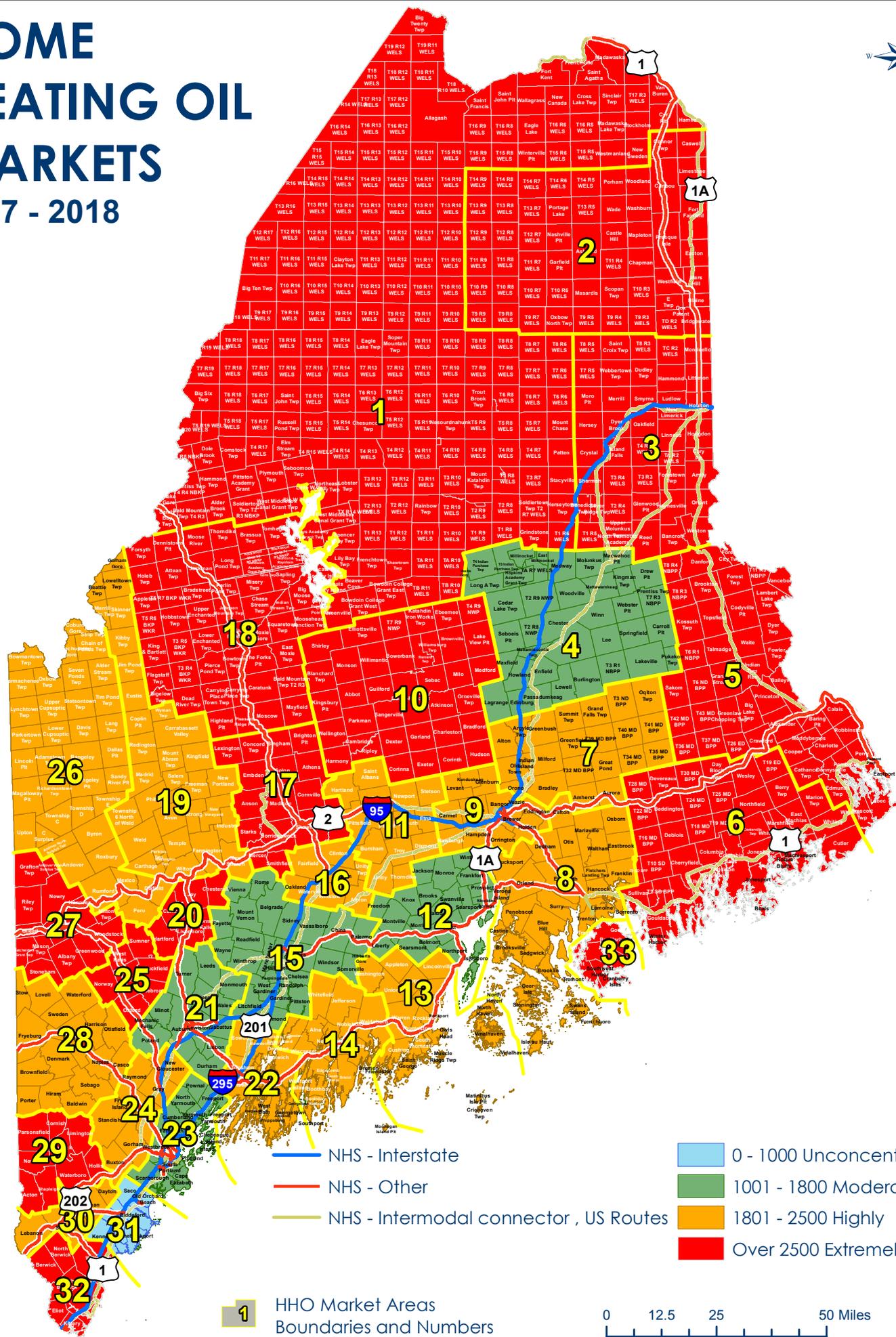
1. St. John Valley
2. Ashland/Presque Isle
3. Houlton
4. Lincoln
5. Woodland/Calais
6. Cherryfield/Machias
7. Old Town
8. Ellsworth
9. Bangor
10. Dover-Foxcroft
11. Pittsfield/Newport
12. Belfast
13. Rockland
14. Mid Coast
15. Augusta
16. Waterville
17. Skowhegan
18. Jackman/Greenville
19. Farmington
20. Jay
21. Lewiston/Auburn
22. Bath/Brunswick
23. Portland
24. Gray
25. Paris
26. Rumford/Rangeley
27. Bethel
28. Bridgton
29. Limerick
30. Sanford
31. Biddeford/Saco
32. York
33. Mt. Desert

### MFO MARKETS

- Androscoggin
- Aroostook
- Cumberland
- Franklin
- Hancock
- Kennebec
- Knox
- Lincoln
- Oxford
- Penobscot
- Piscataquis
- Sagadahoc
- Somerset
- Waldo
- Washington
- York

# HOME HEATING OIL MARKETS

## 2017 - 2018

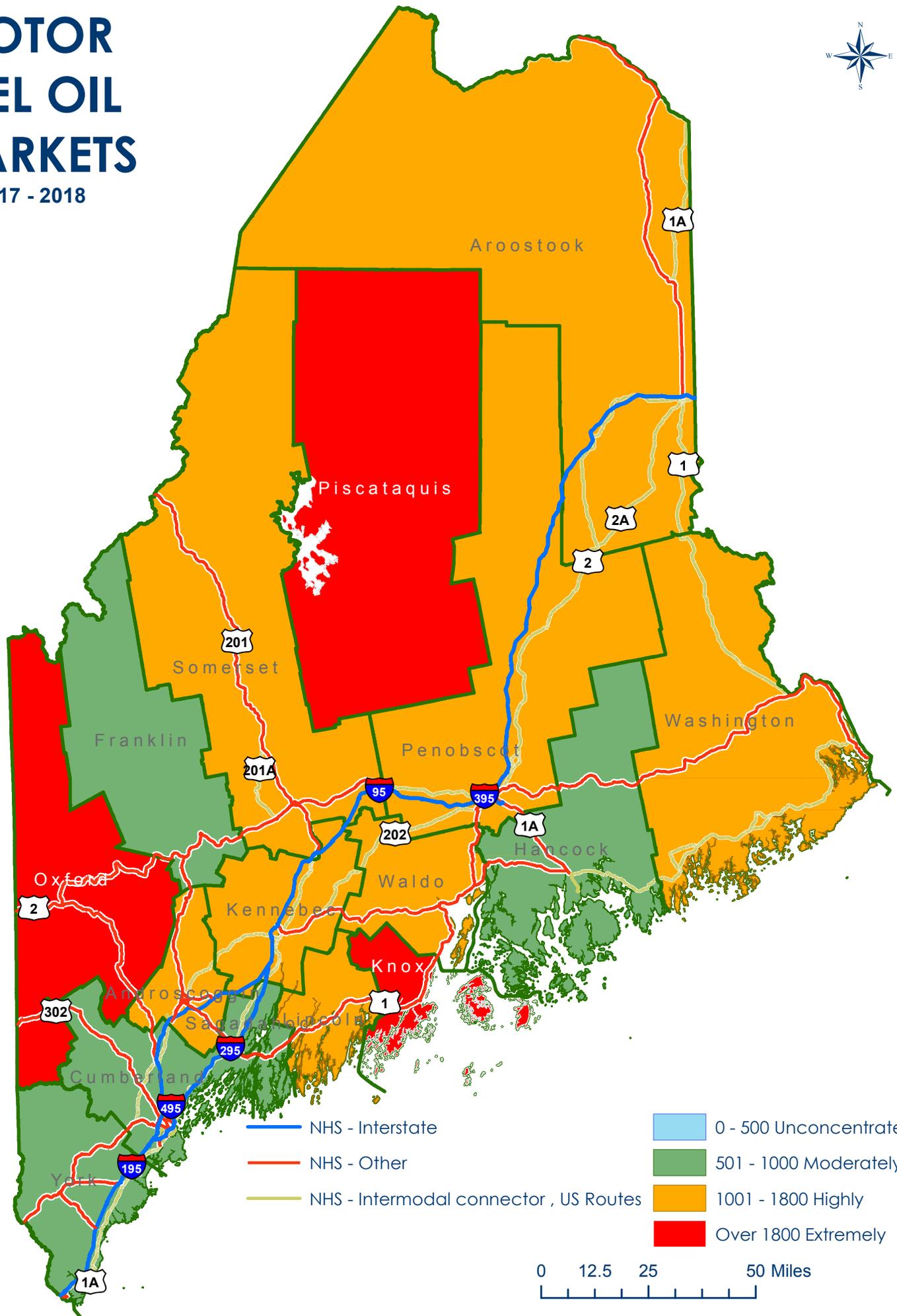


- NHS - Interstate
- NHS - Other
- NHS - Intermodal connector, US Routes
- 0 - 1000 Unconcentrated
- 1001 - 1800 Moderately
- 1801 - 2500 Highly
- Over 2500 Extremely

**1** HHO Market Areas Boundaries and Numbers

# MOTOR FUEL OIL MARKETS

2017 - 2018



**APPENDIX B**

**HHI DATA TABLES**

**HHO & MFO Concentration by Market Area 2008 to 2017**



