DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R5–ES–2018–0050; 4500090023]

RIN 1018–BD15

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Candy Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the candy darter (*Etheostoma osburni*) under the Endangered Species Act (Act). In total, approximately 596 stream kilometers (370 stream miles), in Virginia and West Virginia, fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for the candy darter. Elsewhere in the **Federal Register** today, we published a final rule listing the candy darter as an endangered species under the Act.

DATES: We will accept comments on the proposed rule or DEA that are received or postmarked on or before January 22, 2019. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 7, 2019.

ADDRESSES: You may submit comments on the proposed rule or DEA by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R5–ES–2018–0050, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: Docket No. FWS–R5–ES–2018–0050, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Document availability: The DEA is available at *https://www.fws.gov/northeast/candydarter,* at *http://www.regulations.gov* under Docket No. FWS–R5–ES–2018–0050, at the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**), and at the Southwestern Virginia Ecological Services Field Office (330 Cummings Street, Abingdon, VA 24210–3208).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *https://www.fws.gov/northeast/candydarter,* at *http://www.regulations.gov* under Docket No. FWS–R5–ES–2018–0050, and at the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**) or Southwestern Virginia Ecological Services Field Office (address provided above). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Offices set out above, and may also be included in the preamble and/or at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: John Schmidt, Field Supervisor, U.S. Fish and Wildlife Service, West Virginia Ecological Services Field Office, 694 Beverly Pike, Elkins, WV 26241–9475; telephone 304–636–6586. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, any species that is determined to be endangered or threatened requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can be completed only by issuing a rule.

This rule proposes to designate critical habitat for the candy darter (*Etheostoma osburni*). Elsewhere in today's **Federal Register**, we published a rule to list the candy darter as an endangered species under the Act.

The basis for our action. Under the Endangered Species Act, any species that is determined to be an endangered or a threatened species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Endangered Species Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

We prepared an economic analysis of the proposed designation of critical habitat. To consider economic impacts, we prepared an analysis of the economic impacts of the proposed critical habitat designation. We hereby announce the availability of the draft economic analysis and seek public review and comment.

In the near future. We intend to reestablish populations within the candy darter's historical range under section 10(j) of the Act in a future publication, and we are seeking public input on other potential recovery tools and on areas currently unoccupied by the candy darter within the historical range that contain essential physical and biological features (see Exclusions, below, for more detail).

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of

designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of candy darter habitat;

(b) What areas, that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the candy darter and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that may be impacted.

(6) Information on the extent to which the description of probable economic impacts in the draft economic analysis (DEA) is a reasonable estimate of the likely economic impacts.

(7) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(9) Information about currently unoccupied areas within the historical range of the species that contain the essential physical or biological features that would aid in the reestablishment of populations under section 10(j) of the Act.

(10) Information regarding the need for other recovery tools such as safe harbor agreements, in addition to, or instead of, the designation of critical habitat, and why.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

All comments submitted electronically via *http://www.regulations.gov* will be presented on the website in their entirety as submitted. For comments submitted via hard copy, we will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive and supporting documentation we used in preparing this proposed rule will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

See the candy darter proposed listing rule (82 FR 46197; October 4, 2017) for a history of previous Federal actions prior to today's publication of this proposed rule.

Elsewhere in today's **Federal Register**, we published a final rule to list the candy darter as an endangered species under the Act.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are

essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We will determine whether unoccupied areas are essential for the conservation of the species by considering the life-history, status, and conservation needs of the species. This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the species status assessment (SSA) report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available data at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species' conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Service may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat.''

There is no imminent threat of take attributed to collection or vandalism identified under Factor B for this species (82 FR 46197; October 4, 2017), and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, we next determine whether such designation of critical habitat would not be beneficial to the species. In our proposed listing rule (82 FR 46197; October 4, 2017), that was informed by the SSA (Service 2017, entire), we determined that there are habitat-based threats to the candy darter species identified under Factor A (82 FR 46197, pp. 46200–46201). Therefore, we find that the designation of critical habitat would be beneficial to the candy darter through the provisions of section 7 of the Act. Because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and would be beneficial, we find that designation of critical habitat is prudent for the candy darter.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the candy darter is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where these species are located (Service 2018, entire). This and other information (Industrial Economics, Inc. (IEc) 2018, entire) represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the candy darter (see below).

Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. For example, physical features might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features (PBFs) essential to the conservation of the candy darter from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the final listing rule published elsewhere in today's **Federal Register**. We have determined that the following physical or biological features are essential to the conservation of the candy darter:

(1) Ratios or densities of nonnative species that allow for maintaining populations of candy darters.

(2) A blend of unembedded gravel and cobble that allows for normal breeding, feeding, and sheltering behavior.

(3) Adequate water quality characterized by seasonally moderated temperatures and physical and chemical parameters (*e.g.,* pH, dissolved oxygen levels, turbidity) that support normal behavior, growth, and viability of all life stages of the candy darter.

(4) An abundant, diverse benthic macroinvertebrate community (*e.g.,* mayfly nymphs, midge larvae, caddisfly larvae) that allows for normal feeding behavior.

(5) Sufficient water quantity and velocities that support normal behavior, growth, and viability of all life stages of the candy darter.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The overall habitat characteristics that are important for the candy darter include sufficiently stabilized forest stream banks throughout the watersheds such that water quality allows for normal feeding, breeding, and sheltering in an area with sufficiently low numbers of nonnative species (Service 2018, pp. 15–17, 22–25, 32–34). The features essential to the conservation of the candy darter may require special management considerations or protections to reduce the following threats: (1) Hybridization with the nonnative variegate darter (*Etheostoma variatum*); (2) general increase in water temperature, primarily attributed to land use changes; (3) changes in water chemistry, including, but not limited to, changes in pH levels and contamination with coliform bacteria; (4) habitat fragmentation primarily due to construction of barriers and impoundments; (5) excessive sedimentation and stream bottom embeddedness (the degree to which gravel, cobble, rocks, and boulders are surrounded by, or covered with, fine sediment particles); and (6) competition for habitat and other instream resources and predation from nonnative fishes.

Management activities that could ameliorate these threats include, but are not limited to: Use of best management practices (BMPs) designed to reduce sedimentation, erosion, and bankside destruction; protection of riparian corridors and retention of sufficient canopy cover along banks; reduction of other watershed disturbances that release sediments, pollutants, or nutrients into the water; public outreach requesting the public's assistance with stopping the movement of nonnative aquatic species; increased enforcement and/or outreach regarding existing regulations prohibiting the movement of bait fish; survey and monitoring to further characterize the extent and spread of hybridization with variegate darters; research to determine whether some environmental factors or set of factors might allow candy darters to persist in particular areas despite variegate darter introductions; research characterizing habitat conditions in historically extirpated candy darter sites to facilitate successful reintroduction efforts; research and development of tools and techniques that can be used to address the competitive behavior that allows for variegate darters to dominate candy darters, which leads to hybridization; and re-introductions of candy darters to historically extirpated areas and/or population augmentation of candy darters in sufficient numbers to outcompete variegate darters.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we did not find any areas that were essential for the conservation of the species.

The current distribution of the candy darter is much reduced from its historical distribution. We anticipate that recovery will require continued protection of existing populations and habitat, in addition to establishing populations in additional streams that more closely approximate its historical distribution to ensure there are adequate numbers of fish in stable populations and that these populations occur over a wide geographic area. These actions will help to ensure that catastrophic events, such as flooding or a contamination spill event, cannot simultaneously affect all known populations.

Sources of data for this species include the West Virginia Department of Natural Resources, Virginia Department of Game and Inland Fisheries, U.S. Geological Survey, published scientific literature and government reports, and unpublished data from researchers at the Virginia Polytechnic Institute, West Virginia University, and the University of Missouri. A complete list of specific sources is provided in the SSA report (Service 2018, pp. 68–74) and available online at *http://www.regulations.gov* under Docket No. FWS–R5–ES–2018–0050.

Areas Occupied at the Time of Listing

The proposed critical habitat designation does not include all streams known to have been historically occupied by the species; instead, it focuses on occupied streams within the historical range that retain the necessary PBFs that allow for the maintenance and expansion of existing populations. The following streams have sections that meet the definition of areas occupied by the species (Service 2018, pp. 13, 56) at the time of listing:

- In the Greenbrier River watershed of West Virginia (WV)—the East and West Forks of the Greenbrier River, Little River of the West Fork, Little River of the East Fork, the ''Upper'' Greenbrier River (between Knapps Creek and the confluences of East and West Forks), Deer Creek, North Fork Deer Creek, Sitlington Creek, and Knapp Creek;
- In the Middle New River watershed of Virginia (VA)—Dismal Creek, Stony Creek, and Laurel Creek;
- In the Lower Gauley River watershed of WV—the ''Lower'' Gauley River;
- In the Upper New River watershed of VA—Cripple Creek; and
- In the Upper Gauley River watershed of WV—the headwaters of the Gauley River, Straight Creek, ''Upper'' Gauley River, Panther Creek, Williams River, Tea Creek, Cranberry River, Cherry River, North and South Forks of the Cherry River, and Laurel Creek.

There are no developed areas within the wetted portion of these streams.

Areas Outside of the Geographic Range at the Time of Listing

We are not proposing to designate any areas outside of the geographic range at the time of listing. However, in line with our conservation strategy, we intend to reestablish populations within the candy darter's historical range under section 10(j) of the Act or through other applicable voluntary conservation tools (*e.g.,* safe harbor agreements). Areas within the historical range that may be considered for repatriation include sections of Reed Creek, Pine Run, and Sinking Creek in VA; and sections of Indian Creek, Bluestone River, and Camp Creek in WV. We may consider these areas for repatriation because the candy darter is no longer present in these areas, these areas do not currently contain the variegate darter, the land use-based threats previously responsible for the candy darter's extirpation have been ameliorated, and repopulation of the candy darter in these areas would not be possible without human assistance because they are isolated from other currently occupied candy darter streams. We are seeking public input during the open comment period regarding other areas that are currently unoccupied within the historical range of the candy darter, contain the essential physical and biological features that support the candy darter's life-history processes, and/or could facilitate the reestablishment of populations under section 10(j) of the Act.

Summary of Criteria Used To Identify Critical Habitat

In summary, for areas within the geographic area occupied by the species at the time of listing, we propose critical habitat unit boundaries using the following approach:

(1) We delineated areas within the historical range that had positive survey data between the year 2000 and the time of listing (see Service 2018).

(2) We terminated stream segments at barriers, confluences, areas where genetically pure candy darters have been extirpated, other obvious unsuitable habitat, or a location selected based on expert knowledge of a lack of presence.

(3) We included connecting stream segments between occupied stream segments as long as the inclusion does not disagree with criterion (2) and there are no data to suggest that the candy darter is not present.

(4) If there are no data points (positive or negative occurrence), we did not include the segment.

(5) In the absence of other biologically meaningful termini, we established a buffer approximately 1-mile long from the last known positive survey point.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the candy darter. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation as critical habitat lands that we have determined are occupied at the time of listing and contain one or more of the PBFs to support life-history processes essential to the conservation of the candy darter. Some units contain all of the identified PBFs and support multiple life-history processes. Some units contain only some of the PBFs necessary to support the candy darter's particular use of that habitat.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* under Docket No. FWS–R5–ES–2018–0050, on *https://www.fws.gov/northeast/candydarter/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Proposed Critical Habitat Designation

We are proposing to designate approximately 596 stream kilometers (skm) (370 stream miles (smi)) in five units as critical habitat for the candy

darter. The critical habitat areas we describe below constitute our best assessment of areas that meet the definition of critical habitat for the candy darter. The five areas we propose as critical habitat are: (1) Greenbrier Unit, (2) Middle New Unit, (3) Lower Gauley Unit, (4) Upper New Unit, and (5) Upper Gauley Unit. All stream reaches within each watershed that are proposed for designation were occupied at the time of listing. The approximate area of each proposed critical habitat unit is shown in the table below.

TABLE OF PROPOSED CRITICAL HABITAT UNITS FOR THE CANDY DARTER

Critical habitat unit	Land ownership	Unit size (stream length)	
		Miles	Kilometers
1. Greenbrier	Federal	78	126
	State	6	10
	Private	70	113
Unit Total		154	248
2. Middle New	Federal	14	22
	State	0	0
	Private	13	21
Unit Total		27	43
3. Lower Gauley	State	0	0
	State	0	0
	Private	0	0
Unit Total		2	3
4. Upper New	Federal	0	0
	State	0	0
	Private	5	8
Unit Total		5	8
5. Upper Gauley	Federal	90	145
	State	0	0
	Private	92	148
Unit Total		182	293
Grand Total		370	596

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for candy darter, below. In all instances, the units are occupied (see Areas Occupied at the Time of Listing, above); the State of VA or WV, as applicable, owns the stream water and stream bottoms; and the lands described below are those adjacent to the designated critical habitat stream areas.

Unit 1: Greenbrier

The Greenbrier Unit consists of six subunits in Pocahontas County, WV. The occupied streams are adjacent to primarily Federal land, with some private land and one State owned parcel. Candy darter have been surveyed in the Greenbrier Unit as recently as 2014 (Service 2018, p. 48). See details below.

Unit 1a: East Fork of the Greenbrier River, Pocahontas County, WV

Unit 1a includes approximately 31.2 skm (19.4 smi) of the East Fork of the Greenbrier River from a point approximately 3.2 skm (2.0 smi) upstream of the Bennett Run confluence, downstream to the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, WV; and approximately 12.2 skm (7.6 smi) of the Little River from a point 3.2 skm (2.0 smi) upstream of the power line right-of-way, downstream to the confluence of the Little River and the East Fork of the Greenbrier River. The land adjacent to this unit is mostly forested interspersed with small communities, low density residences, and agricultural fields along the lower portion of the East Fork of the Greenbrier River. Approximately 26.2 skm (16.3 smi) of Unit 1a is within the Monongahela National Forest with the remainder located almost entirely adjacent to private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Candy darters occur at multiple sites in this unit (Service 2018, p. 28) . Unit 1a contributes to the redundancy of the Greenbrier metapopulation.

Unit 1b: West Fork of the Greenbrier River, Pocahontas County, WV

Unit 1b includes approximately 29.9 skm (18.6 smi) of the West Fork of the Greenbrier River from the Public Road 44 crossing, downstream to the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, WV; and approximately 14.2 skm (8.8 smi) of the Little River from a point approximately 1.6 skm (1.0 smi) upstream of the Lukins Run confluence, downstream to the confluence of the Little River and the West Fork of the Greenbrier River. The land adjacent to this unit is almost entirely forested interspersed with a few residences and agricultural fields along the lower portion of the West Fork of the Greenbrier River near the town of Durbin, WV. Approximately 43.2 skm (26.8 smi) of Unit 1b is within the

Monongahela National Forest with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys found candy darters at multiple sites in this unit (Service 2018, p. 28). Unit 1b contributes to the redundancy of the Greenbrier metapopulation.

Unit 1c: Upper Greenbrier River, Pocahontas County, WV

Unit 1c includes approximately 69.3 skm (43.1 smi) of the Greenbrier River from the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, WV, downstream to the confluence of Knapp Creek at Marlinton, WV. The land adjacent to this unit is mostly forested; however, several small communities with residences and light commercial development, along with scattered rural residences and agricultural fields, occur at various locations. Approximately 47.5 skm (29.5 smi) of Unit 1c is within the Monongahela National Forest and the Seneca State Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Survey data indicate candy darters are present in the upper and lower portions of this unit (Service 2018, p. 28). While survey data for the intervening section are lacking, candy darters may occur where suitable habitat is present. Unit 1c contributes to the redundancy of the Greenbrier metapopulation and provides connectivity between the other Greenbrier watershed populations.

Unit 1d: Deer Creek, Pocahontas County, WV

Unit 1d includes approximately 21.2 skm (13.2 smi) of Deer Creek from the confluence of Deer Creek and Saulsbury Run, downstream to the confluence with the Greenbrier River; and approximately 16.3 skm (10.1 smi) of North Fork from a point approximately 1.6 skm (1.0 smi) upstream of the Elleber Run confluence, downstream to the confluence of North Fork and Deer Creek. The lower half of the land adjacent to this unit is mostly forested, while the upper portion contains low density residences and agricultural fields. Approximately 10.0 skm (6.2 smi) of Unit 1d is within the Monongahela National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys collected candy darters at two locations in this unit (Service 2018, p. 28). Unit 1d contributes to the redundancy of the Greenbrier metapopulation.

Unit 1e: Sitlington Creek, Pocahontas County, WV

Unit 1e includes approximately 10.1 skm (6.3 smi) of Sitlington Creek from the confluence of Galford Run and Thorny Branch, downstream to the confluence with the Greenbrier River. Some of the riparian area of Unit 1e is forested; however, the majority of the land adjacent to this unit is agricultural fields and widely scattered residences. Approximately 1.2 skm (0.7 smi) of Unit 1e is within the Monongahela National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Candy darters at several locations in this unit (Service 2018, p. 28). Unit 1e contributes to the redundancy of the Greenbrier metapopulation.

Unit 1f: Knapp Creek, Pocahontas County, WV

Unit 1f includes approximately 43.9 skm (27.3 smi) of Knapp Creek from a point approximately (0.1 smi) west of the WV Route 84 and Public Road (PR) 55 intersection, downstream to the confluence with the Greenbrier River at Marlinton, WV. The land adjacent to this unit is largely forested; however, low density residential and agricultural fields occur in much of the upstream portions. The land surrounding the lowest section of Unit 1f is dominated by residential and commercial development. Approximately 7.2 skm (4.5 smi) of Unit 1f is within the Monongahela National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys indicate candy darters at several locations in this unit (Service 2018, p. 28). Unit 1f contributes to the redundancy of the Greenbrier metapopulation.

Unit 2: Middle New

The Middle New Unit comprises three stream subunits in Bland and Giles Counties, VA. The occupied streams are adjacent to a mix of Federal and private land. Candy darter have been surveyed in the Middle New Unit as recently as 2016 (Service 2018, p. 48). See details below.

Unit 2a: Dismal Creek, Bland and Giles Counties, VA

Unit 2a includes approximately 4.2 skm (2.6 smi) of Dismal Creek from the confluence with Standrock Branch, downstream to the confluence of Dismal Creek and Walker Creek. The land adjacent to this unit is almost entirely forested, with some scattered residences and small agricultural fields. Approximately 3.2 skm (2.0 smi) of Unit 2a is within the George Washington and Jefferson National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys indicate a small candy darter population that contributes to the representation and redundancy of the species (Service 2018, p. 28).

Unit 2b: Stony Creek, Giles County, VA

Unit 2b includes approximately 34.1 skm (21.2 smi) of Stony Creek from a point approximately 2.4 skm (1.5 smi) upstream of North Fork Mountain Road, downstream to the confluence with the New River. The land adjacent to this unit is almost entirely forested, with some scattered residences, a large underground lime mine, a processing plant, and a railroad spur line along the downstream portion. Approximately 19.2 skm (11.9 smi) of Unit 2b is within the George Washington and Jefferson National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys indicate candy darters at multiple locations within this unit. Unit 2b is the most robust population in Virginia and contributes to the representation and redundancy of the species (Service 2018, p. 28).

Unit 2c: Laurel Creek, Bland County, VA

Unit 2c includes approximately 5.1 skm (3.2 smi) of Laurel Creek from a point approximately 0.8 skm (0.5 smi) upstream of the unnamed pond, downstream to the confluence of Laurel Creek and Wolf Creek. The unit passes through a forested gap in a ridgeline; however, the riparian zone is dominated by Interstate Highway 77, U.S. Highway 52, and residential and commercial development. Unit 2c is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys found candy darters at several locations within this unit (Service 2018, p. 28). Unit 2c contributes to the representation and redundancy of the species.

Unit 3: Lower Gauley, ''Lower'' Gauley River, Nicholas County, WV

Unit 3 includes approximately 2.9 skm (1.8 smi) of the Gauley River from

the base of the Summersville Dam, downstream to the confluence of Collison Creek. The land adjacent to this unit is entirely forested, with the exception of parking areas and infrastructure at the base of the Summersville Dam. The entirety of Unit 3 is within the National Park Service's (NPS') Gauley River National Recreation Area and the U.S. Army Corps of Engineer's (Corps') Summersville Recreation Area. Candy darters are abundant in the tailwaters of the dam. Unit 3 maintains the only candy darter population remaining in the Lower Gauley watershed and contributes to the representation and redundancy of the species and candy darters were surveyed as recently as 2014 (Service 2018, pp. 28 & 48).

Unit 4: Upper New, Cripple Creek, Wythe County, VA

Unit 4 includes approximately 7.9 skm (4.9 smi) of Cripple Creek from a point approximately (2.0 smi) upstream of the State Road 94 bridge, downstream to the confluence of Cripple Creek and the New River. The land adjacent to this unit is primarily low density residences and agricultural fields, although some small segments pass through wooded parcels. The stream in Unit 4 is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys found candy darters at several locations within this unit as recently as 2016 (Service 2018, pp. 28 & 48). This is the only known candy darter population in the Upper New River watershed, and this unit contributes to the representation and redundancy of the species.

Unit 5: Upper Gauley

The Upper Gauley Unit consists of six stream subunits in Nicholas, Greenbrier, Pocahontas, and Webster Counties, WV. The occupied streams are adjacent to a mix of Federal and private land. Candy darter have been surveyed in the Upper Gauley Unit as recently as 2014 (Service 2018, p. 48). See details below.

Unit 5a: Gauley Headwaters, Webster County, WV

Unit 5a includes approximately 23.2 skm (37.3 smi) of the Gauley River from the North and South Forks of the Gauley River, downstream to the confluence of the Gauley River and the Williams River at Donaldson, WV; and 2.9 skm (1.8 smi) of Straight Creek from its confluence with the Gauley River to a point approximately 2.9 skm (1.8 smi) upstream of the confluence. The land adjacent to this unit is mostly forested; however, aerial imagery (Environmental Systems Research Institute (ESRI) 2015; ESRI 2016; ESRI 2017) shows forest clearings with varying degrees of regrowth, indicating ongoing timber harvests in some tributary stream systems. Other human development in the watershed consists primarily of scattered residences and roads, mostly in the valley adjacent to the Gauley River. Approximately 9.0 skm (5.6 smi) of Unit 5a is within the Monongahela National Forest. The remainder of the unit is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys of Unit 5a captured candy darters at multiple locations (Service 2018, p. 28). The unit contributes to the redundancy of the Upper Gauley metapopulation.

Unit 5b: Upper Gauley River, Nicholas and Webster Counties, WV

Unit 5b includes approximately 43.8 skm (27.2 smi) of the Gauley River from the confluence of the Gauley and Williams Rivers at Donaldson, WV, downstream to a point approximately 1.6 skm (1.0 smi) upstream of the Big Beaver Creek confluence. The land adjacent to this unit is mostly forested; however, aerial imagery (ESRI 2015; ESRI 2016; ESRI 2017) show forest clearings with varying degrees of regrowth, indicating ongoing timber harvests in some areas. Other human development consists primarily of low-density residential areas and small communities with some commercial facilities. Small agricultural fields are associated with some of the scattered residences. Approximately 14.6 skm (9.2 smi) of Unit 5b is within the Monongahela National Forest and/or adjacent to land owned by the Corps. The streams in the remainder of the unit are adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys of Unit 5b captured candy darters at several locations (Service 2018, p. 28). The unit provides connectivity between other candy darter streams in the Upper Gauley watershed and contributes to the redundancy of the Upper Gauley metapopulation.

Unit 5c: Panther Creek, Nicholas County, WV

Unit 5c includes approximately 16.3 skm (10.1 smi) of Panther Creek from a point approximately 1.1 skm (0.7 smi) upstream of the Grassy Creek Road crossing, downstream to the confluence with the Gauley River. The unit is mostly forested; however, aerial imagery (ESRI 2015; ESRI 2016; ESRI 2017) show forest clearings with varying degrees of regrowth, indicating ongoing timber harvests in much of the upland areas. Other human development consists of the occasional residence and small agricultural field in the creek valley, and the Richwood Municipal Airport located on an adjacent ridge. The streams in Unit 5c are adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. While survey data are sparse for this unit, candy darters occur within Panther Creek, and the stream maintains suitable habitat for the species; thus, this unit contributes to the redundancy of the Upper Gauley metapopulation (Service 2018, p. 28).

Unit 5d: Williams River, Pocahontas and Webster Counties, WV

Unit 5d includes approximately 52.4 skm (32.6 smi) of the Williams River from the confluence with Beaverdam Run, downstream to the confluence of the Williams River and the Gauley River at Donaldson, WV; and 5.1 skm (3.2 smi) of Tea Creek from a point on Lick Creek approximately 2.7 skm (1.7 smi) upstream of the Lick Creek confluence, downstream to the Tea Creek confluence with the Williams River. The land adjacent to this unit is almost entirely forested with just a few residences and small agricultural fields at the lower portion of the river. The streams in Unit 5d are entirely within the Monongahela National Forest. Survey data indicate candy darters are present at the upper and lower portions of this unit. While data are sparse for the majority of the intervening stretch, we assume, based on the available evidence, that the habitat is suitable for the species (Service 2018, p. 28). Unit 5d contributes to the redundancy of the Upper Gauley metapopulation.

Unit 5e: Cranberry River, Nicholas and Webster Counties, WV

Unit 5e includes approximately 39.3 skm (24.4 smi) of the Cranberry River from the confluence of the North and South Forks of the Cranberry River, downstream to the confluence of the Cranberry River and the Gauley River. The land adjacent to this unit is almost entirely forested, and the stream is entirely within the Monongahela National Forest. Survey data indicate candy darters are present at the upper and lower portions of this unit. While survey are sparse for the intervening stretch, we assume, based on the available evidence, that the habitat is suitable for the species (Service 2018, p. 28). Unit 5e contributes to the

redundancy of the Upper Gauley metapopulation.

Unit 5f: Cherry River, Greenbrier and Nicholas Counties, WV

Unit 5f includes approximately 16.7 skm (10.4 smi) of Cherry River from the confluence of the North and South Forks of the Cherry River, downstream to the confluence of the Cherry River and the Gauley River; approximately 28.0 skm (17.4 smi) of the North Fork Cherry River from the Pocahontas Trail crossing, downstream to the confluence of the North and South Forks of the Cherry River; approximately 26.2 skm (16.3 smi) of the South Fork Cherry River from a point approximately 0.5 skm (0.3 smi) south of County Road 29/4 in VA, downstream to the confluence of the North and South Forks of the Cherry River; and approximately 24.9 skm (15.5 smi) of Laurel Creek from a point approximately 0.3 skm (0.2 smi) west of Cold Knob Road, downstream to the confluence of Laurel Creek the Cherry River. The land adjacent to this unit is mostly forested with scattered residences along the lower portion of the Cherry River. The town of Richwood, WV, with residential and commercial development and an industrial sawmill, is at the confluence of the North and South Forks of the Cherry River. The North and South Forks of the Cherry River are almost entirely forested; however, aerial imagery (ESRI 2015; ESRI 2016; ESRI 2017) show forest clearings with varying degrees of regrowth, indicating ongoing timber harvests in several locations. There are scattered residences on Laurel Creek and some evidence of recent timber harvests; otherwise, the land adjacent to this section of Unit 1f is mostly forested. Approximately 29.1 skm (18.1 smi) of Unit 5f is within the Monongahela National Forest. The remainder is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Survey data indicate candy darters are well distributed throughout most of this unit (Service 2018, p. 28). Unit 5f contributes to the redundancy of the Upper Gauley metapopulation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule adopting a new definition of ''destruction or adverse modification'' on February 11, 2016 (81 FR 7214). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of the candy darter. Such alterations may include, but are not limited to, those that alter the PBFs essential to the conservation of these species or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support PBFs essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the candy darter. These activities include, but are not limited to:

(1) Actions that would promote or facilitate the movement of variegate darters (or other nonnative aquatic species). Such activities could include, but are not limited to, the transfer of surface water across watershed boundaries and the modification or removal of dams that are currently limiting the spread of variegate darters where they have been introduced. These activities could further decrease the abundance of the candy darter through hybridization with the nonnative variegate darter.

(2) Actions that would significantly increase water temperature or sedimentation and stream bottom embeddedness. Such activities could include, but are not limited to, land use changes that result in an increase in sedimentation, erosion, and bankside destruction or the loss of the protection of riparian corridors and leaving insufficient canopy cover along banks.

(3) Actions that would significantly alter water chemistry. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (nonpoint source). These activities could alter water conditions to levels that are beyond the tolerances of the candy darter and result in direct or cumulative adverse effects to these individuals and their life cycles.

(4) Actions that would contribute to further habitat fragmentation. Such activities include, but are not limited to, construction of barriers that impede the instream movement of the candy darter (*e.g.,* dams, culverts, or weirs). These activities can isolate populations that are more at risk of decline or extirpation as a result of genetic drift, demographic or environmental stochasticity, and catastrophic events.

(5) Actions that would contribute to nonnative competition for habitat and other instream resources and to predation. Possible actions could include, but are not limited to, stocking of nonnative fishes or other related actions. These activities can introduce predators or affect the growth, reproduction, and survival of the candy darter through competition for resources.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face and the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

We have not considered any areas for exclusion from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information we obtain during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat (Service 2018b). The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the candy darter (Industrial Economics, Incorporated (IEc) 2018). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already

subject to such protections and are therefore unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species, because the additional management or conservation efforts may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our draft economic analysis (DEA) of the proposed critical habitat designation for the candy darter and is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O.s' regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the candy darter, first we identified, in the IEM dated April 18, 2018, probable incremental economic impacts associated with the following categories of activities: (1) Watershed and stream restoration activities (Natural Resources Conservation Service (NRCS), U.S. Forest Service (USFS), Service, Corps, Environmental Protection Agency (EPA), Federal Emergency Management Agency (FEMA)); (2) timber harvest and vegetation management (USFS); (3) prescribed fire (USFS); (4) construction and management of recreation improvement activities (USFS, NPS); (5) coal mining (Office of Surface Mining (OSM)); (6) pipeline and utility crossings (Corps, Federal Energy Regulatory Commission (FERC)); (7) road and bridge construction and maintenance (Corps, Federal Highway Administration (FHWA)); (8) pesticide use (USFS, FERC, FHWA); (9) abandoned mine reclamation (OSM); (10) emergency response activities (FEMA); and (11) oil and gas exploration (Corps). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the candy darter is present, Federal agencies already are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the candy darter's critical habitat. The following specific circumstances in this case help to inform our evaluation: (1) The essential PBFs identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm to constitute jeopardy to the candy darter would also likely adversely affect the essential PBFs of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

We have identified and delineated five proposed critical habitat units, totaling approximately 596 skm (370 smi), that are currently (*i.e.,* at the time of listing) occupied by the candy darter. These units are considered occupied year-round for the purposes of consultation based on current survey data. In these areas, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the candy darter. Because we are proposing only the designation of occupied critical habitat, we anticipate a relatively small increase in administrative costs related to the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

The entities most likely to incur incremental costs are parties to section 7 consultations, in this case, only Federal action agencies. We do not anticipate any costs to State or local agencies, or impacts on property values related to the public's perception of additional regulation, because we do not expect the designation of critical habitat for the candy darter to result in changes to Virginia or West Virginia fishing regulations, or other local regulations (IEc 2018, pp. 14–15).

The probable incremental economic impacts of the candy darter critical habitat designation are expected to be limited to additional administrative effort resulting from a small number of future section 7 consultations. This is due to the fact that (1) All proposed critical habitat stream reaches are considered to be occupied by the species; (2) within occupied habitat, regardless of whether critical habitat is designated, all projects with a Federal nexus will already be subject to the section 7 requirement; and (3) during section 7 consultation, project modifications that would be recommended to avoid adverse modification would already be requested to avoid jeopardizing the continued existence of the species. There are no forecasted incremental costs associated with project modifications (IEc 2018, p. 8).

At approximately $10,000 or less per consultation, to reach the threshold of $100 million of incremental administrative impacts in a single year, critical habitat designation would have to result in more than 11,000 consultations in a single year (IEc 2018, p. 11). No more than 91 candy darter consultations (31 technical assistance, 55 informal, 1 formal, 2 reinitiated formal, and 1 programmatic) are anticipated in any given year (IEc 2018, pp. 12–13). Units 1 (Greenbrier Watershed) and 5 (Upper Gauley Watershed) have the highest potential costs, due in part to the higher densities of occupied candy darter streams relative to the other units and the anticipated consultation workload

associated with the Monongahela National Forest (Unit 1) and planned road construction (Unit 5). However, the estimated incremental costs of critical habitat designation for the candy darter in the first year are unlikely to exceed $200,000 (2018 dollars) (IEc 2018, p. 15). Thus, the annual administrative burden will not reach $100 million.

As we stated earlier, we are soliciting data and comments from the public on the DEA and all aspects of the proposed rule and our required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Exclusions

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. To consider economic impacts, we prepared an analysis of the probable economic impacts of the proposed critical habitat designation and related factors.

During the development of a final designation, we will consider any additional economic impact information we receive through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts or Homeland Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands adjacent to the proposed designation of critical habitat for candy darter are not owned or managed by the Department of Defense or Department of Homeland Security, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are nonpermitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

Although we have determined that there are currently no HCPs or other management plans for the candy darter and the proposed designation does not include any tribal lands or trust resources, we are aware of management plans within the candy darter's range such as the Monongahela National Forest Land and Resource Management Plan and forest plans for the George Washington and Thomas Jefferson National Forests. At this time, we anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not intend to exercise his discretion to exclude any areas from the designation based on other relevant impacts.

Consideration of Reestablishing Populations Within the Historical Range Under Section 10(j) of the Act

We believe that the best way to facilitate reintroductions of candy darter within the historical range where the essential PBFs can be found will be to use the authorities under section 10(j) of the Act. We have developed a conservation strategy for the candy darter, part of which identified the need to reestablish candy darter populations within areas of its historical range. These areas could include Reed Creek, Pine Run, and Sinking Creek in VA; and sections of Indian Creek, Bluestone River, and Camp Creek in WV. Because the candy darter is extirpated from these areas and natural repopulation is not possible without human assistance, use of a 10(j) rule may be one appropriate tool to achieve this recovery objective. An overview of the process to establish an experimental population under section 10(j) of the Act is described below.

Section 10(j) of the Act enables us to designate certain populations of federally listed species that are released into the wild as ''experimental.'' The circumstances under which this designation can be applied are: (1) The population is geographically separate from nonexperimental populations of the same species (*e.g.,* the population is reintroduced outside the species' current range but within its probable historical range); and (2) we determine that the release will further the conservation of the species. Section 10(j) is designed to increase our flexibility in managing an experimental population by allowing us to treat the population as threatened, regardless of the species' status elsewhere in its range. Threatened status gives us more discretion in developing and implementing management programs and special regulations for a population, and allows us to develop any regulations we consider necessary to provide for the conservation of a threatened species. In situations where we have experimental populations, certain section 9 prohibitions (*e.g.,* harm, harass, capture) that apply to endangered and threatened species may no longer apply, and a rule issued under section 4(d) of the Act can be developed that contains the prohibitions and exceptions necessary and appropriate to conserve that species. This flexibility allows us to manage the experimental population in a manner that will ensure that current and future land, water, or air uses and activities will not be unnecessarily restricted and that the population can be managed for recovery purposes.

When we designate a population as experimental, section 10(j) of the Act requires that we determine whether that population is either essential or nonessential to the continued existence of the species, based on the best available information. Nonessential experimental populations located outside National Wildlife Refuge System or National Park System lands are treated, for the purposes of section 7 of the Act, as if they are proposed for listing. Thus, for nonessential experimental populations, only two provisions of section 7 would apply outside National Wildlife Refuge System and National Park System lands: Section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species, and section 7(a)(4), which requires Federal agencies to informally confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. Section 7(a)(2) of the Act, which requires Federal agencies to ensure that their activities are not likely to jeopardize the continued existence of a listed species, would not apply except

on National Wildlife Refuge System and National Park System lands. Experimental populations determined to be ''essential'' to the survival of the species would remain subject to the consultation provisions of section 7(a)(2) of the Act.

To establish an experimental population, we must issue a proposed rule and consider public comments on the proposed rule prior to publishing a final rule. In addition, we must comply with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). Also, our regulations require that, to the extent practicable, a rule issued under section 10(j) of the Act represent an agreement between the Service, the affected State and Federal agencies, and persons holding any interest in land that may be affected by the establishment of the experimental population (see 50 CFR 17.81(d)).

The flexibility gained by establishment of a nonessential experimental population through section 10(j) would be reduced if there is a designation of critical habitat that overlaps it. This is because Federal agencies would still be required to consult with us on any actions that may adversely modify critical habitat. In fact, section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated under the Act for any experimental population determined to be not essential to the continued existence of a species.

We wish to reestablish the candy darter in areas of its historical range. We strongly believe that to achieve recovery for the candy darter we would need the flexibility provided for in section 10(j) of the Act to help ensure the success of reestablishing the candy darter in suitable unoccupied areas within the historical range. Use of section 10(j) is meant to encourage local cooperation through management flexibility. Critical habitat is often viewed negatively by the public because it is not well understood and there are many misconceptions about how it affects private landowners. It is important for recovery of this species that we have the support of the public when we move towards meeting the recovery goals. Therefore, we conclude that the best way to facilitate reintroduction into unoccupied portions of the candy darter range is to garner support of private landowners adjacent to potential reintroduction areas through the management flexibility provided by 10(j) of the Act.

In summary, we believe that establishing nonessential experimental populations under Section 10(j) of the Act within the historical range will be the most effective means of achieving recovery for the candy darter. Establishing nonessential experimental populations will greatly benefit the overall recovery of the candy darter by allowing us to move forward using the flexibility and greater public acceptance of section 10(j) of the Act to reestablish the candy darter in other portions of its historical range where it no longer occurs. This is likely one of the most important steps in reaching recovery of this species, and we believe that section 10(j) is the best tool to achieve this objective. Thus, we believe that establishing a nonessential experimental population in unoccupied areas will be beneficial in conserving the species within historical range. We intend to initiate rulemaking regarding a section 10(j) rule for the candy darter in the near future.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of six individuals (and received responses from four) with expertise in darters; fisheries, population, or landscape ecology; genetics and conservation genetics; and/or speciation and conservation biology, regarding the species status assessment (SSA) report (Service 2018), which informed this proposed rule. The SSA report for the candy darter is a compilation of the best scientific and commercial data available concerning the status of the species, including the past, present, and future threats to this species. A team of Service biologists prepared the SSA report. The purpose of peer review is to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received by the date specified in **DATES** and sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, and how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Executive Order 13771

This rule is not an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not

have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated if we adopt this rule as proposed, the Service certifies that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this proposed rule would significantly or uniquely affect small governments because the waters being proposed for critical habitat designation are owned by the States of Virginia and West Virginia. These government entities do not fit the definition of ''small government jurisdiction.'' Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the candy darter in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions

on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for the candy darter would not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we request information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Virginia and West Virginia. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule would not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments would no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands that were occupied by the candy darter at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by the candy darter that are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for the candy darter on any tribal lands.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available on the

internet at *http://www.regulations.gov* and upon request from the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Service's Species Assessment Team, the West Virginia Ecological Services Field Office, and the Southwest Virginia Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.95, amend paragraph (e) by adding an entry for ''Candy Darter (*Etheostoma osburni*)'' immediately following the entry for ''Amber Darter (*Percina antesella*),'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Candy Darter (***Etheostoma osburni***)

(1) Critical habitat units are depicted for Bland, Giles, and Wythe Counties, Virginia, and Nicholas, Pocahontas, Greenbrier, and Webster Counties, West Virginia, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the candy darter consist of the following components:

(i) Ratios or densities of nonnative species that allow for maintaining populations of candy darters.

(ii) Blend of unembedded gravel and cobble that allows for normal breeding, feeding, and sheltering behavior.

(iii) Adequate water quality characterized by seasonally moderated temperatures and physical and chemical parameters (*e.g.,* pH, dissolved oxygen levels, turbidity) that support normal behavior, growth, and viability of all life stages of the candy darter.

(iv) Abundant, diverse benthic macroinvertebrate community (*e.g.,* mayfly nymphs, midge larvae, caddisfly larvae) that allows for normal feeding behavior.

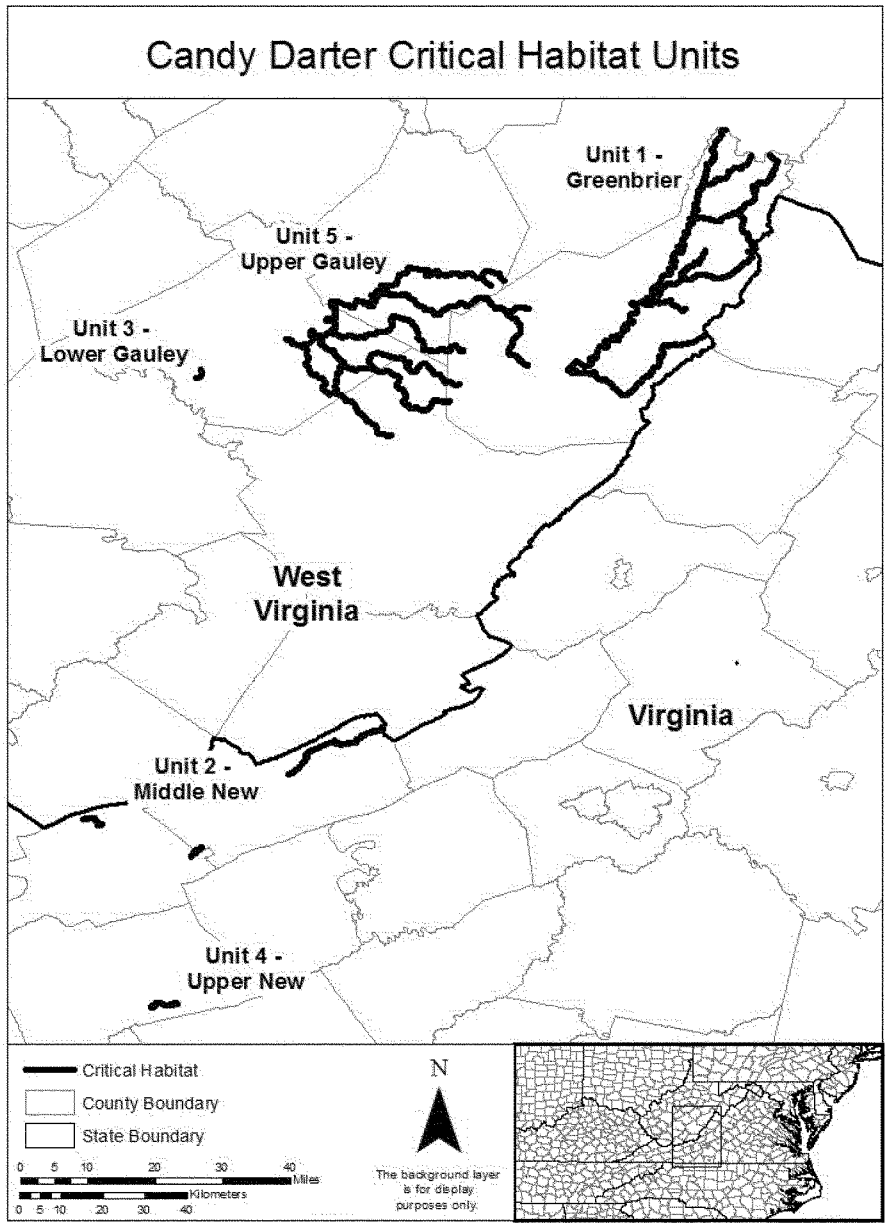
(v) Sufficient water quantity and velocities that support normal behavior, growth, and viability of all life stages of the candy darter.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

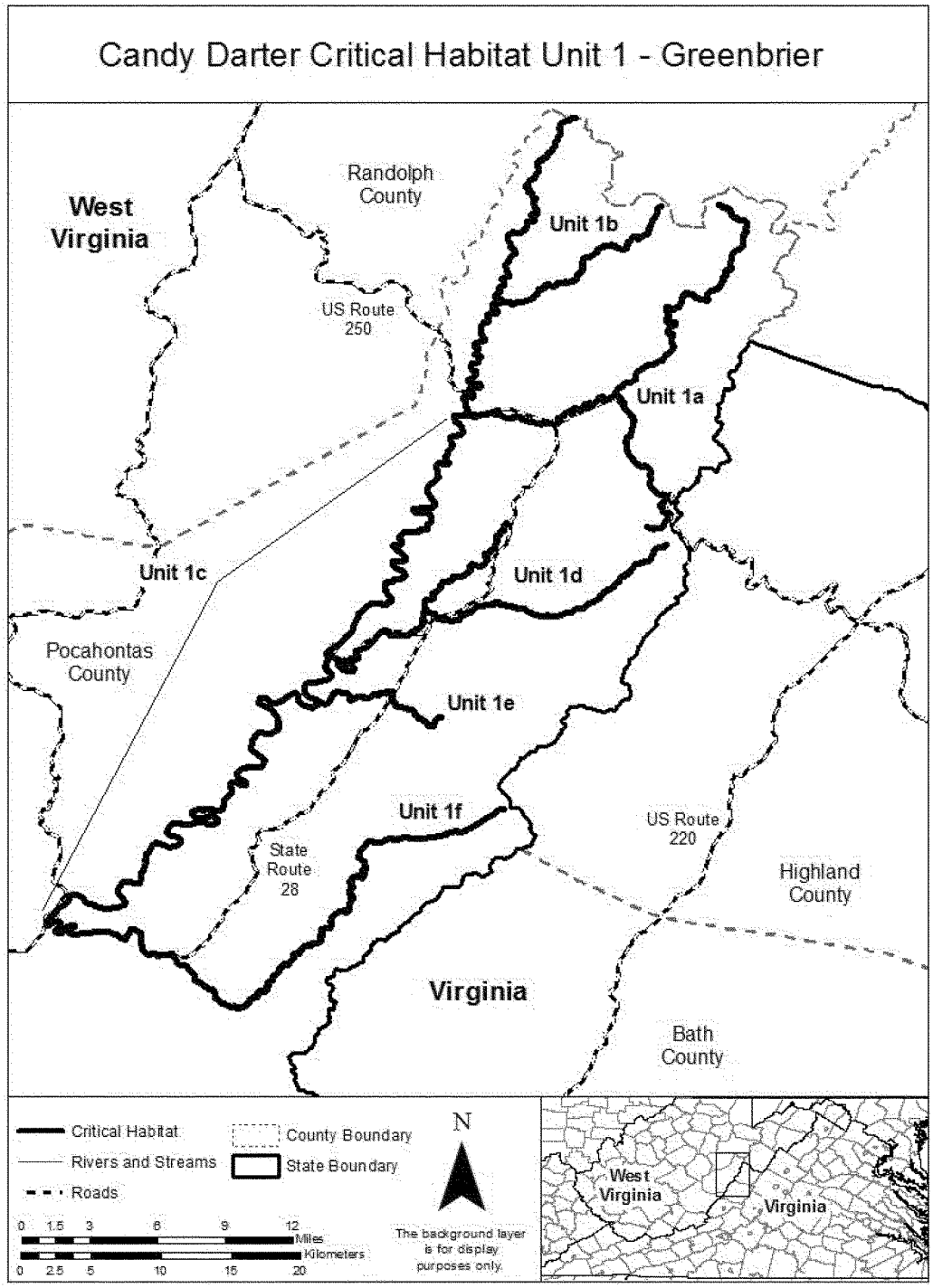
(4) *Critical habitat map units.* The provided maps were made using the geographic projection GCS_North_American_1983 coordinate system. Four spatial layers are included as background layers. We used two political boundary layers indicating the State and county boundaries within the United States available through ArcMap Version 10.5 software by ESRI. The roads layer displays major interstates, U.S. highways, State highways, and county roads in the Census 2000/TIGER/Line dataset provided by the U.S. Census Bureau, and available through ArcMap Version 10.5 software. Lastly, the hydrologic data used to indicate river and stream location are a spatial layer of rivers, streams, and small tributaries from the National Hydrology Database (NHD) Plus Version 2 database. This database divides the United States into a number of zones, and the zones that include the area where candy darter critical habitat is indicated are the Ohio-05 hydrologic zone and the Mid Atlantic-02 hydrologic zone. The maps provided display the critical habitat in relation to State and county boundaries, major roads and highways, and connections to certain rivers and streams within the larger river network. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *https://www.fws.gov/northeast/candydarter/,* at *http://www.regulations.gov* at Docket No. FWS–R5–ES–2018–0050, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map of candy darter critical habitat units follows:

BILLING CODE 4333–15–P



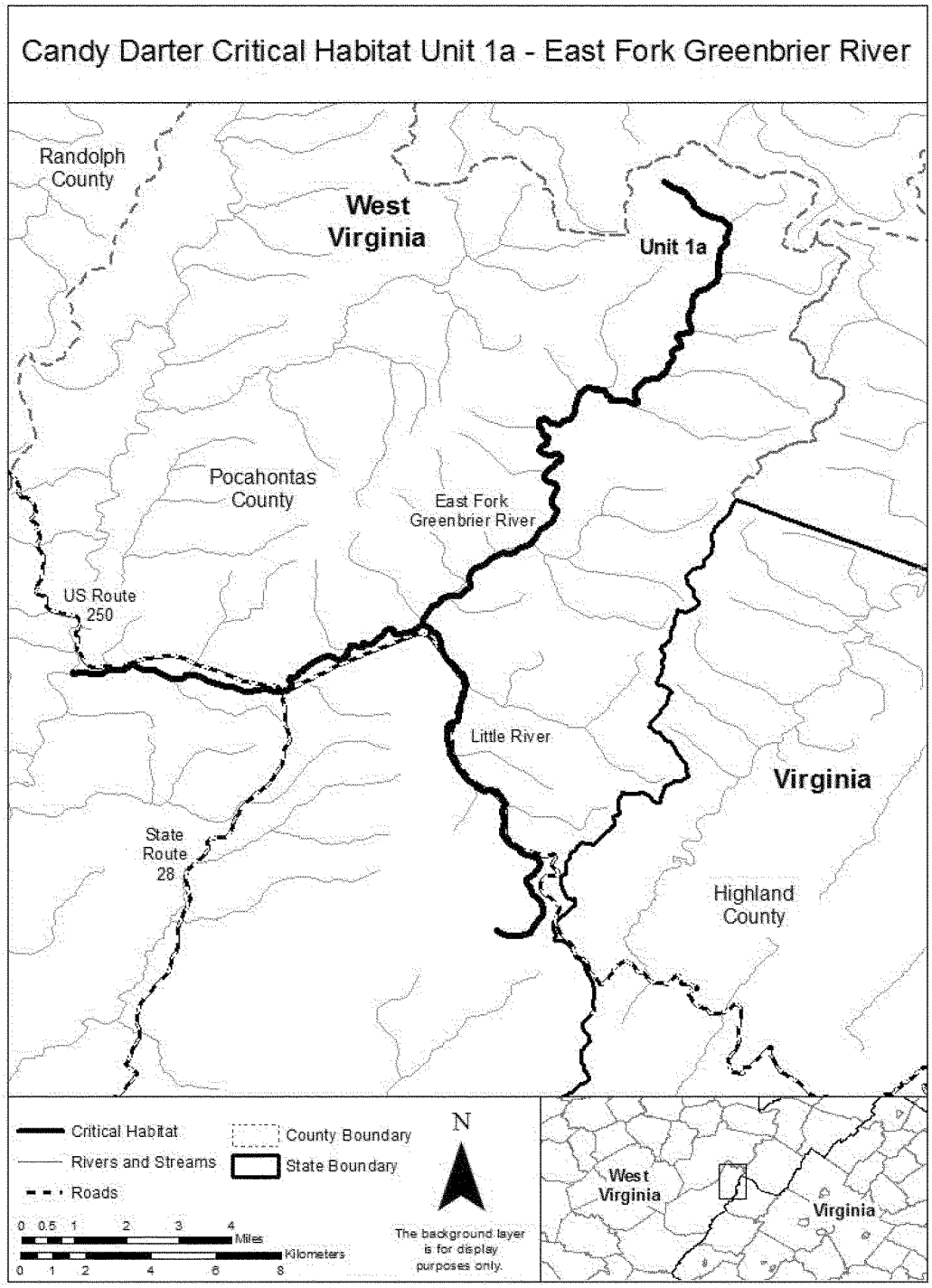
(6) Index map of Unit 1—Greenbrier follows:



(7) Unit 1a: East Fork of Greenbrier River, Pocahontas County, West Virginia.

(i) *General description:* Unit 1a consists of approximately 31.2 stream kilometers (skm) (19.4 stream miles (smi)) of the East Fork of the Greenbrier River from a point approximately 3.2 skm (2.0 smi) upstream of the Bennett Run confluence, downstream to the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, West Virginia; and approximately 12.2 skm (7.6 smi) of the Little River from a point 3.2 skm (2.0 smi) upstream of the power line right-of-way, downstream to the confluence of the Little River and the East Fork of the Greenbrier River. Approximately 26.2 skm (16.3 smi) of Unit 1a is within the Monongahela National Forest with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

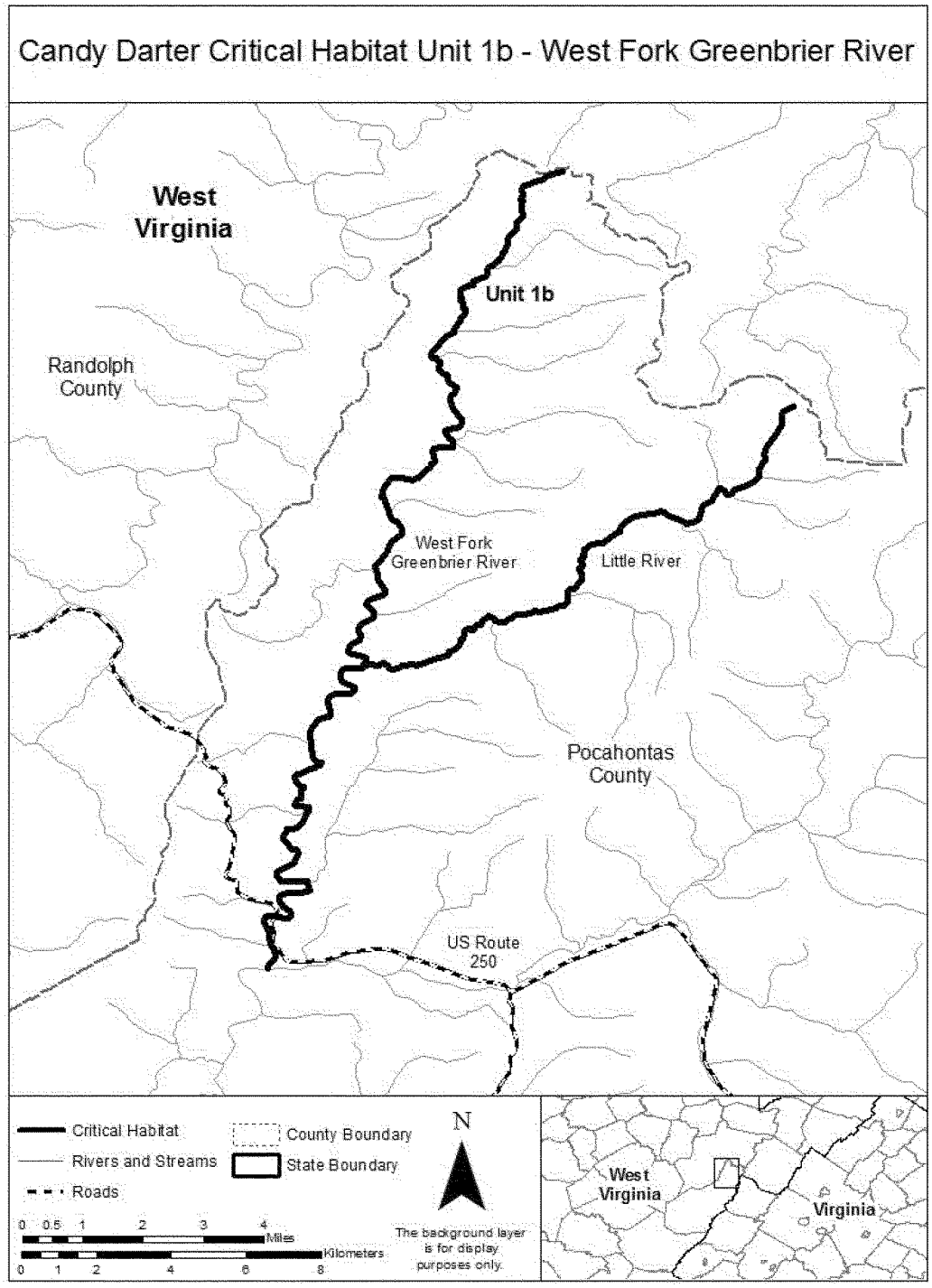
(ii) Map of Unit 1a, East Fork of Greenbrier River, follows:



(8) Unit 1b: West Fork of Greenbrier River, Pocahontas County, West Virginia.

(i) *General description:* Unit 1b includes approximately 29.9 skm (18.6 smi) of the West Fork of the Greenbrier River from the Public Road 44 crossing, downstream to the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, West Virginia; and approximately 14.2 skm (8.8 smi) of the Little River from a point approximately 1.6 skm (1.0 smi) upstream of the Lukins Run confluence, downstream to the confluence of the Little River and the West Fork of the Greenbrier River. Approximately 43.2 skm (26.8 smi) of Unit 1b is within the Monongahela National Forest with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

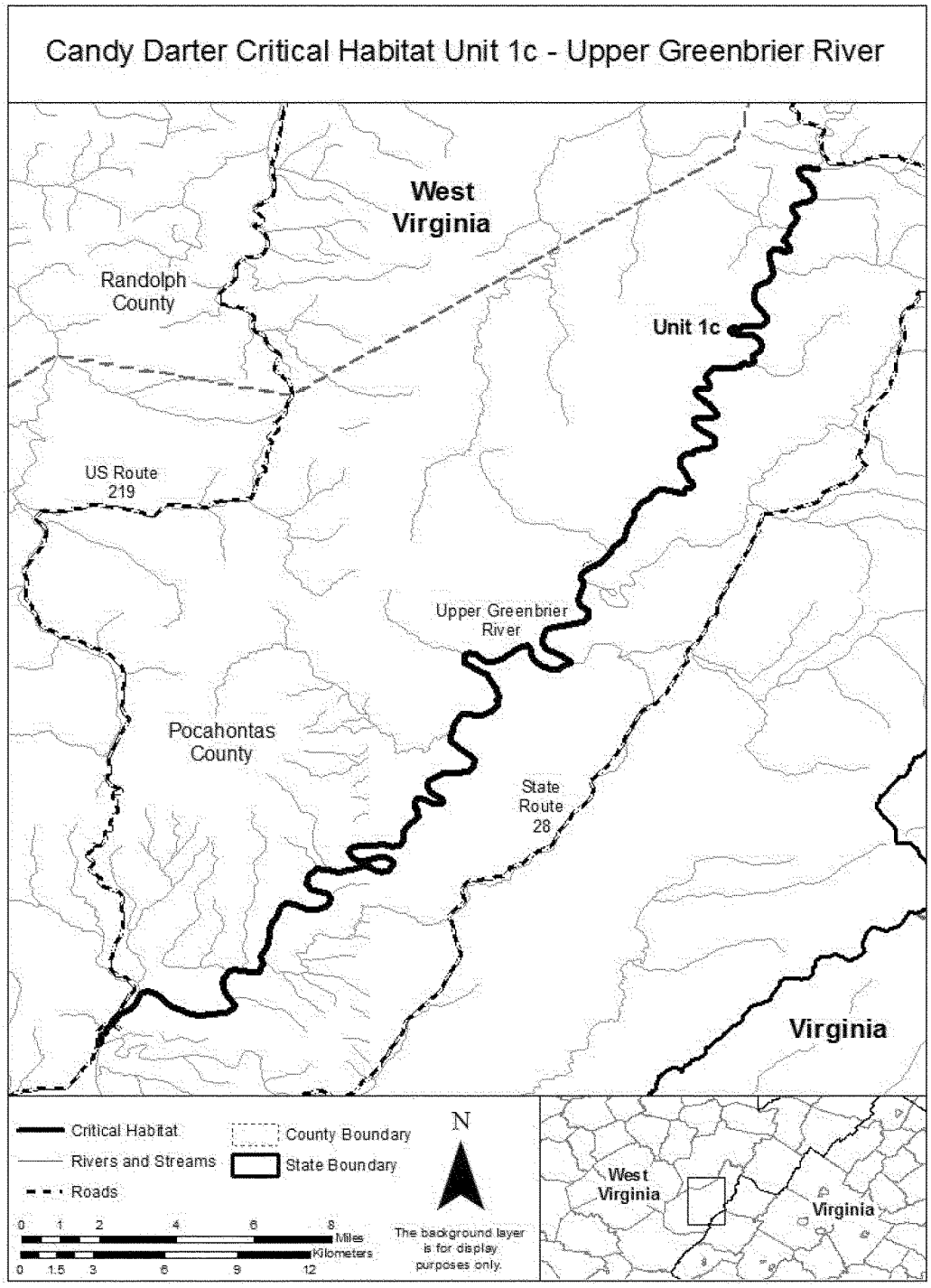
(ii) Map of Unit 1b, West Fork of Greenbrier River, follows:



(9) Unit 1c: Upper Greenbrier River, Pocahontas County, West Virginia.

(i) *General description:* Unit 1c includes approximately 69.3 skm (43.1 smi) of the Greenbrier River from the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, West Virginia, downstream to the confluence of Knapp Creek at Marlinton, West Virginia. Approximately 47.5 skm (29.5 smi) of Unit 1c is within the Monongahela National Forest and the Seneca State Forest, with the remainder adjacent to located almost entirely on private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

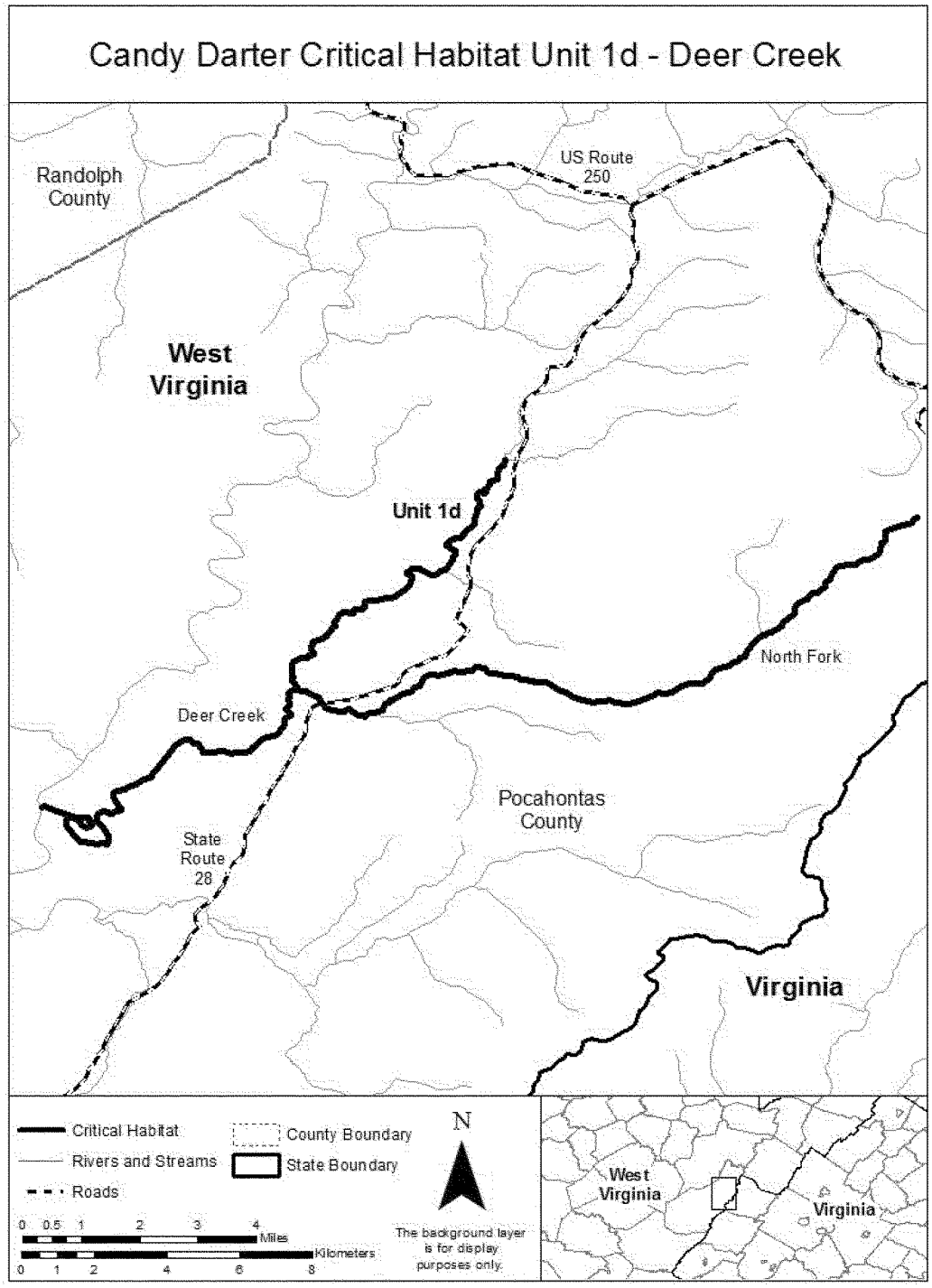
(ii) Map of Unit 1c, Upper Greenbrier River, follows:



(10) Unit 1d: Deer Creek, Pocahontas County, West Virginia.

(i) *General description:* Unit 1d includes approximately 21.2 skm (13.2 smi) of Deer Creek from the confluence of Deer Creek and Saulsbury Run, downstream to the confluence with the Greenbrier River; and approximately 16.3 skm (10.1 smi) of North Fork from a point approximately 1.6 skm (1.0 smi) upstream of the Elleber Run confluence, downstream to the confluence of North Fork and Deer Creek. Approximately 10.0 skm (6.2 smi) of Unit 1d is within the Monongahela National Forest, with the remainder adjacent to almost entirely on private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

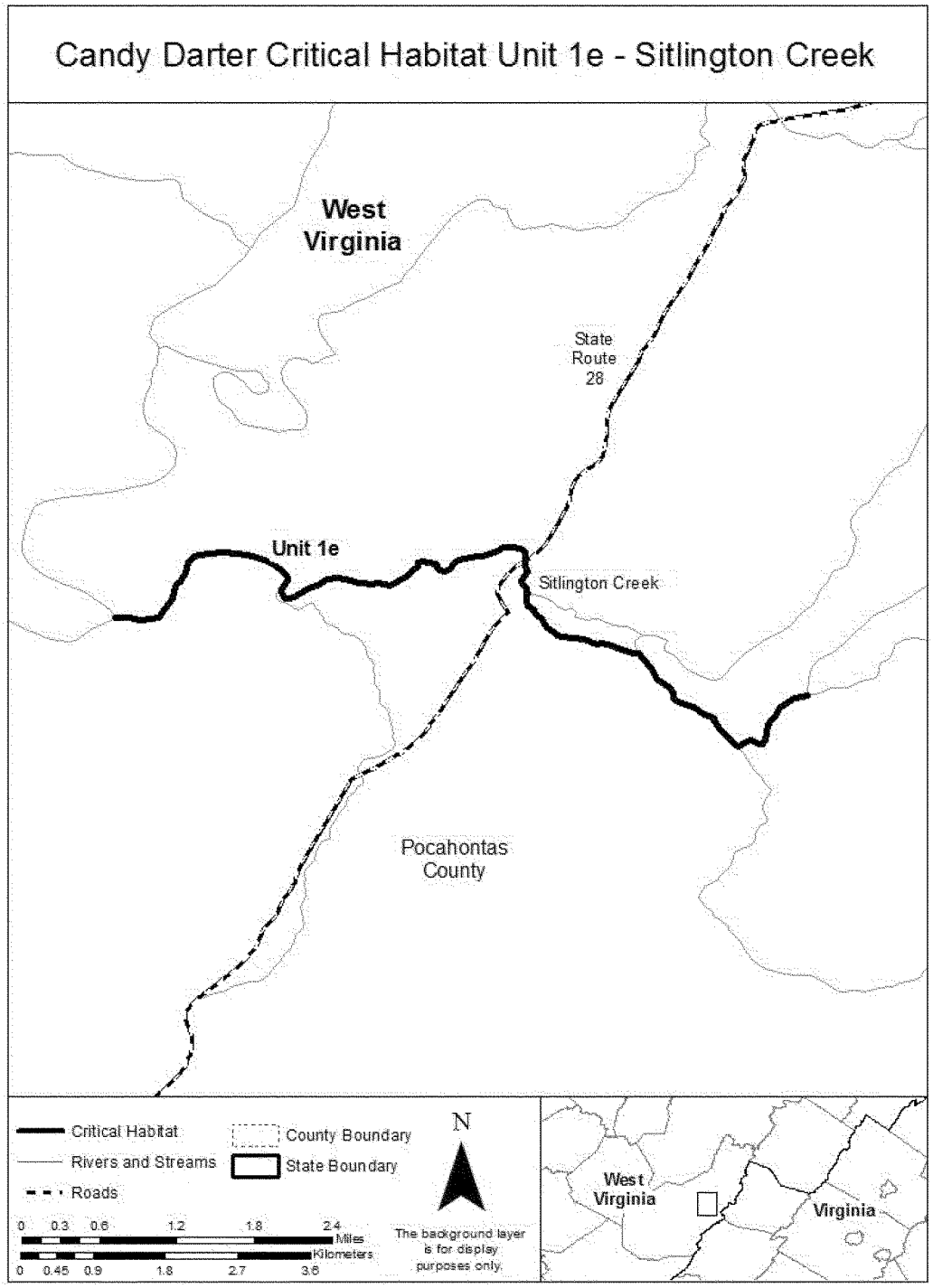
(ii) Map of Unit 1d, Deer Creek, follows:



(11) Unit 1e: Sitlington Creek, Pocahontas County, West Virginia.

(i) *General description:* Unit 1e includes approximately 10.1 skm (6.3 smi) of Sitlington Creek from the confluence of Galford Run and Thorny Branch, downstream to the confluence with the Greenbrier River. Approximately 1.2 skm (0.7 smi) of Unit 1e is within the Monongahela National Forest, with the remainder adjacent to almost entirely on private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

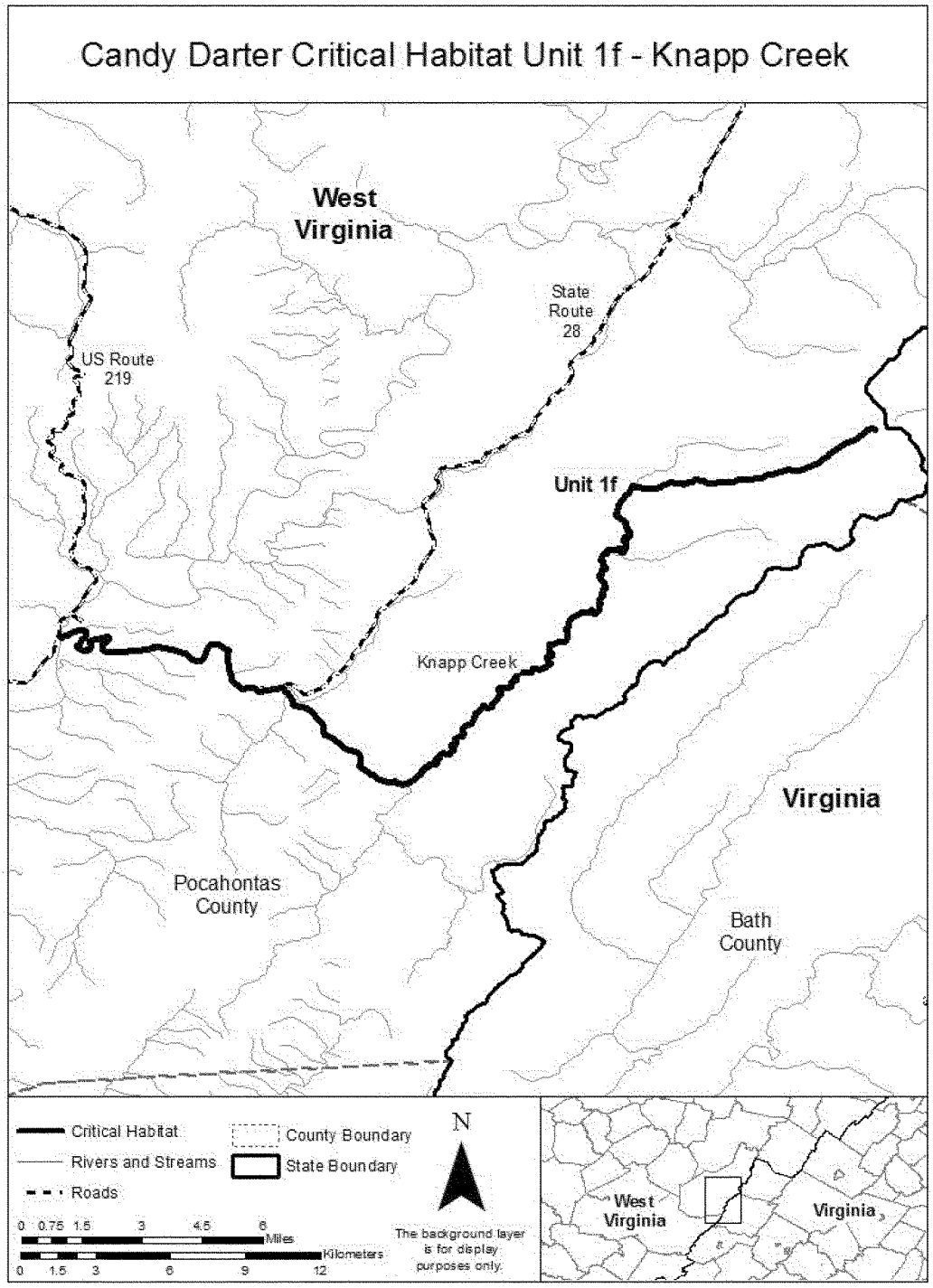
(ii) Map of Unit 1e, Sitlington Creek, follows:



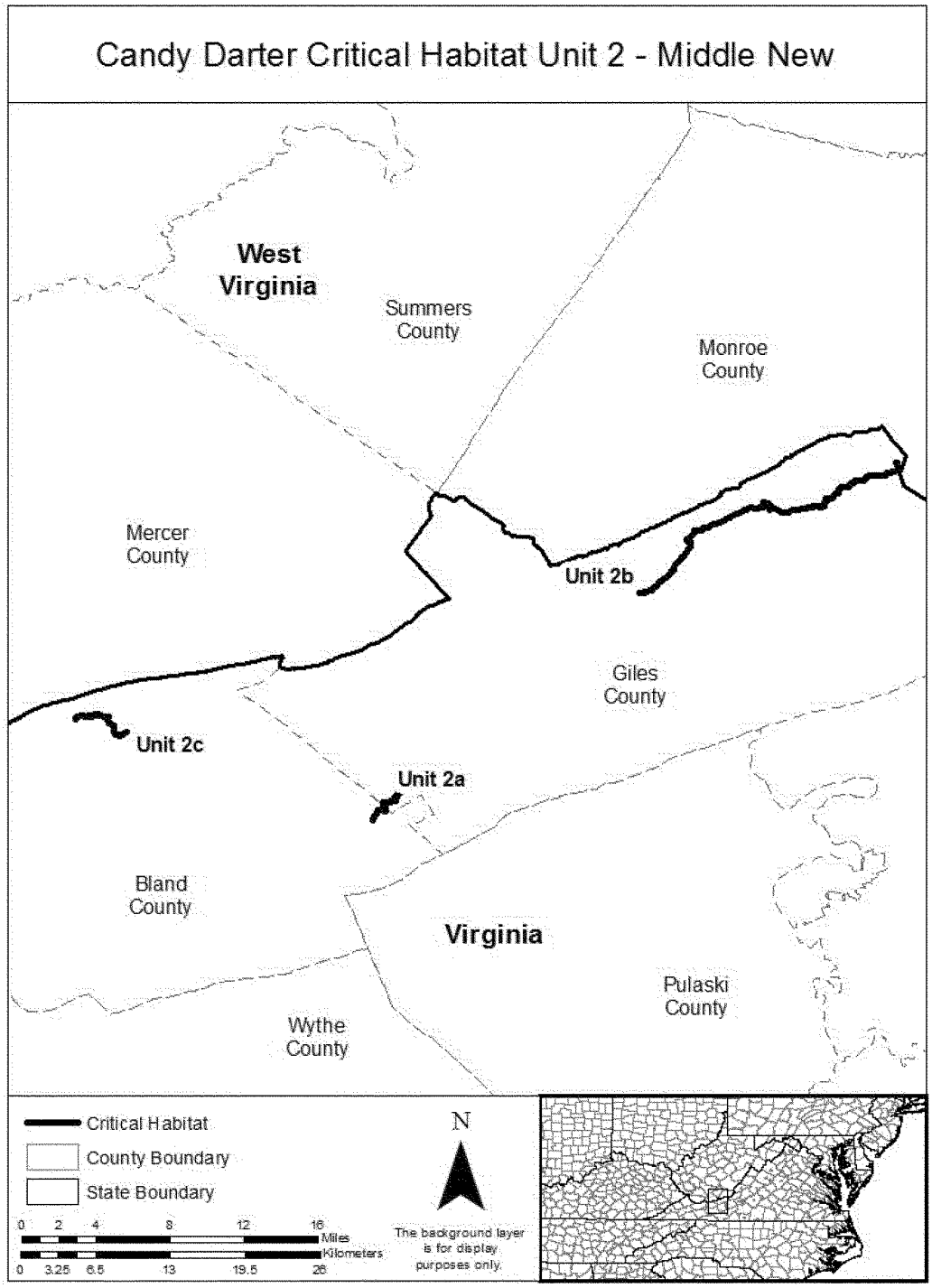
(12) Unit 1f: Knapp Creek, Pocahontas County, West Virginia.

(i) *General description:* Unit 1f includes approximately 43.9 skm (27.3 smi) of Knapp Creek from a point approximately (0.1 smi) west of the WV Route 84 and Public Road 55 intersection, downstream to the confluence with the Greenbrier River at Marlinton, West Virginia. Approximately 7.2 skm (4.5 smi) of Unit 1f is within the Monongahela National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

(ii) Map of Unit 1f, Knapp Creek, follows:



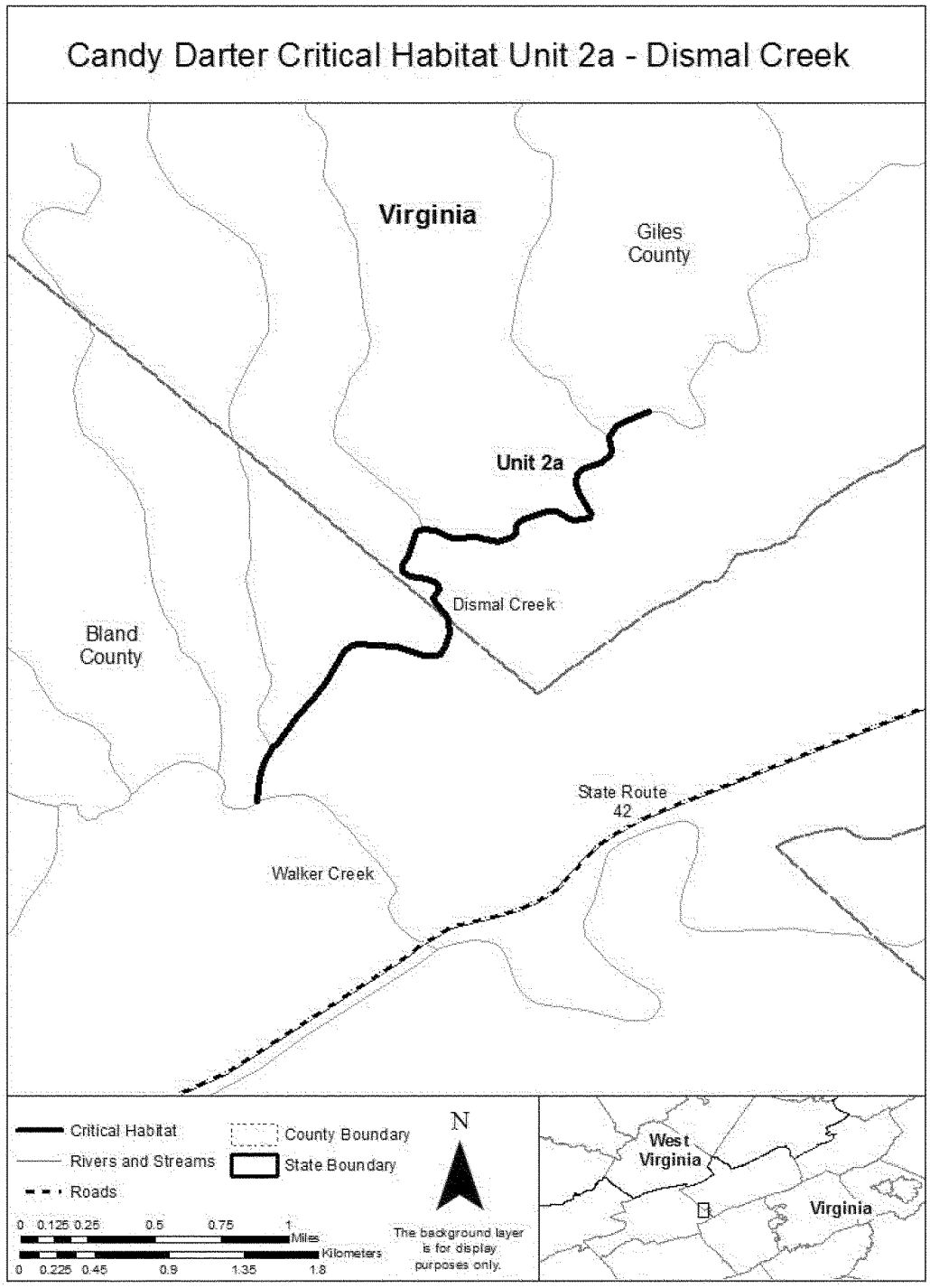
(13) Index map of Unit 2—Middle New follows:



(14) Unit 2a: Dismal Creek, Bland and Giles Counties, Virginia.

(i) *General description:* Unit 2a includes approximately 4.2 skm (2.6 smi) of Dismal Creek from the confluence with Standrock Branch, downstream to the confluence of Dismal Creek and Walker Creek. Approximately 3.2 skm (2.0 smi) of Unit 2a is within the George Washington and Jefferson National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

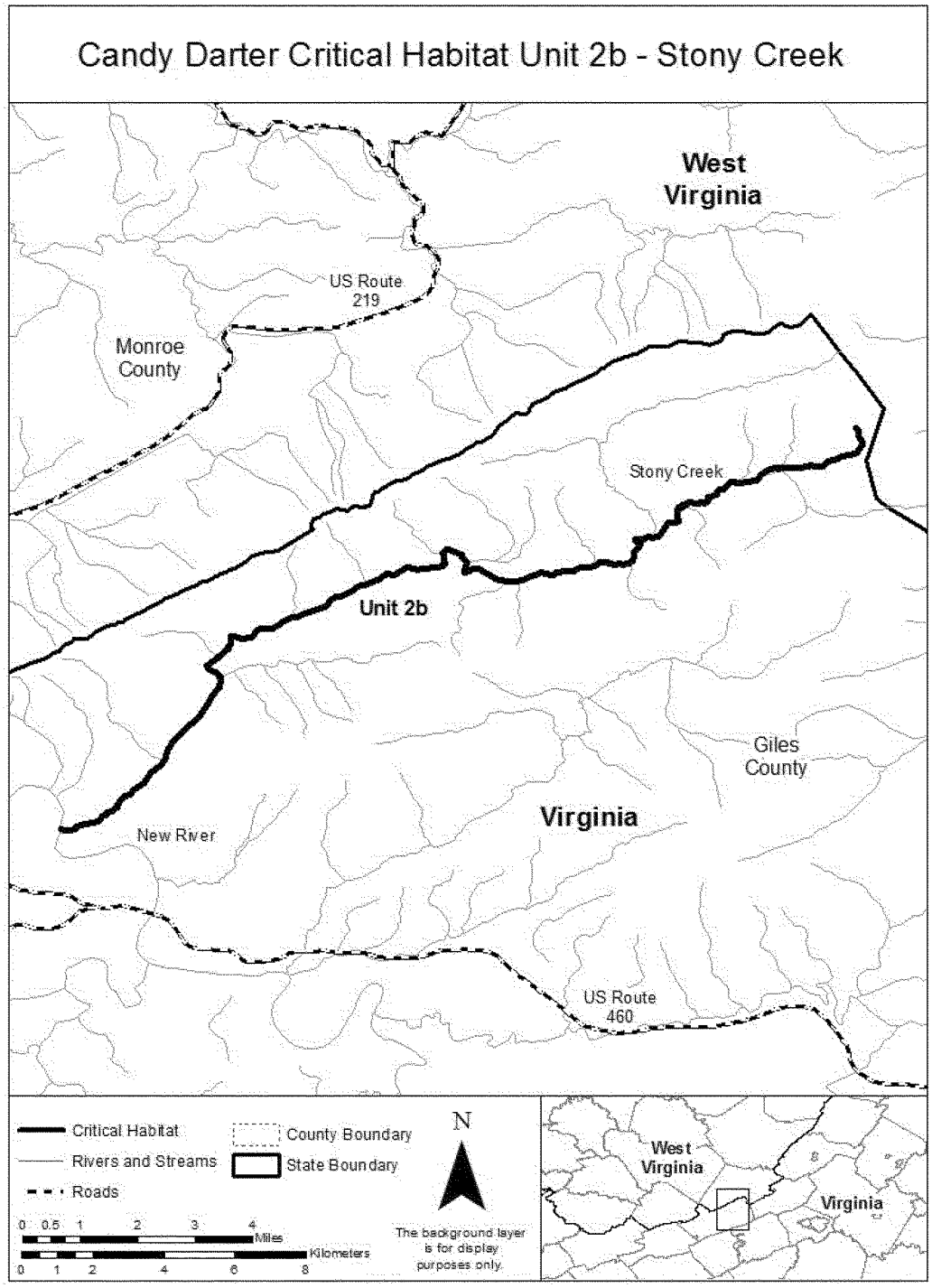
(ii) Map of Unit 2a, Dismal Creek, follows:



(15) Unit 2b: Stony Creek, Giles County, Virginia.

(i) *General description:* Unit 2b includes approximately includes approximately 34.1 skm (21.2 smi) of Stony Creek from a point approximately 2.4 skm (1.5 smi) upstream of North Fork Mountain Road, downstream to the confluence with the New River. Approximately 19.2 skm (11.9 smi) of Unit 2b is within the George Washington and Jefferson National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

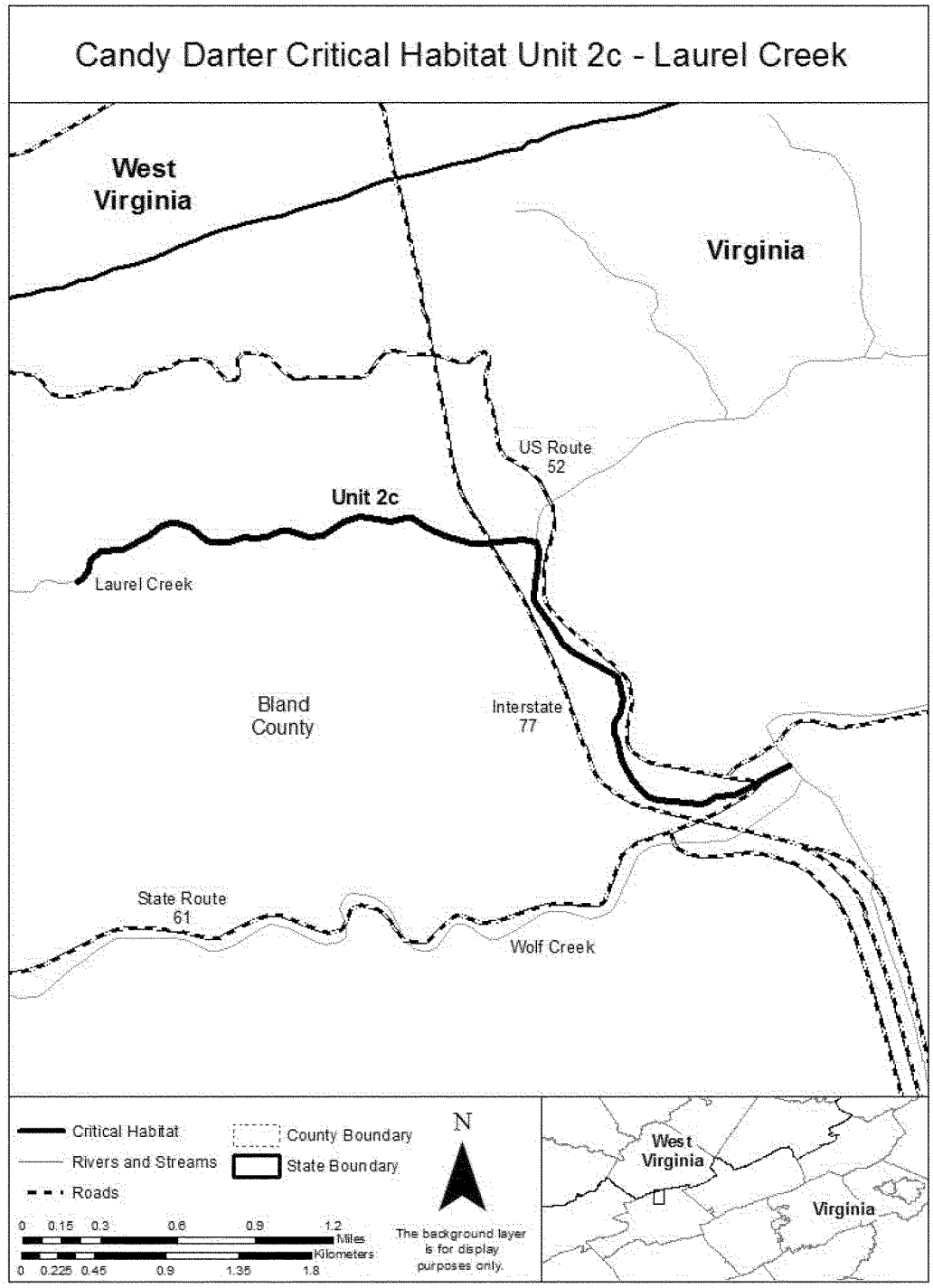
(ii) Map of Unit 2b, Stony Creek, follows:



(16) Unit 2c: Laurel Creek, Bland County, Virginia.

(i) *General description:* Unit 2c includes approximately 5.1 skm (3.2 smi) of Laurel Creek from a point approximately 0.8 skm (0.5 smi) upstream of the unnamed pond, downstream to the confluence of Laurel Creek and Wolf Creek. Unit 2c is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

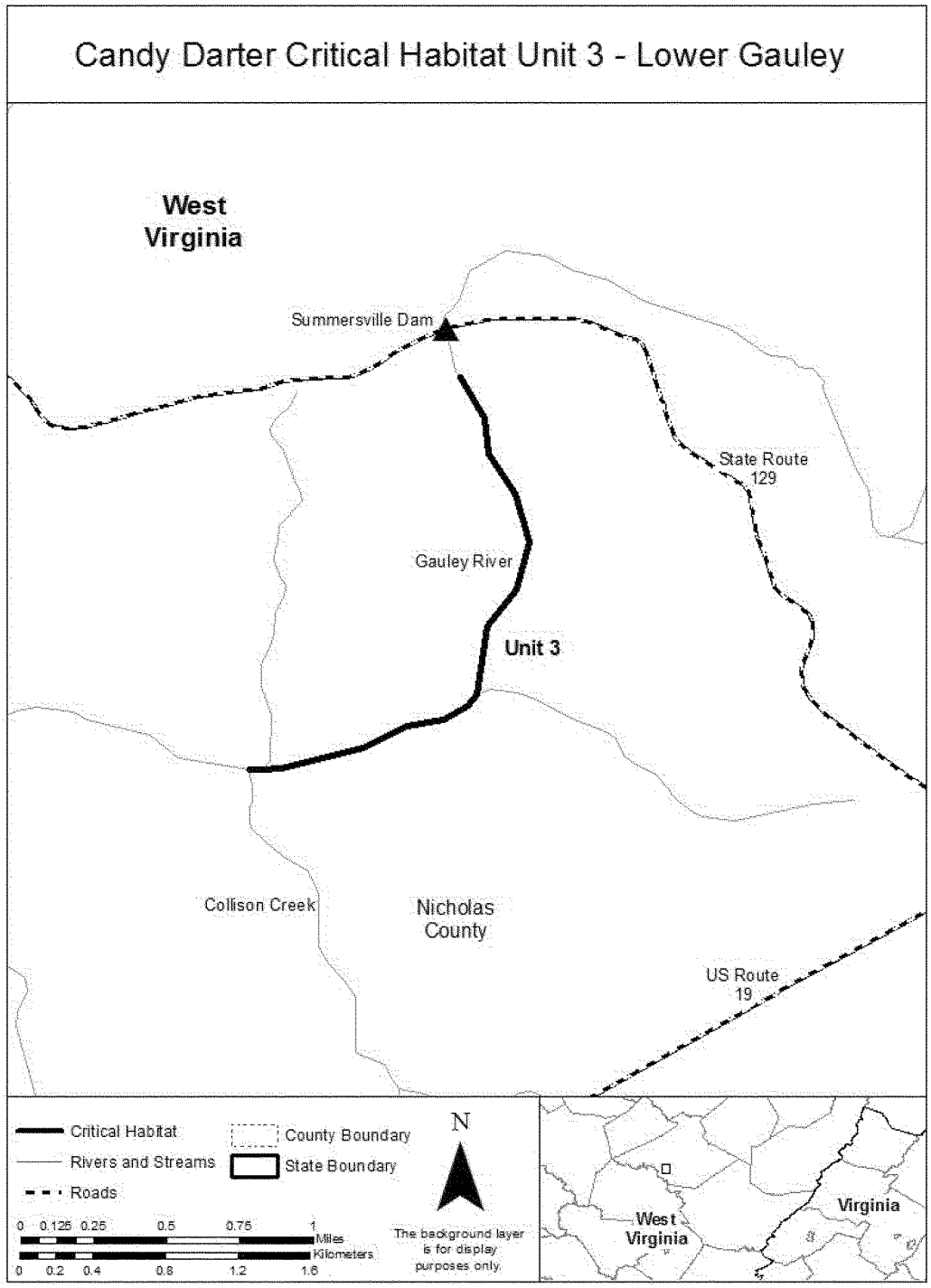
(ii) Map of Unit 2c, Laurel Creek, follows:



(17) Unit 3: Lower Gauley, ''Lower'' Gauley River, Nicholas County, West Virginia.

(i) *General description:* Unit 3 includes approximately 2.9 skm (1.8 smi) of the Gauley River from the base of the Summersville Dam, downstream to the confluence of Collison Creek. The entirety of Unit 3 is within the National Park Service's Gauley River National Recreation Area and the U.S. Army Corps of Engineer's Summersville Recreation Area.

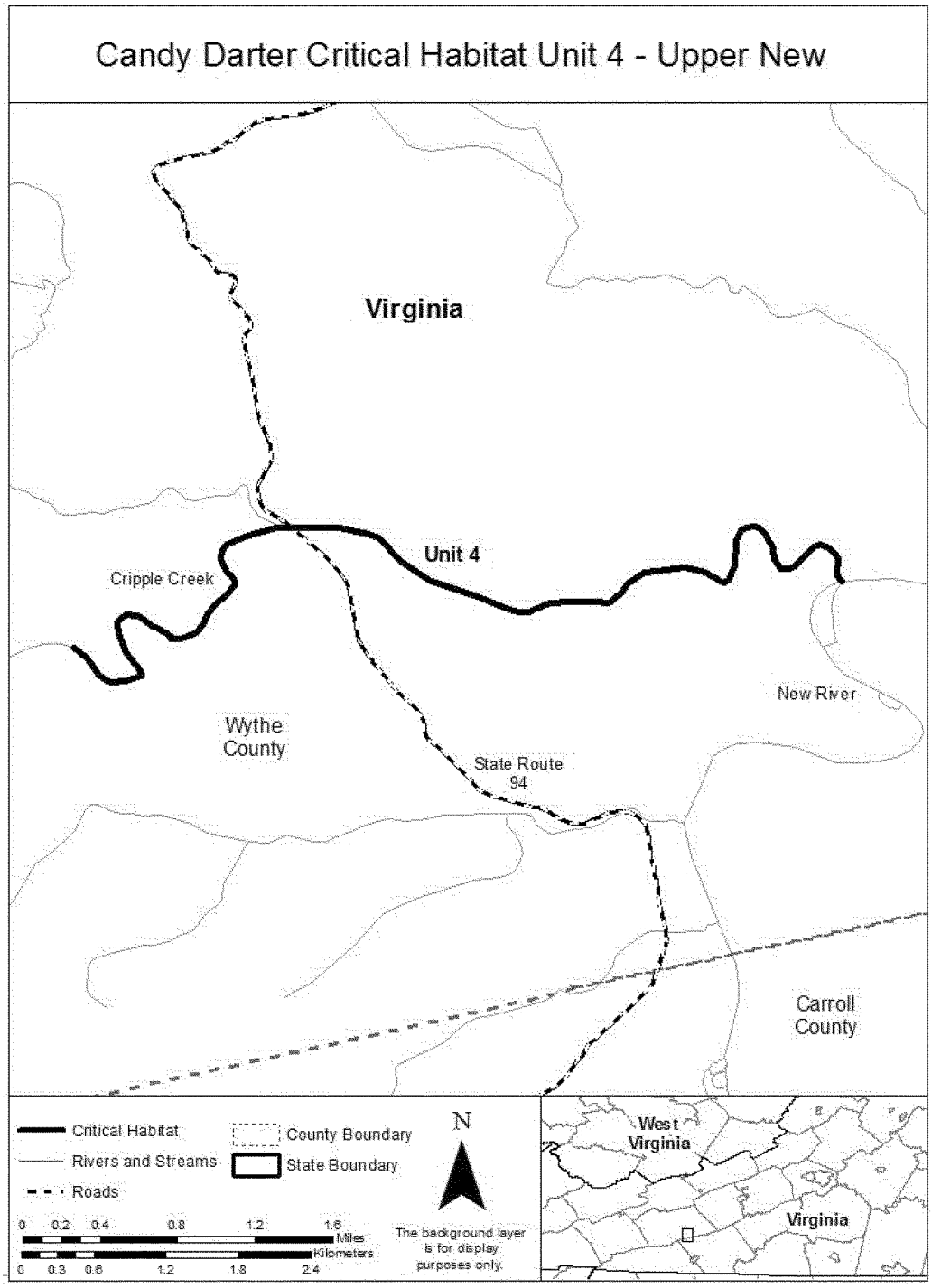
(ii) Map of Unit 3, Lower Gauley, follows:



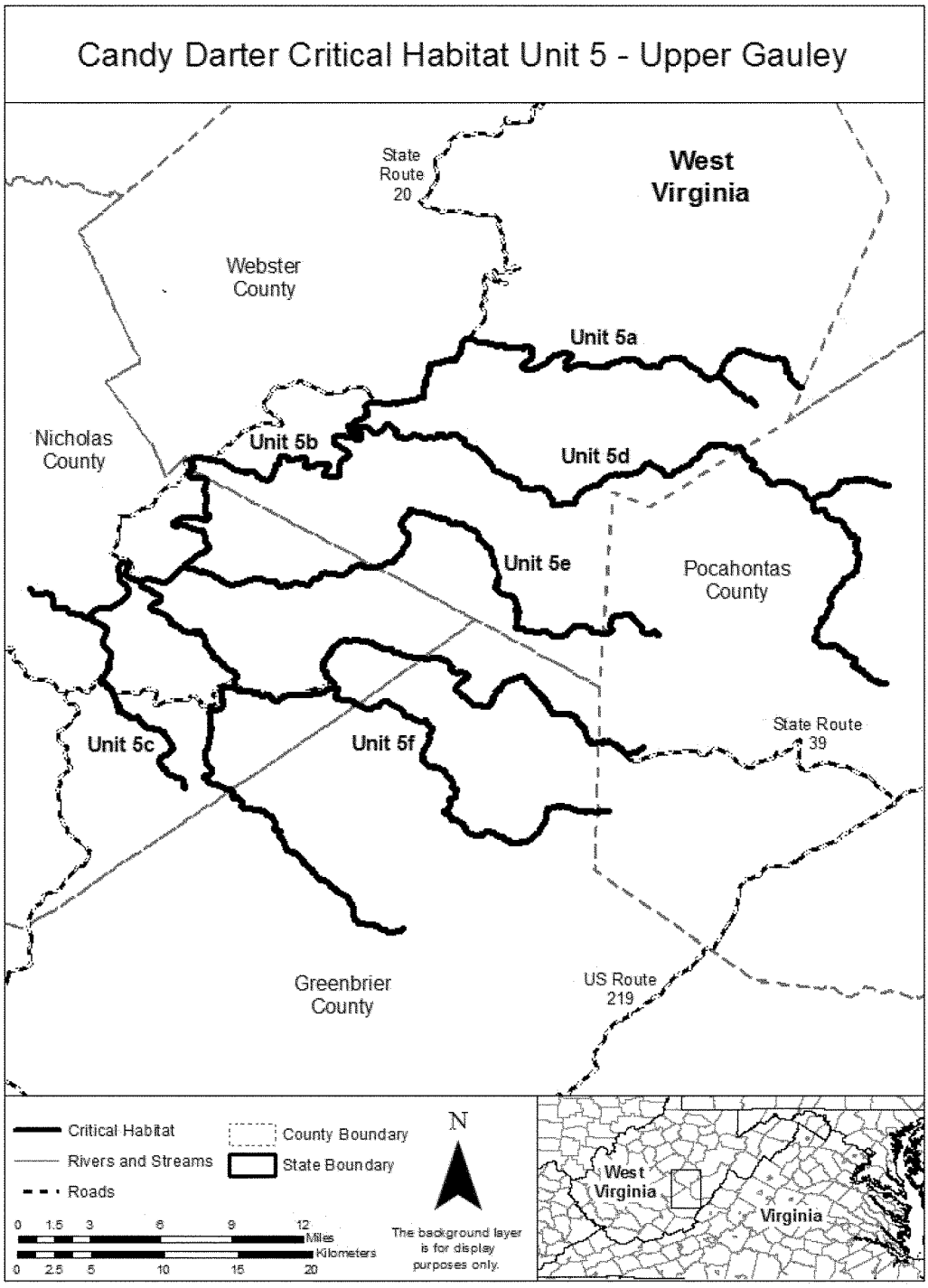
(18) Unit 4: Upper New, Cripple Creek, Wythe County, Virginia.

(i) *General description:* Unit 4 includes approximately 7.9 skm (4.9 smi) of Cripple Creek from a point approximately (2.0 smi) upstream of the State Road 94 bridge, downstream to the confluence of Cripple Creek and the New River. The stream in Unit 4 is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

(ii) Map of Unit 4, Upper New, follows:



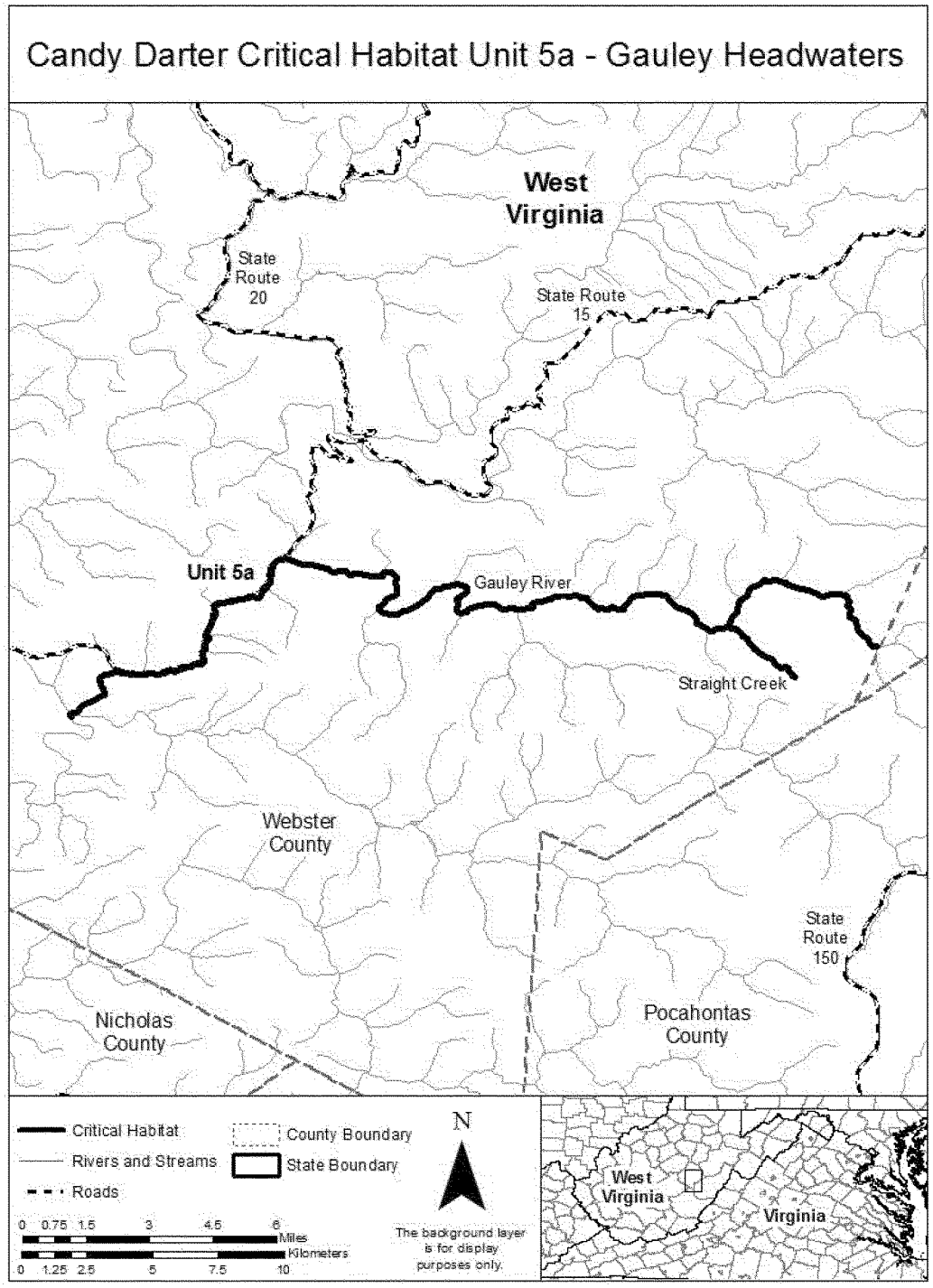
(19) Index map of Unit 5—Upper Gauley follows:



(20) Unit 5a: Gauley Headwaters, Webster County, West Virginia.

(i) *General description:* Unit 5a includes approximately 23.2 skm (37.3 smi) of the Gauley River from the North and South Forks of the Gauley River, downstream to the confluence of the Gauley River and the Williams River at Donaldson, West Virginia; and 2.9 skm (1.8 smi) of Straight Creek from its confluence with the Gauley River to a point approximately 2.9 skm (1.8 smi) upstream of the confluence. Approximately 9.0 skm (5.6 smi) of Unit 5a is within the Monongahela National Forest. The remainder of the unit is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

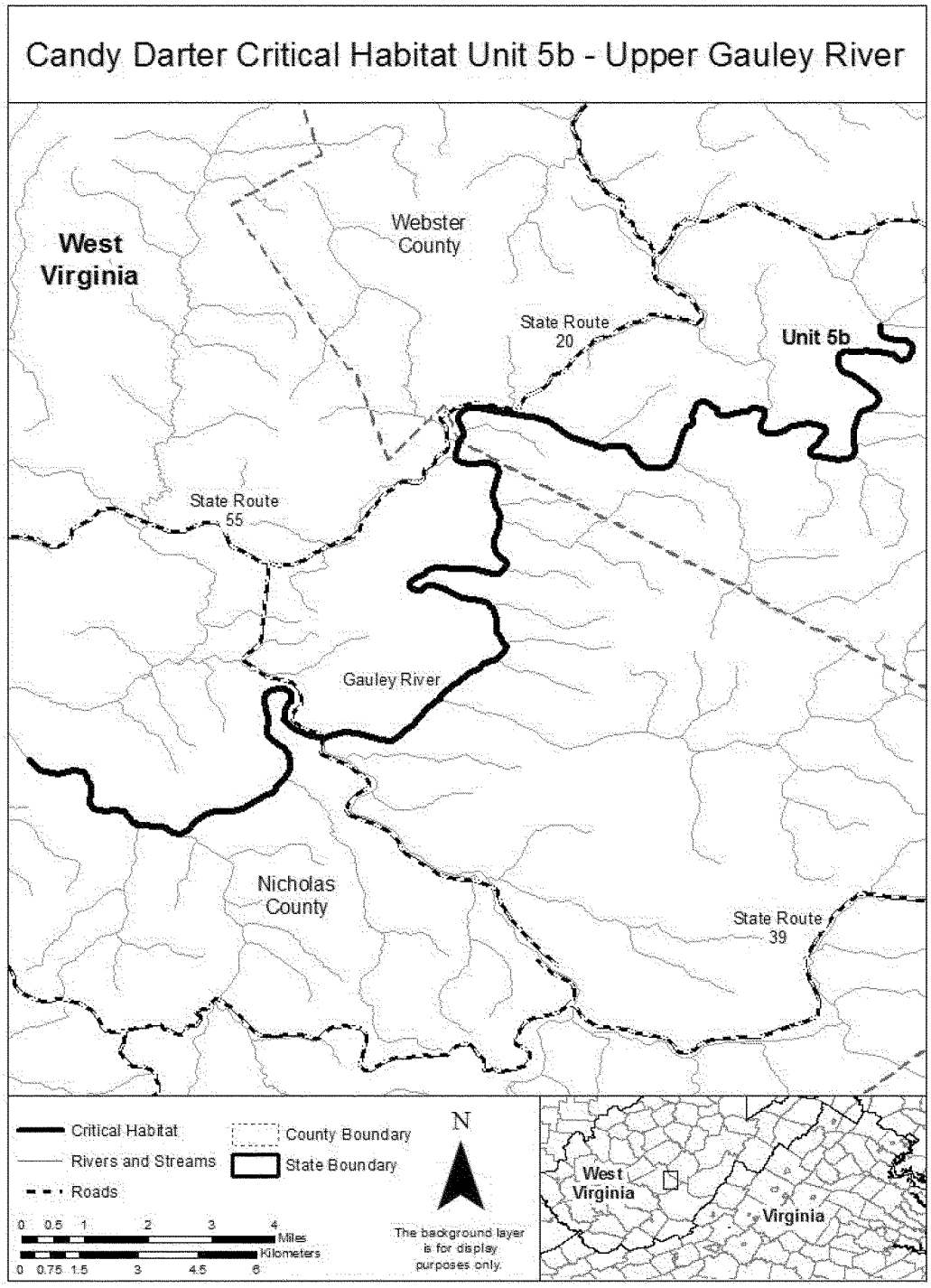
(ii) Map of Unit 5a, Gauley Headwaters, follows:



(21) Unit 5b: Upper Gauley River, Nicholas and Webster Counties, West Virginia.

(i) *General description:* Unit 5b includes approximately 43.8 skm (27.2 smi) of the Gauley River from the confluence of the Gauley and Williams Rivers at Donaldson, West Virginia, downstream to a point approximately 1.6 skm (1.0 smi) upstream of the Big Beaver Creek confluence. Approximately 14.6 skm (9.2 smi) of Unit 5b is within the Monongahela National Forest and/or adjacent to land owned by the U.S. Army Corps of Engineers. The streams in the remainder of the unit are adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

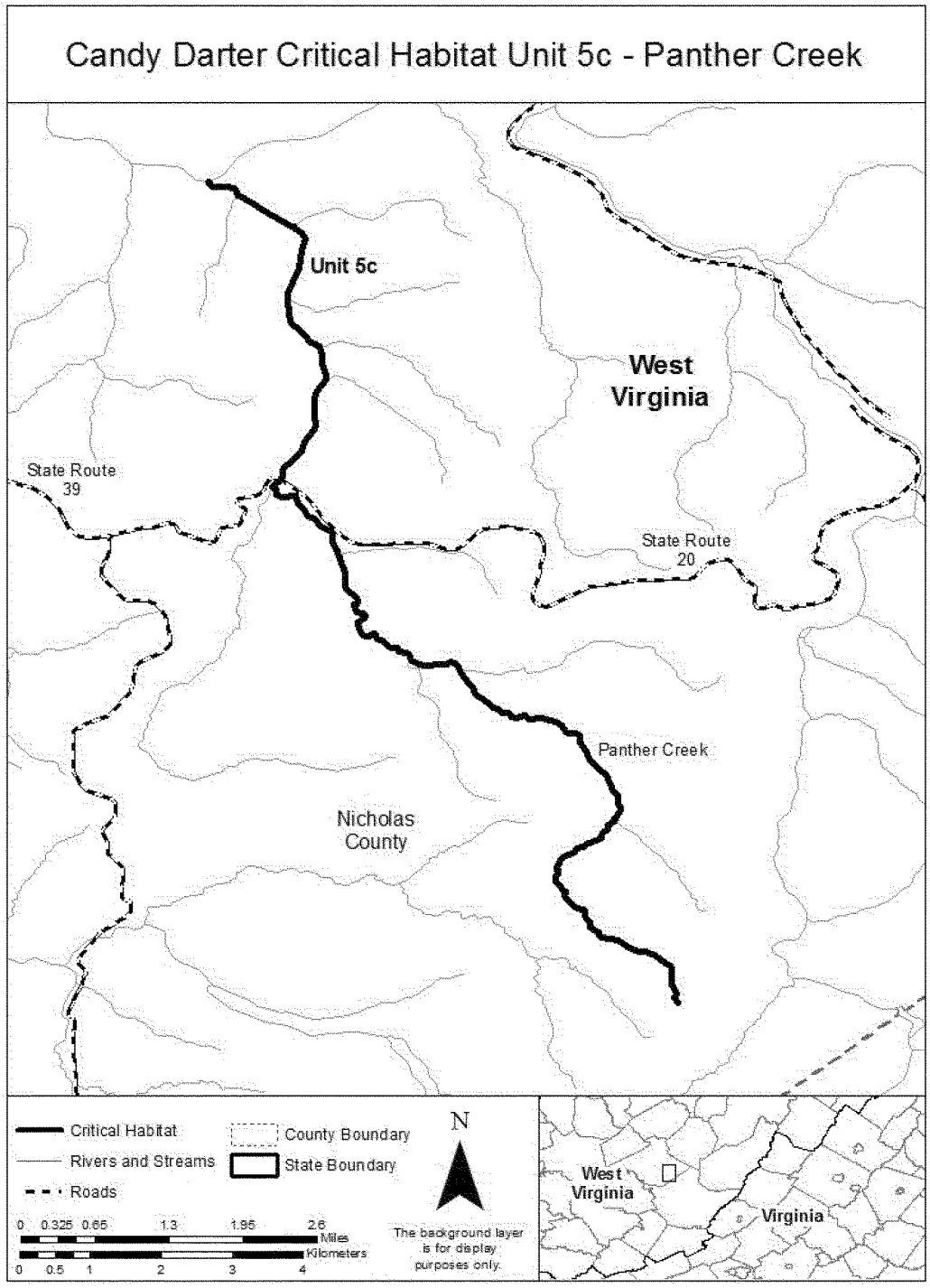
(ii) Map of Unit 5b, Upper Gauley River, follows:



(22) Unit 5c: Panther Creek, Nicholas County, West Virginia.

(i) *General description:* Unit 5c includes approximately 16.3 skm (10.1 smi) of Panther Creek from a point approximately 1.1 skm (0.7 smi) upstream of the Grassy Creek Road crossing, downstream to the confluence with the Gauley River. The streams in Unit 5c are adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

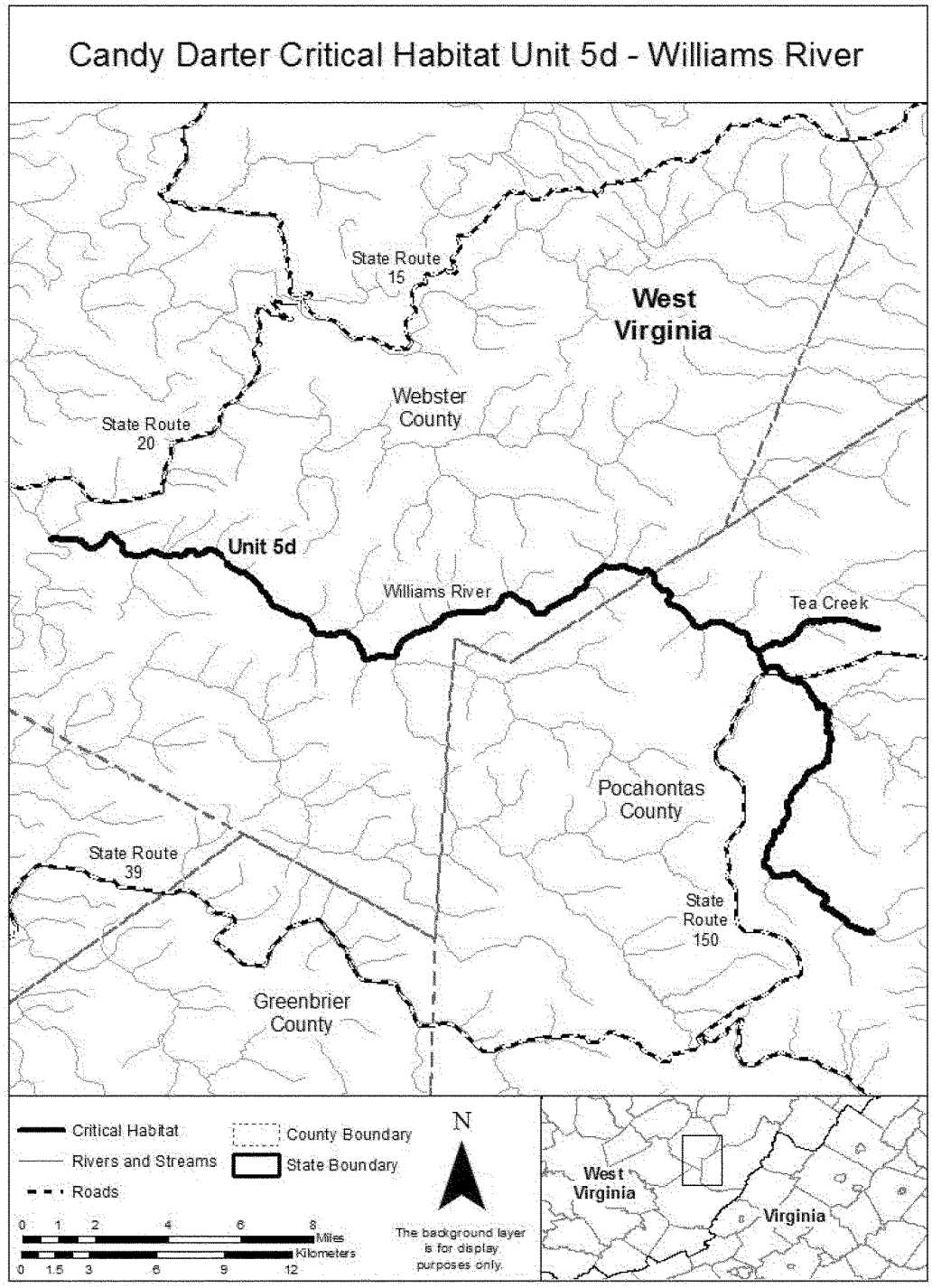
(ii) Map of Unit 5c, Panther Creek, follows:



(23) Unit 5d: Williams River, Pocahontas and Webster Counties, West Virginia.

(i) *General description:* Unit 5d includes approximately 52.4 skm (32.6 smi) of the Williams River from the confluence with Beaverdam Run, downstream to the confluence of the Williams River and the Gauley River at Donaldson, West Virginia; and 5.1 skm (3.2 smi) of Tea Creek from a point on Lick Creek approximately 2.7 skm (1.7 smi) upstream of the Lick Creek confluence, downstream to the Tea Creek confluence with the Williams River. The streams in Unit 5d are entirely within the Monongahela National Forest.

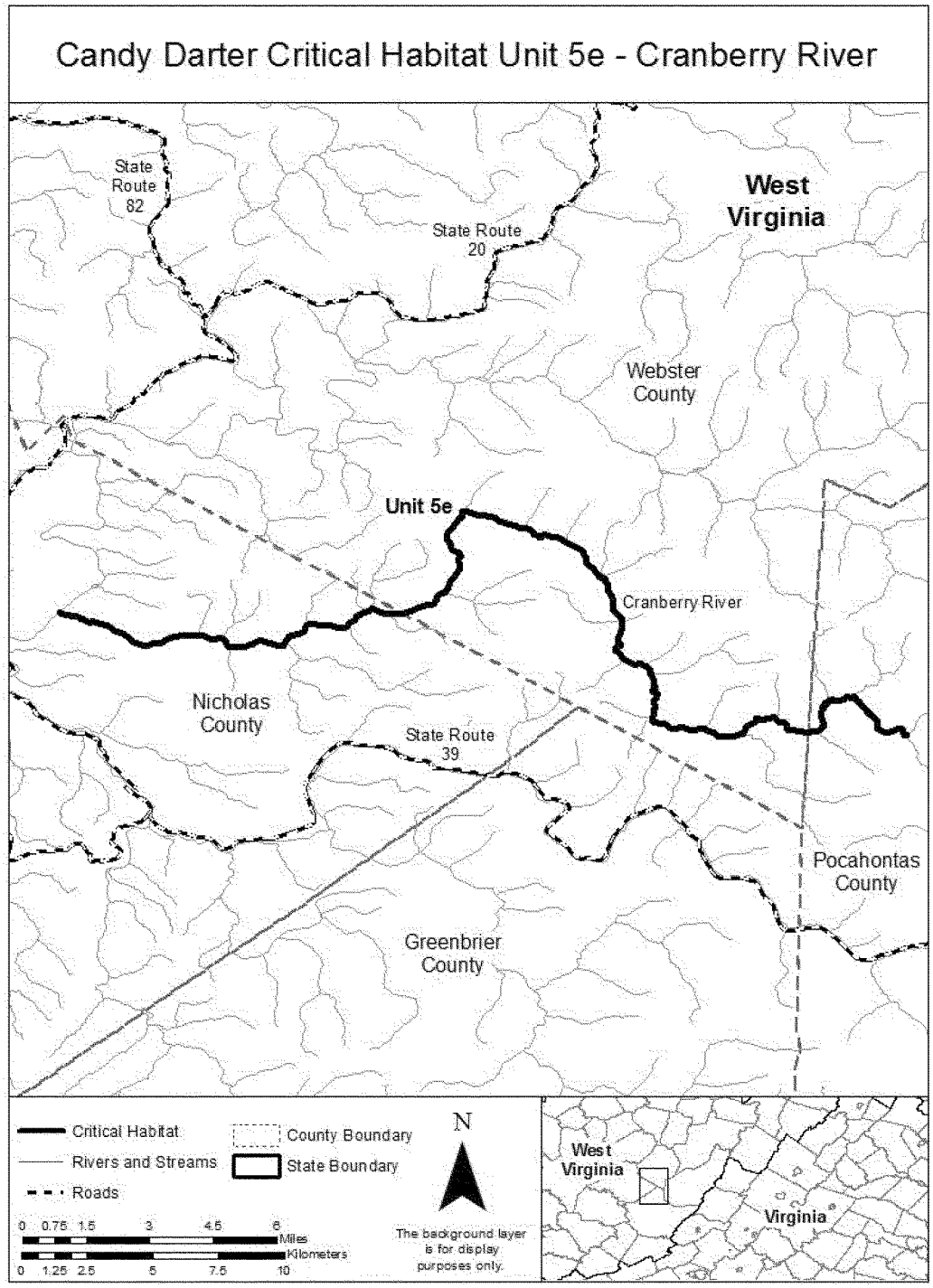
(ii) Map of Unit 5d, Williams River, follows:



(24) Unit 5e: Cranberry River, Nicholas and Webster Counties, West Virginia.

(i) *General description:* Unit 5e includes approximately 39.3 skm (24.4 smi) of the Cranberry River from the confluence of the North and South Forks of the Cranberry River, downstream to the confluence of the Cranberry River and the Gauley River. This stream is entirely within the Monongahela National Forest.

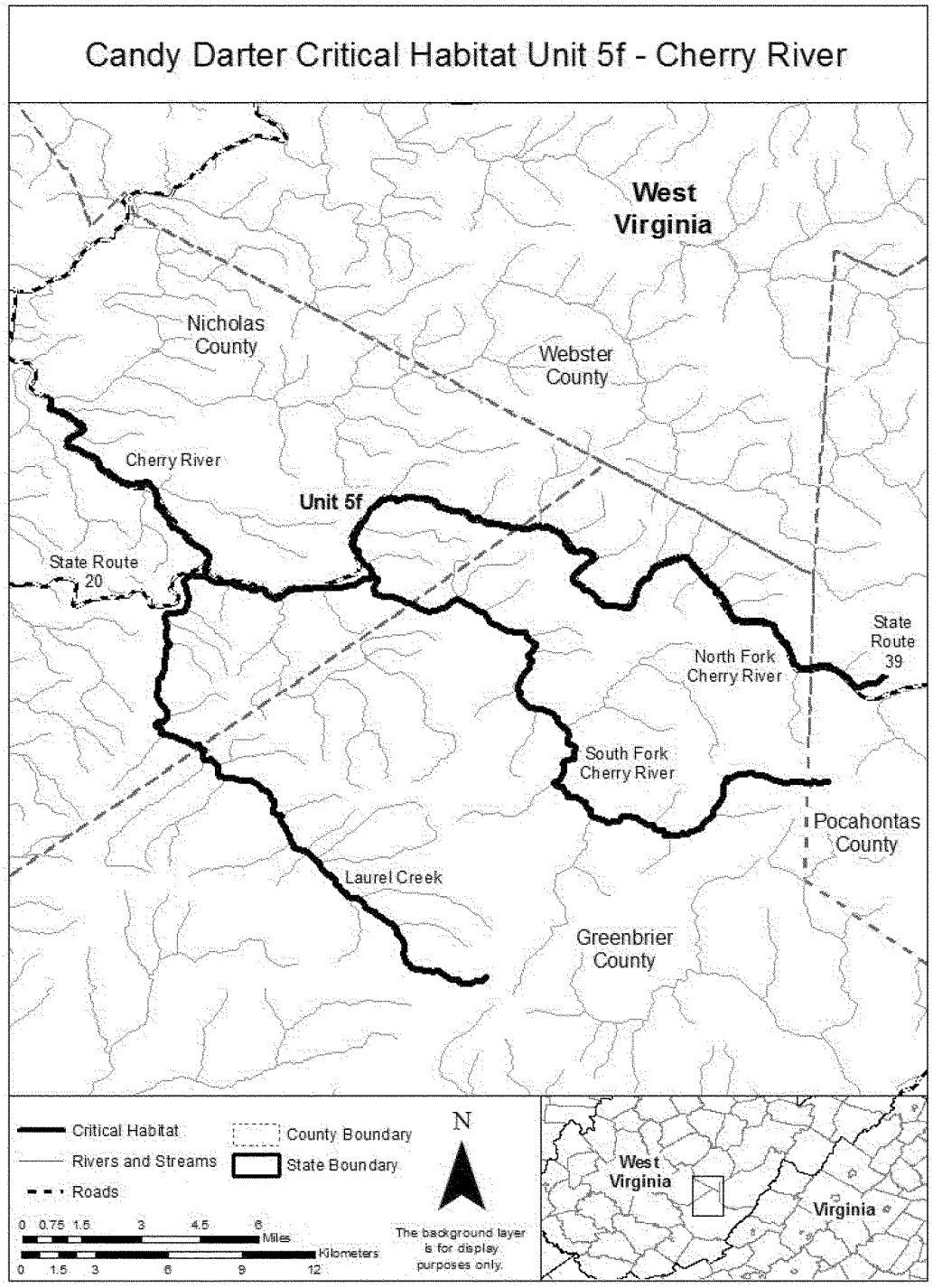
(ii) Map of Unit 5e, Cranberry River, follows:



(25) Unit 5f: Cherry River, Greenbrier and Nicholas Counties, West Virginia.

(i) *General description:* Unit 5f includes approximately 16.7 skm (10.4 smi) of Cherry River from the confluence of the North and South Forks of the Cherry River, downstream to the confluence of the Cherry River and the Gauley River; approximately 28.0 skm (17.4 smi) of the North Fork Cherry River from the Pocahontas Trail crossing, downstream to the confluence of the North and South Forks of the Cherry River; approximately 26.2 skm (16.3 smi) of the South Fork Cherry River from a point approximately 0.5 skm (0.3 smi) south of County Road 29/4 in Virginia, downstream to the confluence of the North and South Forks of the Cherry River; and approximately 24.9 skm (15.5 smi) of Laurel Creek from a point approximately 0.3 skm (0.2 smi) west of Cold Knob Road, downstream to the confluence of Laurel Creek the Cherry River. Approximately 29.1 skm (18.1 smi) of Unit 5f is within the Monongahela National Forest. The remainder is adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

(ii) Map of Unit 5f, Cherry River, follows:



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Dated: August 14, 2018.

James W. Kurth

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

Note: This document was received for publication by the Office of Federal Register on November 15, 2018.

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