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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R5-ES-2018-0050; FF09E21000 FXES1111090000 212]

RIN 1018-BD15

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

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the candy darter (*Etheostoma osburni*) under the Endangered Species Act (Act). In total, approximately 593 stream kilometers (368 stream miles) in Virginia and West Virginia fall within the boundaries of the critical habitat designation. The effect of this final rule is to designate critical habitat under the Act for the candy darter, an endangered species of fish.

**DATES:** This rule becomes effective on May 7, 2021.

**ADDRESSES:** This final rule is available on the internet at <http://www.regulations.gov> in Docket No. FWS-R5-ES-2018-0050 or at <https://www.fws.gov/northeast/candydarter> and at the West Virginia Ecological Services Field Office. Comments and materials we received, as well as some supporting documentation we used in preparing this rule, are available for public inspection in the docket at <http://www.regulations.gov>. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, West Virginia Ecological Services Field Office, 90 Vance Drive, Elkins, WV, 26241; telephone 304-636-6586.

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 <http://www.regulations.gov> at Docket No. FWS-R5-ES-2018-0050, and at the West Virginia Ecological Services Field Office, <https://www.fws.gov/>

[westvirginiafieldoffice/index.html](http://www.westvirginiafieldoffice/index.html) (see **FOR FURTHER INFORMATION CONTACT**).

Any additional tools or supporting information that we developed for this critical habitat designation will also be available at the U.S. Fish and Wildlife Service website and field office set out above, and may also be included in the preamble and at <http://www.regulations.gov>.

#### **FOR FURTHER INFORMATION CONTACT:**

Acting Field Supervisor, U.S. Fish and Wildlife Service, West Virginia Ecological Services Field Office, 90 Vance Drive, Elkins, WV 26241; 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.* This document is a final rule to designate critical habitat for the candy darter. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), any species that is determined to be an endangered or threatened species 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.

We listed the candy darter as an endangered species on November 21, 2018 (83 FR 58747). Also, on November 21, 2018, we published in the **Federal Register** a proposed critical habitat designation for candy darter (83 FR 59232). Section 4(b)(2) of the Act states that the Secretary shall designate 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.

*What this document does.* This document is a final rule that designates critical habitat necessary for the conservation of the candy darter. The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for candy darter. We are designating a total of approximately 593 stream kilometers (368 stream miles) of rivers and streams in Virginia and West Virginia for the candy darter.

*Peer review and public comment.* Our designation is based on the best scientific data available in our peer-reviewed species status assessment (SSA) report. The SSA was used to inform the decisionmaking process of

the proposed and final listing rules (82 FR 46197 and 83 FR 58747, respectively) and proposed and final critical habitat designations (83 FR 59232 and this rule, respectively). For further detail on the responses from peer reviewers, see the final rule listing the candy darter as an endangered species (83 FR 58747). We also considered all comments and information received from the public during the comment period for the proposed designation of critical habitat. Information we received from public comment is incorporated in this final designation of critical habitat, as appropriate, or addressed below in Summary of Comments and Recommendations.

#### **Previous Federal Actions**

We proposed the candy darter for listing on October 4, 2017 (82 FR 46197), and finalized the listing on November 21, 2018 (83 FR 58747). As such, the candy darter is included as an endangered species on the List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations at 50 CFR 17.11(h). We also proposed to designate critical habitat for the candy darter on November 21, 2018 (83 FR 59232). For information on any actions prior to these rules, refer to the proposed listing rule.

#### **Summary of Comments and Recommendations**

We requested written comments from the public on the proposed designation of critical habitat for the candy darter (83 FR 59232) during an open comment period that opened on November 21, 2018, and closed on January 22, 2019. We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods.

During the comment period, we received 14 comment letters directly addressing the proposed critical habitat designation. All substantive information provided during the comment period has been grouped into general issues specifically relating to the proposed critical habitat designation for the candy darter and either incorporated directly into this final determination, as appropriate, or addressed below in the following summary.

In addition, some of the 14 substantive comments directly related to the critical habitat designation also contained suggestions that were applicable to general recovery issues for

the candy darter, but not directly related to the critical habitat designation (*i.e.*, meaning these comments are outside the scope of the critical habitat rule). These general comments included topics such as the use of reintroductions or translocations, specific areas for high-quality reintroduction sites, riparian vegetation management to address the effects of climate change on water temperature in candy darter streams, and baitfish regulations. While these comments may not be directly incorporated into the critical habitat rule, we have noted the suggestions and look forward to working with our partners on these topics during recovery planning for the candy darter.

#### *Comments From Federal Agencies*

(1) *Comment:* The U.S. Forest Service (USFS), the West Virginia Department of Natural Resources (DNR), and several public commenters suggested that reintroductions or translocations or both would be important conservation strategies for the candy darter. Some commenters suggested specific areas that would represent high-quality reintroduction sites.

*Our response:* During recovery planning and implementation for the candy darter, we will work collaboratively with our partners and all stakeholders to recover the species. Translocation into historically occupied habitats is consistent with the recovery strategy laid out in the Candy Darter Recovery Outline (Service 2019, entire). We appreciate the support of our partners in this regard and will continue to work with them to determine appropriate locations to implement this strategy, monitor the success of these efforts, and manage these populations as needed.

(2) *Comment:* The USFS urged us to consider that designating critical habitat might mandate conservation measures beneficial to the candy darter but perhaps be detrimental to the overall aquatic ecosystem (*e.g.*, maintaining or adding barriers to fish passage).

*Our response:* Barriers to fish passage may reduce the spread of variegate darters (*Etheostoma variatum*), the primary threat to candy darters, within candy darter habitats. However, the designation of critical habitat will not result in the mandate to install any passage barriers. Any proposals to install or remove fish passage barriers would be evaluated on a case-by-case basis for their potential effects to the candy darter and its critical habitat, as well as for the overall conservation benefits and effects to other ecosystem functions.

(3) *Comment:* The USFS asked us to clarify and recognize that the areas of ongoing hybridization between variegate darters and candy darters may change.

*Our response:* Occupied habitat for the candy darter are those areas where individual fish with pure candy darter alleles were found based on the most recent survey results. We recognize that the zone of hybridization may change over time and that pure candy darters may become extirpated from some portions of currently occupied habitat in the future. However, maintaining existing populations is important to the survival and recovery of the species. Therefore, designation of occupied habitat as it occurs at the time of listing is appropriate. Critical habitat can be revised in the future if substantial new information becomes available that would suggest certain areas should be added or removed.

(4) *Comment:* The USFS asked us to acknowledge the importance of Forest Service Watershed Restoration Action Plans (and other conservation actions ongoing in national forests) within the range of the candy darter and expressed interest in discussing potential effects of critical habitat designations on land management activities.

*Our response:* We acknowledge the significant conservation contributions that the USFS has made to protecting and enhancing candy darter habitat and its surrounding watershed. We also recognize that there are section 7 consultation requirements as a result of the listing of the candy darter and the designation of critical habitat. We will continue to work collaboratively with the USFS to address these workload concerns and to determine what additional avoidance, minimization, and conservation measures are appropriate for the species.

(5) *Comment:* The USFS suggested that we consider whether or not the designation of critical habitat may increase the risk of malicious introductions of nonnative fish into candy darter streams.

*Our response:* We are not aware of any efforts to maliciously introduce nonnative fish in candy darter waters. The designation of critical habitat may increase public awareness of the importance of these watersheds and encourage the development of education and outreach about baitfish regulations. We are working with the West Virginia DNR to revise regulations to reduce the potential for baitfish introductions with the aim of increasing awareness and enforcement on this issue.

(6) *Comment:* The USFS and one public commenter raised concerns that climate change may cause widespread

changes in vegetation in the riparian areas that would result in higher temperatures or increased flooding, which increases sedimentation in candy darter streams.

*Our response:* We acknowledge the importance of intact riparian areas to maintaining candy darter habitat and will work with partners to maintain and restore appropriate riparian areas to provide the proper thermal properties and bank stability in candy darter habitat.

#### **Comments From States**

Section 4(i) of the Act states, “the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s comments or petition.” Comments received from agencies within the State of West Virginia (the State) regarding the proposal to designate critical habitat for the candy darter are addressed below.

(7) *Comment:* The proposed critical habitat rule also sought comments on the Service’s intent to explore other recovery tools that may require additional regulations (*e.g.*, designating experimental populations under section 10(j) of the Act) or permits (*i.e.*, Safe Harbor Agreements under section 10 of the Act). The West Virginia DNR expressed concern with using our authorities under section 10(j) of the Act for recovery of the candy darter. The State concluded that establishing experimental populations (or designating additional areas of critical habitat, other than those proposed) is not in the best interest of the species. Conversely, one public commenter suggested that we should use our authorities under section 10(j) of the Act to establish experimental candy darter populations to promote State and private landowner collaboration in conserving the species.

*Our response:* As discussed above, during the recovery planning process for the candy darter, we will work collaboratively with our partners and stakeholders to ensure the best conservation outcome for the species. Translocation into historical habitats is consistent with the species’ recovery strategy.

Upon further consideration, we conclude that designating experimental populations (under section 10(j) of the Act) is not appropriate at this time, and we are not designating any areas as critical habitat beyond those that were proposed. In the future, if we determine, in consultation with partners and stakeholders, that the reintroduction of the species to certain historically occupied streams would benefit from

the regulatory flexibility offered by section 10(j) of the Act, we will publish a proposed rule for public comment. See Summary of Changes from Proposed Rule, below, for additional information.

(8) *Comment:* The West Virginia Department of Environmental Protection (DEP) and a public commenter expressed concerns with designating critical habitat. Commenters indicated that we should not designate critical habitat because: (1) Hybridization (and not loss of habitat) is the primary stressor affecting the candy darter; (2) habitat protections would not reduce the likelihood of extinction; and (3) habitat protections may disproportionately benefit the variegate darter.

*Our response:* The designation of critical habitat is not a discretionary action. According to section 4(a)(3)(A) of the Act, the Secretary of the Interior shall, to the maximum extent prudent and determinable, concurrently with making a determination that a species is an endangered species or a threatened species, designate critical habitat for that species. We have determined that critical habitat is both prudent and determinable for the candy darter (83 FR 59232, November 21, 2018). Therefore, as required by the Act and after consideration of substantive comments on the proposed rule, we are designating, as critical habitat, those areas occupied by the species at the time of listing on which are found the physical or biological features essential for the conservation of the species and which may require special management considerations or protection.

As we discussed in the SSA report (Service 2018, entire) and the proposed rule (83 FR 59232, November 21, 2018), there are multiple stressors in addition to the introduction of the variegate darter that are affecting the candy darter. Management of these other stressors will be important to the conservation of the species. In addition, while eliminating variegate darters from candy darter watersheds is an important goal for the conservation of the species, we are not aware of feasible methods for achieving this goal. We look forward to working with our conservation partners to research potential methods for reducing the threat of variegate darter hybridization. Though the candy darter and variegate darter share many of the same habitat requirements, such as unembedded gravel substrate, we have no evidence to suggest that the maintenance of high-quality habitat for the candy darter disproportionately benefits the variegate darter. On the contrary, it is conceivable that variegate darters are more tolerant of marginal

habitat conditions and that high-quality streams within the candy darter's historical range might provide the candy darter a competitive advantage over the introduced variegate darter.

(9) *Comment:* The West Virginia DNR noted that candy darters may also be present in several perennial tributaries outside of the streams proposed for designation as critical habitat, but that these tributaries have not been surveyed. The State did not recommend including these tributaries as critical habitat at this time, but did recommend that these streams should be considered when reviewing projects that may affect the species.

*Our response:* We acknowledge that the candy darter may be present in additional streams or tributaries that have not been surveyed, and will work with the West Virginia DNR and Virginia Department of Game and Inland Fisheries to develop a list of these streams so that they can be considered during project reviews. The candy darter will be protected as an endangered species wherever it is found under the prohibitions described in section 9 of the Act.

(10) *Comment:* The West Virginia DEP pointed out that the rule does not define the ratio or density of nonnative species that would be consistent with the conservation of the candy darter.

*Our response:* As discussed in the candy darter SSA report, the scientific evidence is clear that nonnative species can have a detrimental effect on native species such as the candy darter. However, the data are not currently available to explicitly define a ratio or density of nonnatives that is protective of the candy darter. Research into establishing such conservation metrics and recovery goals for the candy darter will be addressed during the recovery planning and implementation process.

(11) *Comment:* The West Virginia DNR informed us that they have taken steps to formulate regulations designed to curtail, mitigate, or both, the practice of moving baitfish in regions that still contain candy darter populations and in areas in which they hope to reestablish candy darter populations.

*Our response:* Limiting the movement of baitfish is a key component to reduce the threat of additional variegate darter introductions, and we applaud the State's efforts in this regard.

(12) *Comment:* The West Virginia DNR suggested that we may have underestimated the threat of acid precipitation in the Upper Gauley.

*Our response:* Stream acidification in some candy darter watersheds is a serious concern and we appreciate the efforts of the State and other partners in

addressing this threat. We will address this topic in future recovery planning.

#### *Public Comments*

(13) *Comment:* Two public commenters expressed concerns regarding the effect of a critical habitat designation on the coal mining industry. There was a particular emphasis of concern around a statement in the incremental effects memorandum (IEM) prepared by us for the economic analysis of the critical habitat designation (IEM 2018). The statement reads: "Specific recommendations for coal mining in candy darter watersheds (augmenting the general management recommendations) will include not using valley fills. Strategic placement and frequent maintenance of all construction and operational features (e.g., roads, slurry ponds, and other features that lead to sedimentation) will also be recommended." The commenters stated that this provision would result in a ban on coal mining.

*Our response:* It is important to note the context of this statement within the IEM, as it describes "protections or efforts relevant to the known threats to the species that would provide some level of conservation for the candy darter absent the proposed critical habitat designation." The suggestion of avoiding valley fills as a conservation measure for candy darters specifically refers to potential actions that are *not* a result of critical habitat designation. Therefore, the IEM does not include the effects of these actions in its analysis, as they would occur regardless of the presence or absence of designated critical habitat.

We do not propose (nor do we have the authority) to ban coal mining. Federal agencies are required to consult with the Service to ensure that any action they carry out, fund, or authorize will not jeopardize the species or destroy or adversely modify designated critical habitat. The requirement to ensure any action does not jeopardize the species applies whether or not the action area is designated as critical habitat. Avoiding the use of valley fills in coal mining in candy darter watersheds, as referenced by the IEM, is an example of a conservation measure the Service might recommend during section 7 consultation, whether or not the area is designated as critical habitat.

The Service's 1996 Biological Opinion (BO) issued to the Office of Surface Mining and Reclamation and Enforcement (OSMRE) addresses coal mining practices regulated under the Surface Mining Control and Reclamation Act. The terms and conditions of that BO require the

Service to work with the appropriate State regulatory authority to develop species-specific protective measures (SSPMs) to avoid and minimize the impacts to listed species.

Implementation of SSPMs and development of the required protection and enhancement plan do not make any single conservation measure mandatory (e.g., banning the use of valley fills). Rather, during the consultation process for each project, the Service works with OSMRE and the State regulatory agency to develop specific conservation measures to satisfy the requirement of the BO to avoid and minimize impacts to the candy darter while allowing coal mining to proceed.

*(14) Comment:* Two public commenters provided comments describing the beneficial impacts of forestry best management practices (BMPs) on water quality and encouraged us to use “consistent language, that is supported by science when discussing the value of forestry BMPs.”

*Our response:* We have always relied upon the use of the best scientific and commercial data available in decisionmaking processes, and we will continue to do so with regard to discussions of BMPs. The implementation of BMPs for forestry can reduce sedimentation when consistently and diligently applied, and that these BMPs are important for preserving the integrity of aquatic habitats and the species that occupy them. However, the assertion that current mechanisms are protective of the species does not relieve the Service of its statutory obligation to designate critical habitat. In *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003), the court held that the Act does not direct us to designate critical habitat only in those areas where “additional” special management considerations or protection is needed. If any area provides the physical or biological features essential to the conservation of the species, even if that area is already well managed or protected, that area still qualifies as critical habitat under the statutory definition if special management is needed.

*(15) Comment:* Two public commenters encouraged us to work with the State and private landowners to establish forestry BMPs on property that is adjacent to the critical habitat designation.

*Our response:* We recognize and appreciate the importance of working with landowners and project proponents to protect candy darter habitats, and to avoid, minimize, and mitigate any adverse effects that may

occur. We will continue to use our existing authorities to address these issues as appropriate.

*(16) Comment:* Two public commenters noted that candy darters occupy habitats in watersheds with active coal mining. They stated that this situation suggests that candy darters can “thrive” in these areas.

*Our response:* While candy darter populations may persist in some watersheds where mining or other land disturbances are or have been present, the extent to which these populations are stable and/or thriving remains to be determined. The proposed critical habitat rule does not specify that any particular land use is incompatible with the persistence of candy darter populations. As mentioned in previous responses to comments raising concerns about the impacts to the coal mining industry, we plan to work cooperatively with the relevant State and Federal regulatory agencies to develop conservation measures allowing the continuation of coal mining in a manner that avoids and minimizes impacts to the candy darter and its habitat.

*(17) Comment:* One public commenter requested that we reinstate section 7 consultation and issue a biological opinion for two natural gas Executive Order 13211 construction projects.

*Our response:* We are aware of these two pipeline projects and are in discussions with the Federal Energy Regulatory Commission regarding section 7 consultation needs for the candy darter.

*(18) Comment:* One public commenter asked us to clarify the terms “stream mile” and “protection of riparian buffers” and to confirm that private forest lands are not included in the critical habitat designation. Similarly, another commenter suggested that we should exclude State and private forest lands from a final critical habitat designation.

*Our response:* We determined the “stream mile” to be the estimated length of the occupied stream segment by tracing the approximate centerline of the stream channel from the appropriate upstream defining characteristic to the appropriate downstream defining characteristic using the USA Topo Environmental Systems Research Institute (ESRI) basemap and/or U.S. Geological Survey topographic map. See the “Criteria Used to Identify Critical Habitat” section in the proposed critical habitat rule (83 FR 59232, November 21, 2018) for further details. Within these stream segments, critical habitat consists of the stream channel up to the ordinary high water line. As defined at

33 CFR 329.11, the “ordinary high water mark” on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

Therefore, adjacent upland or terrestrial areas that are not below the ordinary high water line are not included in designated critical habitat. However, we would anticipate conducting section 7 consultations with Federal agencies for projects on Federal lands or for projects with a Federal nexus if a project had indirect impacts to the candy darter’s critical habitat or on the species itself. In general, activities in riparian areas should be conducted in such a manner as to protect adjacent streams from excessive sedimentation, high water temperatures, and other water quality perturbations that would be detrimental to the candy darter. 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 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.

### Summary of Changes From Proposed Rule

Changes from the proposed to the final critical habitat designation were minor in nature. Based on substantive comments received during the public comment period that provided new candy darter survey data and habitat observations, we corrected some stream termini (and resultant segment lengths). Additionally, one stream with candy darter occurrence data was inadvertently omitted from the proposed rule; this segment is now included as critical habitat. The changes listed below resulted in a net reduction of approximately 2.8 stream kilometers (1.7 stream miles) of critical habitat from what was originally proposed. All changes are reflected on the maps, which outline the areas designated as critical habitat and are located at the end of this document.

TABLE 1—CHANGES TO CRITICAL HABITAT UNITS BASED ON INFORMATION RECEIVED DURING THE PUBLIC COMMENT PERIOD

Unit	Subunit	Net change	
		Stream kilometers	Stream miles
1—Greenbrier .....	1a	−5.0	−3.1
1—Greenbrier .....	1b	+3.9	+2.4
2—Middle New .....	2b	−3.1	−1.9
2—Middle New .....	2c	+1.4	+0.9
Total .....		−2.8	−1.7

As mentioned above in Summary of Comments and Recommendations, the Service has reconsidered its intent to establish nonessential experimental populations using our authority under section 10(j) of the Act at this time. Based on comments from a State partner, we conclude that allowing the States to reestablish and translocate the candy darter into historically occupied areas using their own authorities will be a more effective recovery strategy for the candy darter. However, if we receive further substantive information at a later date and determine that the use of a section 10(j) rule will aid in the recovery of the candy darter, we will publish a proposed rule for public comment. Reestablishing candy darter populations into historically occupied areas continues to be an important part of our recovery strategy for the candy darter. We will coordinate with our partners to implement the most effective recovery strategy. In both the State of Virginia and the State of West Virginia, the water and the streambed fall under the authority of the State. As a result, the State resource agencies hold the State regulatory authority over the waters (Virginia Code § 62.1, West Virginia Code § 22–26).

**Critical Habitat**

*Background*

Please refer to our November 21, 2018, proposed critical habitat rule (83 FR 59232) for a summary of species information available to the Service at the time that the proposed rule was published. Based on information we received during the proposed rule’s public comment period, we updated several critical habitat stream termini to more accurately capture areas that meet the definition of critical habitat and remove areas that do not. We also added one inadvertently omitted occupied stream as critical habitat in the Greenbrier River watershed. The result of these changes in this final rule is a net reduction of approximately 1.7 stream miles (2.8 stream kilometers)

(outlined above). These changes are incorporated into the critical habitat maps at the end of this rule.

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 which are necessary to bring any endangered species 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 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 of 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. 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 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, the recovery plan 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) the Act's section 9 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 the recovery of this species. Similarly, critical habitat designations made on the basis of the best available information 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.

On August 27, 2019, we published a final rule in the **Federal Register** (84 FR 45020) to amend our regulations concerning the procedures and criteria we use to designate and revise critical habitat. That rule became effective on September 26, 2019, but, as stated in that rule, the amendments it sets forth apply to “rules for which a proposed rule was published after September 26, 2019.” We published our proposed critical habitat designation for the candy darter on November 21, 2018 (83 FR 59232); therefore, the amendments set forth in the August 27, 2019, final rule at 84 FR 45020 do not apply to this final designation of critical habitat for the candy darter.

#### *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 essential to the conservation of candy darter from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the proposed critical habitat designation and final listing rule published in the **Federal Register** on November 21, 2018 (83 FR 59232 and 83 FR 58747, respectively), and the recovery outline for the candy darter (Service 2019, entire), which can be found at: [https://ecos.fws.gov/docs/recovery\\_plan/2018%20CDRecoveryOutline.pdf](https://ecos.fws.gov/docs/recovery_plan/2018%20CDRecoveryOutline.pdf). 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, etc.) 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; and

(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 that 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 streambanks 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; (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 or concentrations of certain contaminants (such as, but not limited to, 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: (1) Use of BMPs designed to reduce sedimentation, erosion, and bankside destruction; (2) protection of riparian corridors and retention of sufficient canopy cover along streambanks; (3) reduction of other watershed disturbances that release sediments, pollutants, or nutrients into the water; (4) public outreach requesting the public's assistance with stopping the movement of nonnative aquatic species; (5) increased enforcement and/or outreach regarding existing regulations prohibiting the movement of bait fish; (6) survey and monitoring to further characterize the extent and spread of hybridization with variegate darters; (7) research to determine whether some environmental factors or set of factors might allow candy darters to persist in particular areas despite variegate darter introductions; (8) research characterizing habitat conditions in historically extirpated candy darter sites to facilitate successful reintroduction efforts; (9) 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 (10) reintroductions 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 designating any areas outside the geographical area occupied by the species at the time of listing, because we did not find any areas that were essential for the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time

of listing in 2018. Refer to the candy darter proposed critical habitat designation for a full description of criteria used to identify critical habitat (83 FR 59232, November 21, 2018).

When determining critical habitat boundaries within this final rule, 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 that are suitable for the candy darter. The scale of the maps that the Service 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 final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation requirements with respect to critical habitat and the requirement of no destruction or adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. 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> at Docket No. FWS-R5-ES-2018-0050, on our internet site <https://www.fws.gov/northeast/candydarter/>, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

#### **Final Critical Habitat Designation**

We are designating five units as critical habitat for the candy darter. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. Those five units are: (1) Greenbrier, (2) Middle New, (3) Lower Gauley, (4) Upper New, and (5) Upper Gauley.

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**Table 2.** Designated critical habitat units for candy darter.

Critical Habitat Unit	Land Ownership	Unit Size (Stream Length)	
		Miles	Kilometers
1. Greenbrier	Federal	78	125
	State	6	10
	Private	70	113
	Unit Total	154	248
2. Middle New	Federal	12	19
	State	0	0
	Private	14	22
	Unit Total	25	41
3. Lower Gauley	Federal	2	3
	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
<b>Grand Total</b>		<b>368</b>	<b>593</b>

Note: Stream lengths may not sum due to rounding.

**BILLING CODE 4333-15-C**

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the candy darter, below. In all instances, the units are occupied. The State of Virginia (VA) or West Virginia (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. The Greenbrier Unit has been surveyed for the candy darter as recently as 2014 (Service 2018, p. 48). The unit currently supports all breeding, feeding, and sheltering needs for the species. See details below.

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

Unit 1a consists of approximately 29.7 stream kilometers (skm) (18.5 stream miles (smi)) of the East Fork of the

Greenbrier River from the confluence of an unnamed tributary (located 1.8 skm (1.1 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; approximately 6.8 skm (4.2 smi) of the Little River from the U.S. Highway 250 crossing, downstream to the confluence of the Little River and the East Fork of the Greenbrier River; and approximately 1.9 skm (1.2 smi) of Buffalo Fork from the Buffalo Lake dam, downstream to the confluence of Buffalo Fork and the Little 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 21.2 skm (13.2 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 consists of approximately 29.9 skm (18.6 smi) of the West Fork of the Greenbrier River from the confluence with Snorting Lick Run, downstream to the confluence of the East Fork and West Fork of the Greenbrier River at Durbin, WV; approximately 13.3 skm (8.3 smi) of the Little River from the confluence with Hansford Run, downstream to the confluence of the Little River and the West Fork of the Greenbrier River; and approximately 4.8 skm (3.0 smi) of Mountain Lick Creek from the confluence with an unnamed tributary (located 1.5 skm (0.9 smi) downstream of the Upper Mountain Lick Forest Service Road crossing), downstream to the confluence of Mountain Lick Creek 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 47.1 skm (29.3 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 consists of 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 consists of 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 km (1.0 mi) 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 consists of 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 have been documented 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 consists of approximately 43.9 skm (27.3 smi) of Knapp Creek from a point approximately 0.16 skm (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 documented 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). The unit currently supports all breeding, feeding,

and sheltering needs for the species. See details below.

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

Unit 2a consists of approximately 4.2 skm (2.6 smi) of Dismal Creek from the confluence with Standrock Branch, downstream to the confluence of Dismal Creek and Kimberling 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 documented a small candy darter population, which contributes to the representation and redundancy of the species (Service 2018, p. 28).

*Unit 2b: Stony Creek, Giles County, VA*

Unit 2b consists of approximately 31.1 skm (19.3 smi) of Stony Creek from the confluence with White Rock Branch, 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 16.1 skm (10.0 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 documented 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 consists of 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 and approximately 1.4 skm (0.8 smi) of Wolf Creek from the Laurel Creek confluence downstream to the stream riffle adjacent to the intersection of Wolf Creek Highway and Alder Lane. 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 consists of approximately 2.9 skm (1.8 smi) of the Gauley River from the base of the Summersville Dam, downstream to the confluence of Collision 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 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 supports the only candy darter population remaining in the Lower Gauley watershed and contributes to the representation and redundancy of the species. Candy darters were documented in surveys of Unit 3 as recently as 2014 (Service 2018, pp. 28 & 48). The unit currently supports all breeding, feeding, and sheltering needs for the species.

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

Unit 4 consists of approximately 7.9 skm (4.9 smi) of Cripple Creek from a point approximately 3.2 skm (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. The unit currently supports all breeding, feeding, and sheltering needs for 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). The unit currently supports all breeding, feeding, and sheltering needs for the species. See details below.

*Unit 5a: Gauley Headwaters, Webster County, WV*

Unit 5a consists of approximately 37.3 skm (23.2 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 (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 consists of 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) shows 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 consists of 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) shows 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 consists of 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 consists of 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 data 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 consists of 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 and 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) shows 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 that 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 regulation with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 45020). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

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 U.S. Army Corps of Engineers 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 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 as a whole for the conservation of the candy darter. As discussed above, the role of critical habitat is to support physical or biological features 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, release or 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.

#### Exemptions

##### *Application of Section 4(a)(3) of the Act*

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense lands within the final critical habitat designation.

##### **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, as well as 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.

##### **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. In order to consider economic

impacts, we prepared an Incremental Effects Memo (IEM) and screening analysis, which together with our narrative and interpretation of effects we consider our draft economic analysis (DEA) of the proposed critical habitat designation and related factors. The analysis, dated July 3 2018, was made available for public review from November 21, 2018, through January 22, 2019 (83 FR 59232). The DEA addressed probable economic impacts of critical habitat designation for candy darter. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the candy darter is available in the screening analysis for the candy darter (IEc 2018), available at <http://www.regulations.gov>. We made no changes to the screening analysis from the proposed rule to the final rule.

#### Exclusions

##### *Exclusions Based on Economic Impacts*

After the Service fully considered the economic impacts of the critical habitat designation, the Secretary has decided not to exercise his discretion to exclude any areas from this critical habitat designation based on those economic impacts. A copy of the IEM and screening analysis with supporting documents may be obtained by contacting the West Virginia Ecological Services Field Office (see **ADDRESSES**) or by downloading from the internet at <http://www.regulations.gov>.

##### *Exclusions Based on Impacts on National Security and Homeland Security*

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. We have determined that the lands adjacent to the 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. In addition, we did not receive any requests based for exclusions based on national security impacts from any Federal agency. Consequently, the Secretary is not exercising 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, the Service considers any other relevant impacts of the critical habitat designation, in addition to economic impacts and impacts on national security. The Service considers 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.

In preparing this final rule, we have determined that there are currently no permitted conservation plans or other non-permitted conservation agreements or partnerships for candy darter, and the final designation does not include any tribal lands or tribal trust resources. However, 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. We anticipate no impact on tribal lands, partnerships, permitted or nonpermitted plans or agreements from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

### **Required Determinations**

#### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

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

Executive Order 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.

#### *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 (13 CFR 121.201). 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 required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself, and therefore, 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 are directly regulated by this rulemaking, the Service certifies that the final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a 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. The OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with candy darter conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to 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 rule will 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 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 candy darter does 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 assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Virginia and West Virginia. We received comments from the West Virginia DNR and the West Virginia DEP and have addressed them in the Summary of Comments and Recommendations section of the preamble. 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 rule does 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 and 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 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 Executive Order 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 applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the candy darter. The designated areas of critical habitat are presented on maps, and the 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 any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is 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 within the candy darter’s historical or current range. Therefore, we are not designating critical habitat for the candy darter on tribal lands.

**References Cited**

A complete list of all references cited 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 rule are the staff members of the Service’s Species Assessment Team, the Northeast Regional Office, the West Virginia Ecological Services Field Office, and the Southwestern Virginia Ecological Services Field Office.

**List of Subjects in 50 CFR Part 17**

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

**Regulation Promulgation**

Accordingly, we 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. Amend § 17.11, in paragraph (h), by revising the entry for “Darter, candy” under “Fishes” in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* FISHES	*	*	*	*
Darter, candy .....	<i>Etheostoma osburni</i> .....	Wherever found .....	E	83 FR 58747, 11/21/2018; 50 CFR 17.95(e). <sup>CH</sup>
*	*	*	*	*

■ 3. Amend § 17.95, in paragraph (e), by adding an entry for “*Candy Darter (Etheostoma osburni)*” after the entry for “*Amber Darter (Percina antesella)*”, to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*  
(e) \* \* \*

**Candy Darter (*Etheostoma Osburni*)**

- (1) Critical habitat units are depicted for Bland, Giles, and Wythe Counties, Virginia, and Greenbrier, Nicholas, Pocahontas, 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) A 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) An 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 May 7, 2021.

(4) *Critical habitat map units.* The provided maps were made using the geographic projection GCS\_North\_American\_1983 coordinate system. Four

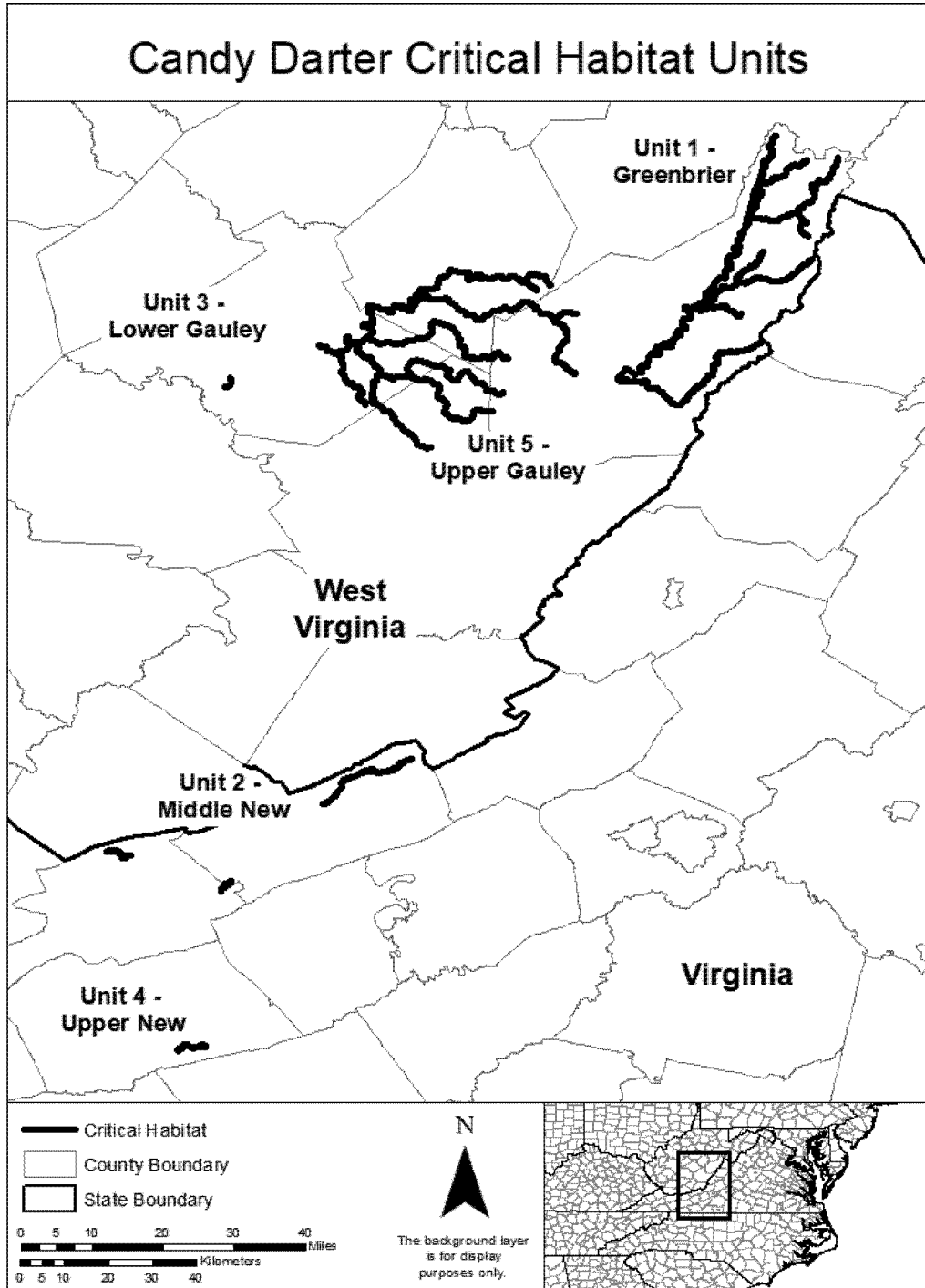
spatial layers are included as background layers. We used two political boundary layers indicating the State and county boundaries within the United States available through ArcMap Version 10.5 software by ESRI. The roads layer displays major interstates, U.S. highways, State highways, and county roads 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.

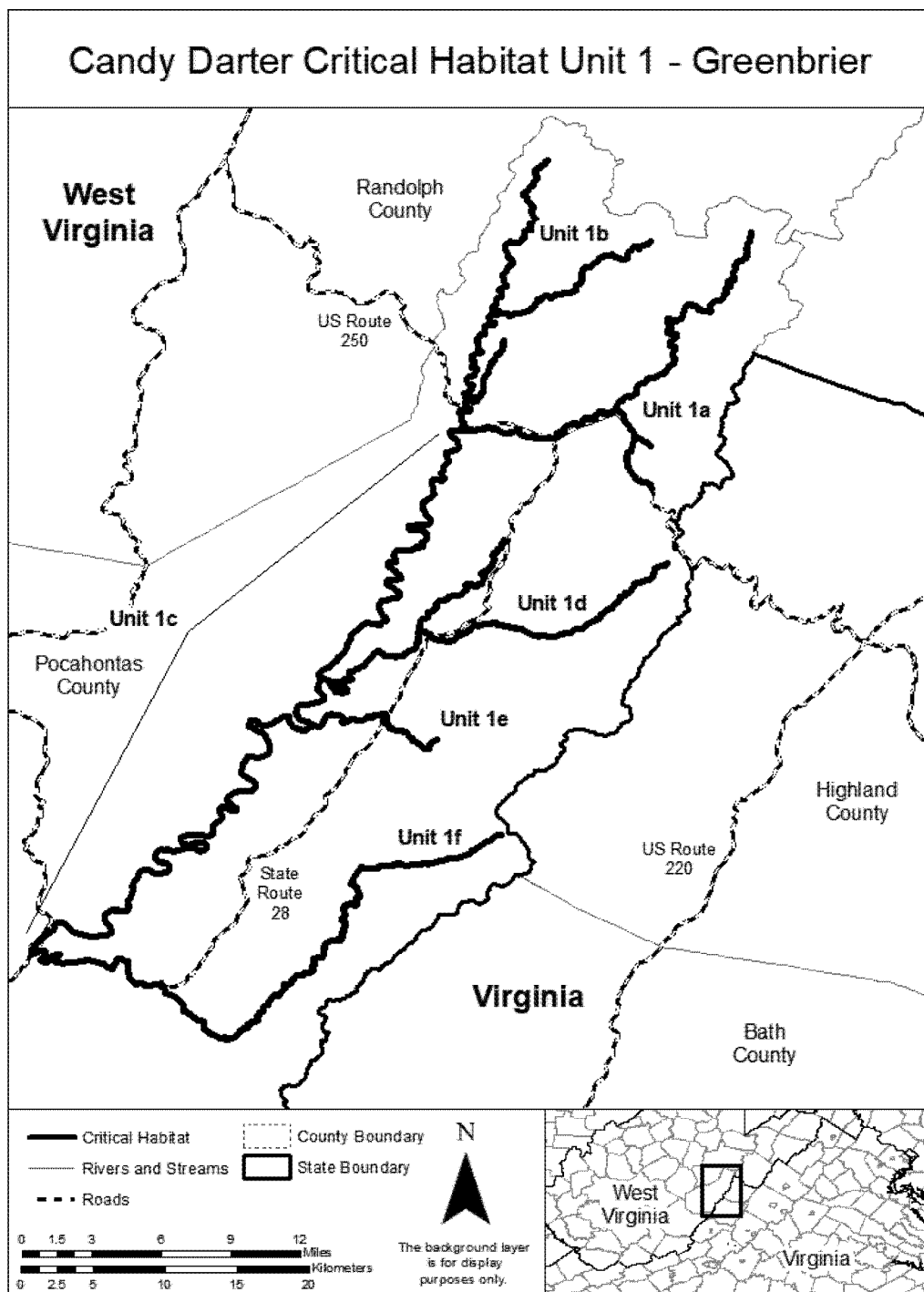


(5) Note: Index map of candy darter critical habitat units follows:

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



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

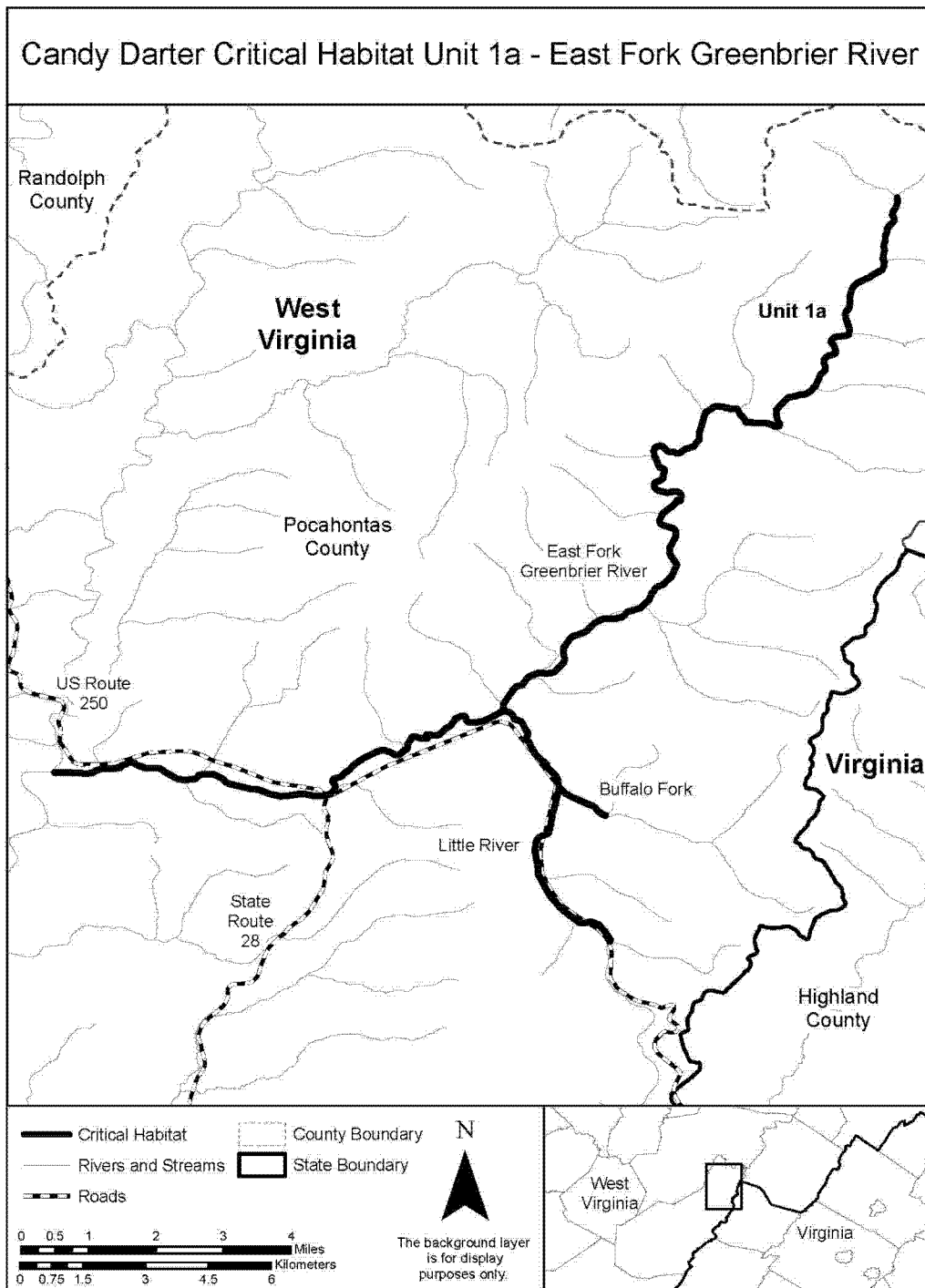
(i) *General description*: Unit 1a consists of approximately 29.7 stream kilometers (skm) (18.5 stream miles (smi)) of the East Fork of the Greenbrier River from the confluence of an unnamed tributary located 1.8 skm (1.1

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 6.8 skm (4.2 smi) of the Little River from the U.S. Highway 250 crossing, downstream to the confluence of the Little River and the East Fork of the Greenbrier River;

and approximately 1.9 skm (1.2 smi) of Buffalo Fork from the Buffalo Lake dam downstream to the confluence of Buffalo Fork and the Little River. Approximately 21.2 skm (13.2 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 consists of approximately 29.9 skm (18.6 smi) of the West Fork of the Greenbrier River from the confluence with Snorting Lick Run, downstream to the confluence of the East Fork and

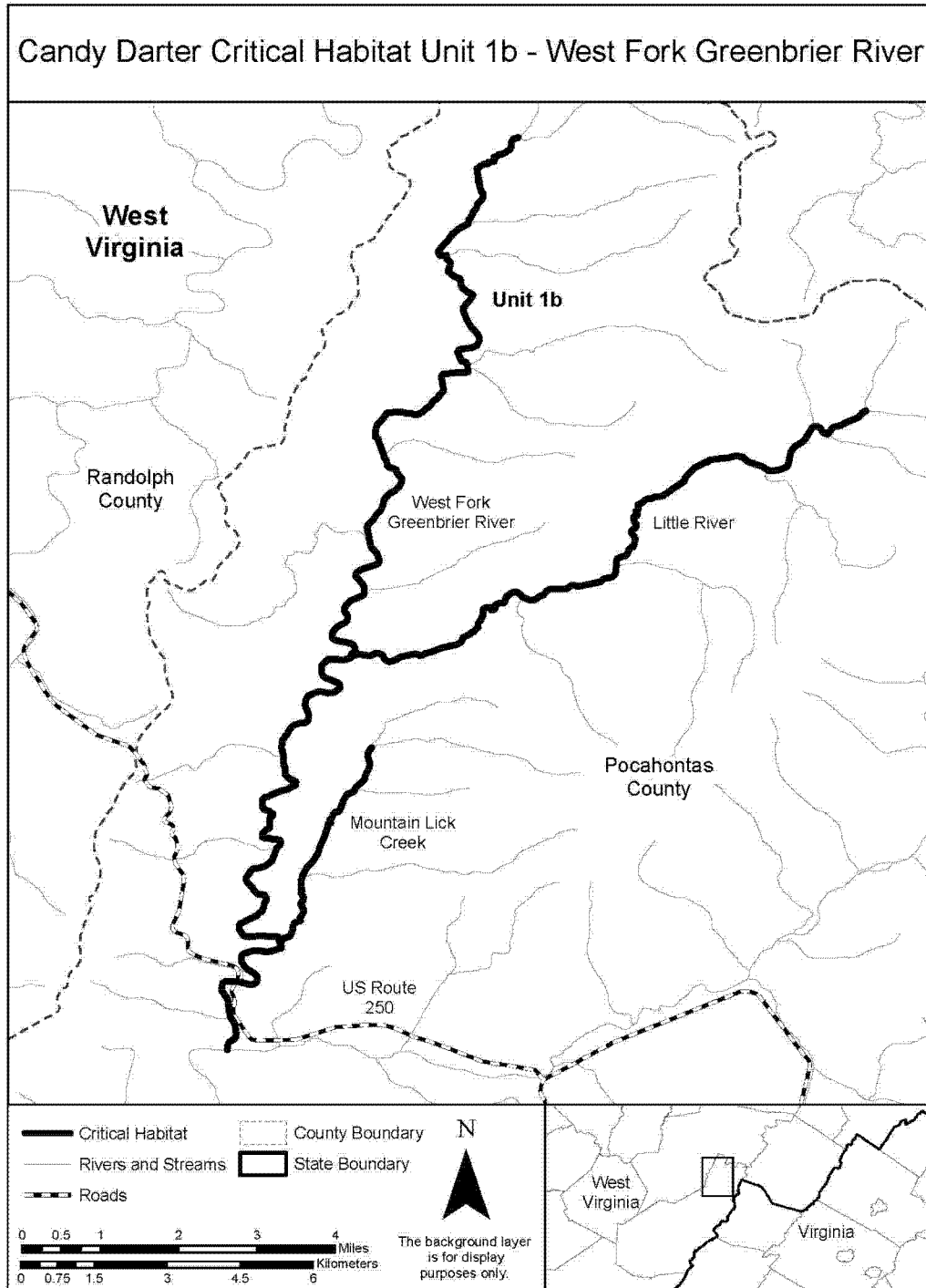
West Fork of the Greenbrier River at Durbin, West Virginia; approximately 13.3 skm (8.3 smi) of the Little River from the confluence with Hansford Run, downstream to the confluence of the Little River and the West Fork of the Greenbrier River; and approximately 4.8 skm (3.0 smi) of Mountain Lick Creek from the confluence with an unnamed

tributary (located 1.5 skm (0.9 smi) downstream of the Upper Mountain Lick Forest Service Road crossing), downstream to the confluence of Mountain Lick Creek and the West Fork of the Greenbrier River. Approximately 47.1 skm (29.3 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.

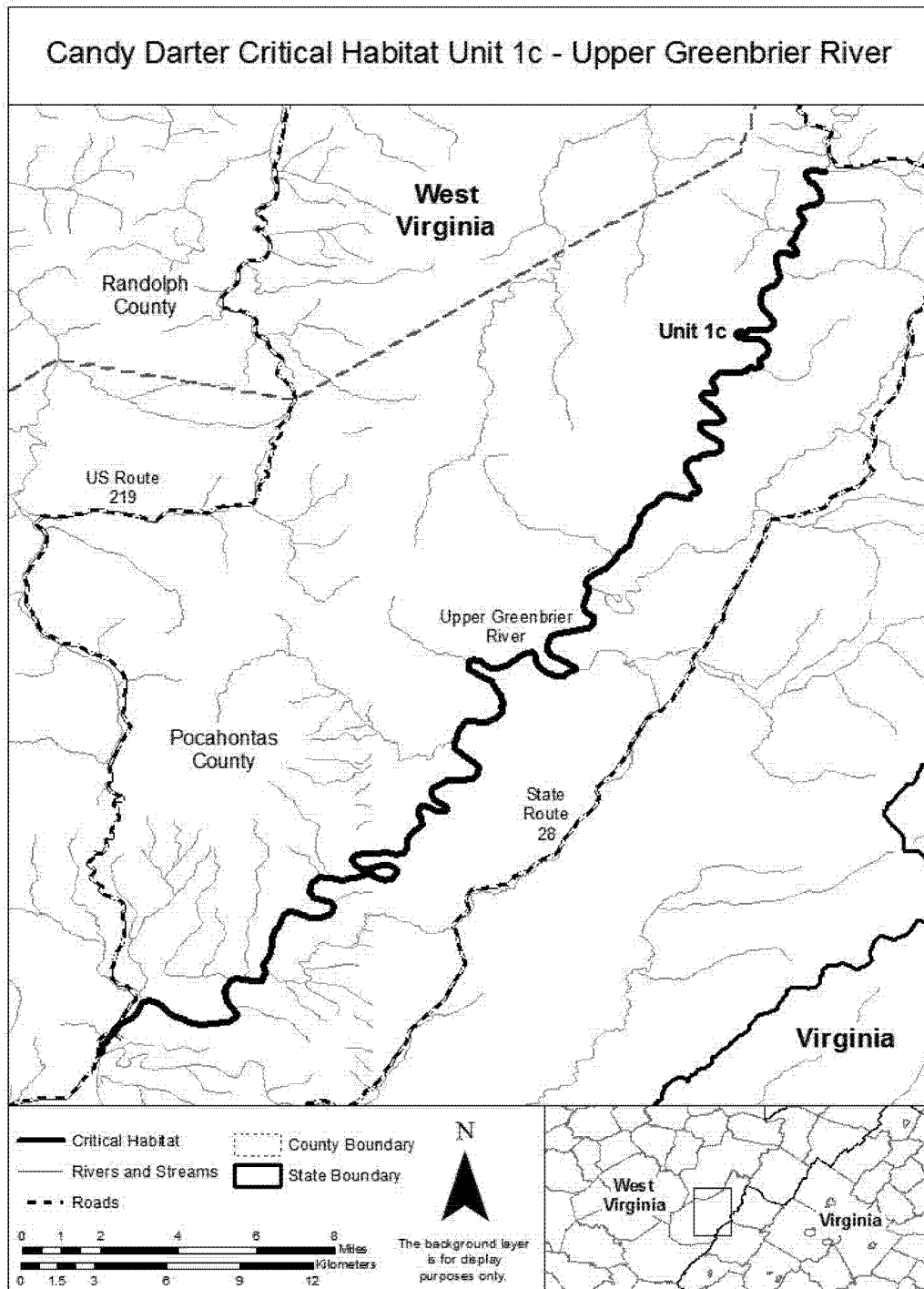
(i) *General description*: Unit 1c consists of approximately 69.3 skm (43.1 smi) of the Greenbrier River from the confluence of the East Fork and West Fork of the Greenbrier River at

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

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:



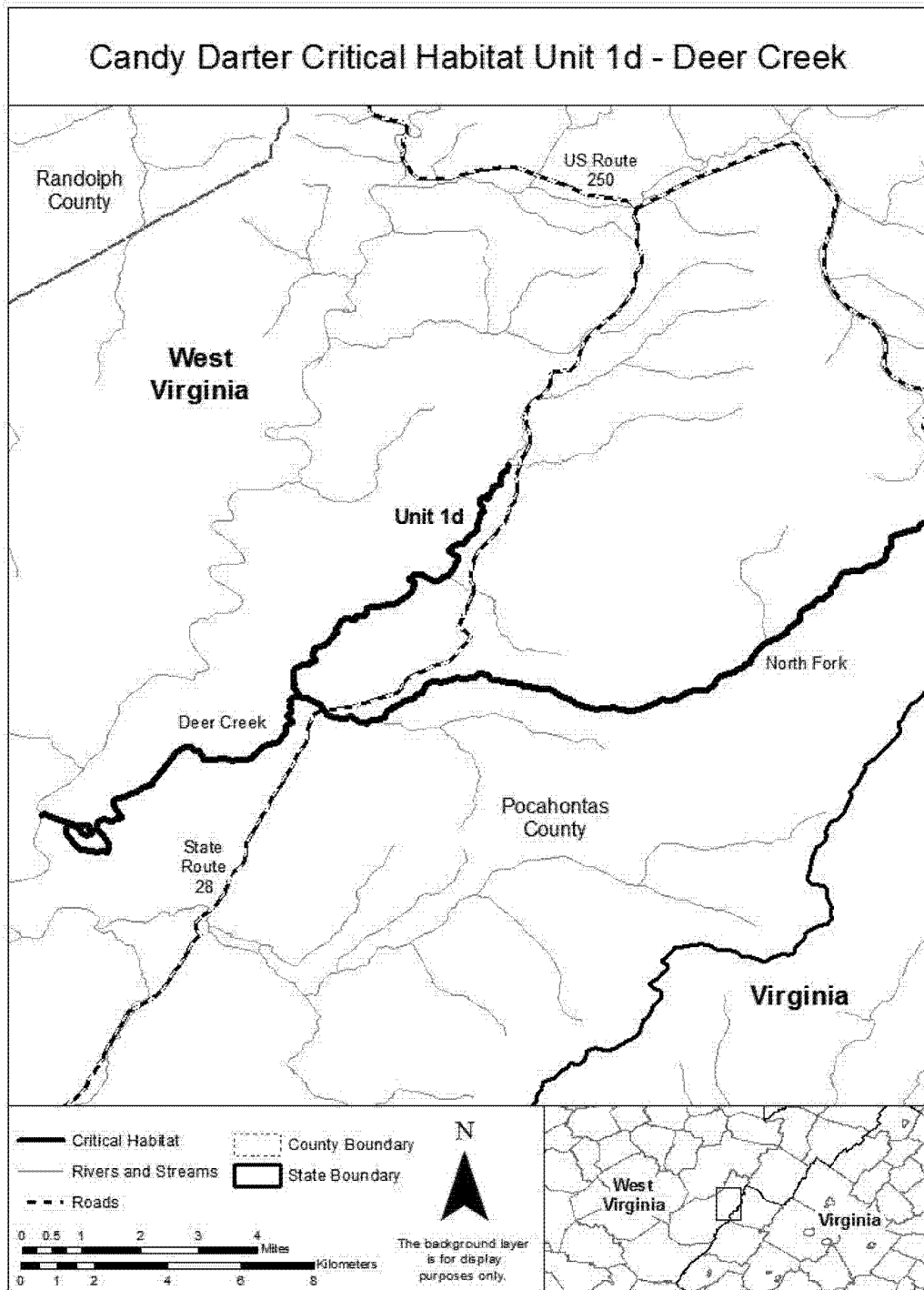
(10) *Unit 1d*: Deer Creek, Pocahontas County, West Virginia.

(i) *General description*: Unit 1d consists of 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 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:



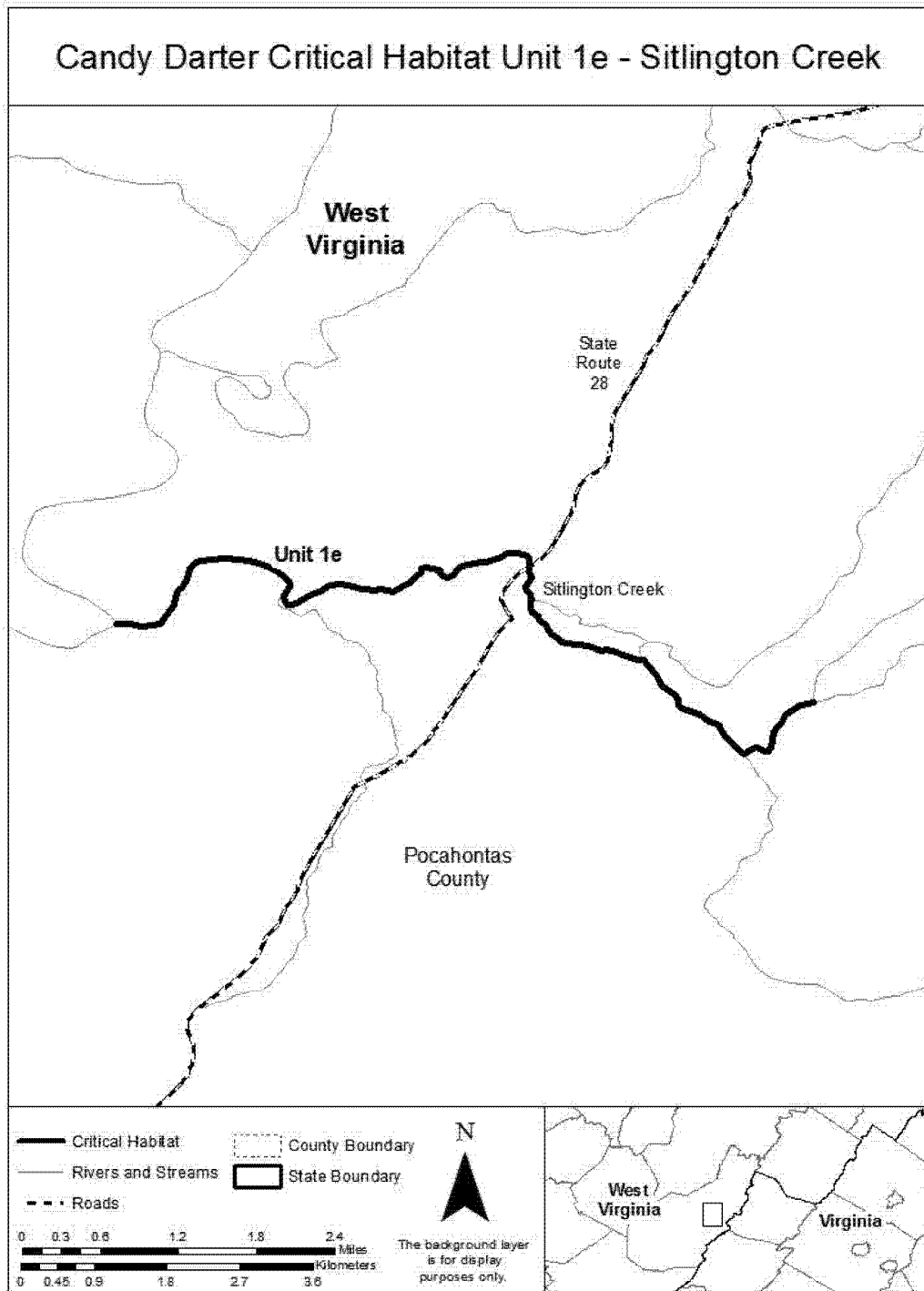
(11) *Unit 1e*: Sitlington Creek, Pocahontas County, West Virginia.

(i) *General description*: Unit 1e consists of 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 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:



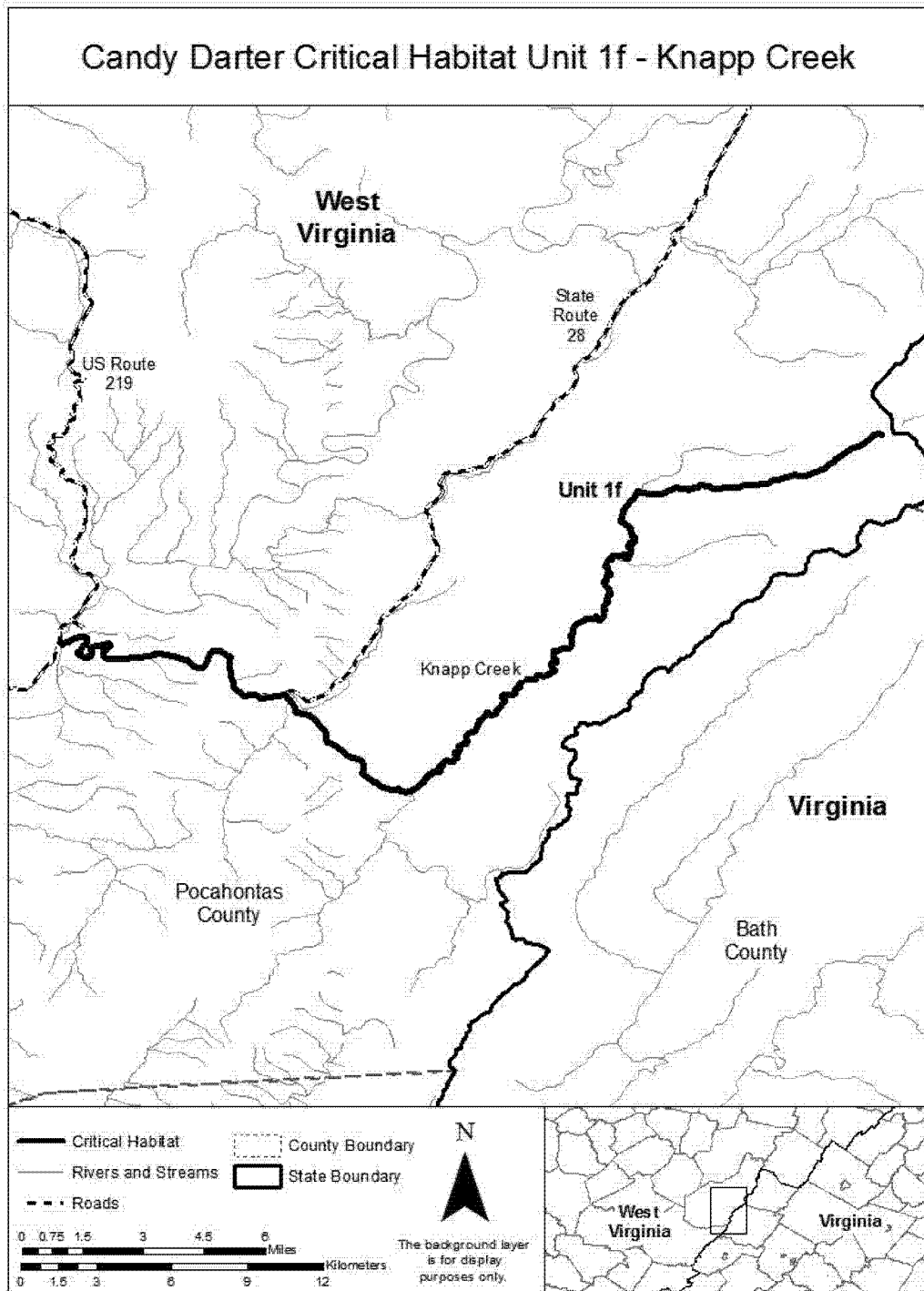
(12) *Unit 1f*: Knapp Creek, Pocahontas County, West Virginia.

(i) *General description*: Unit 1f consists of 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

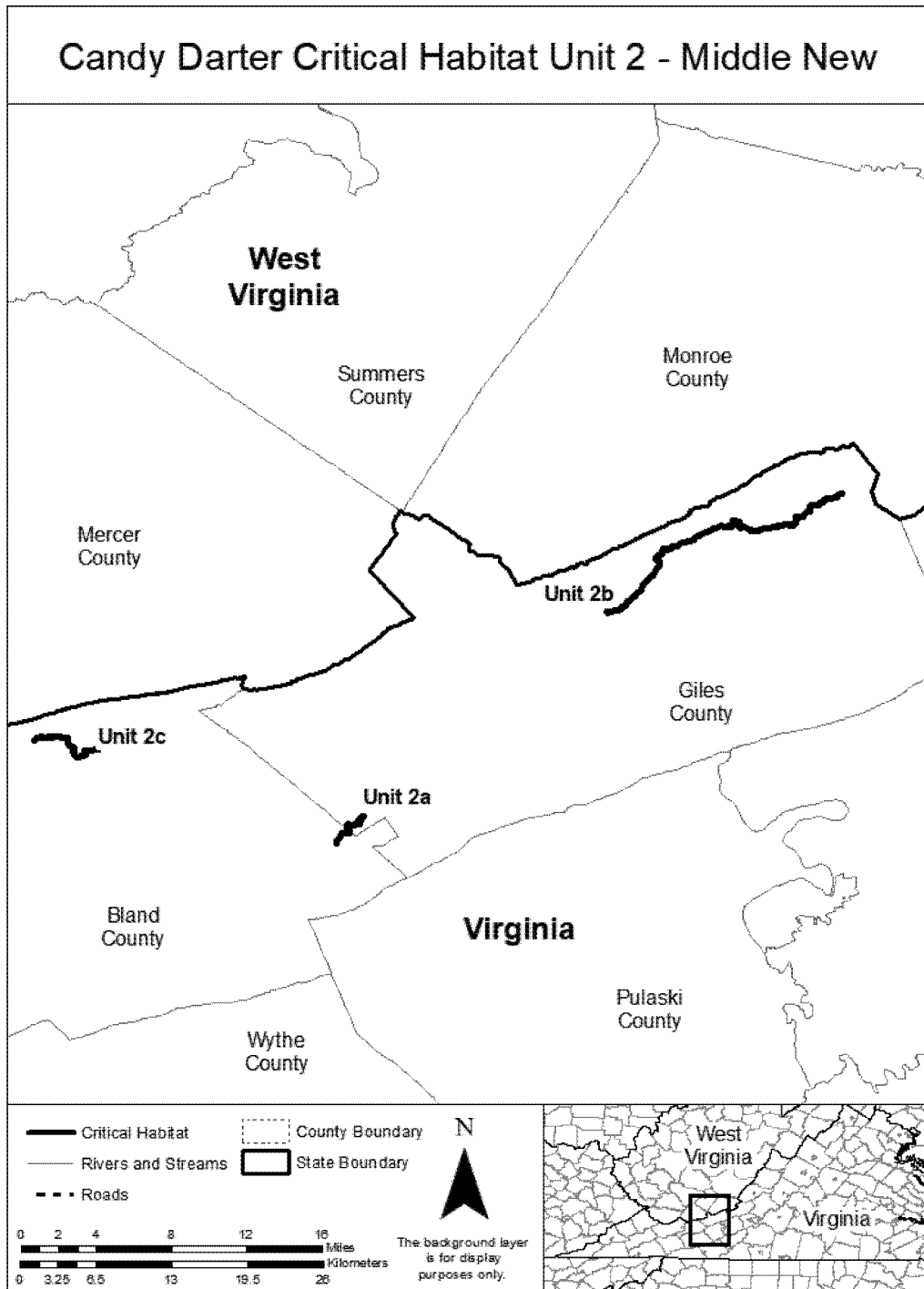
Forest, with the remainder adjacent to private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like.

(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.

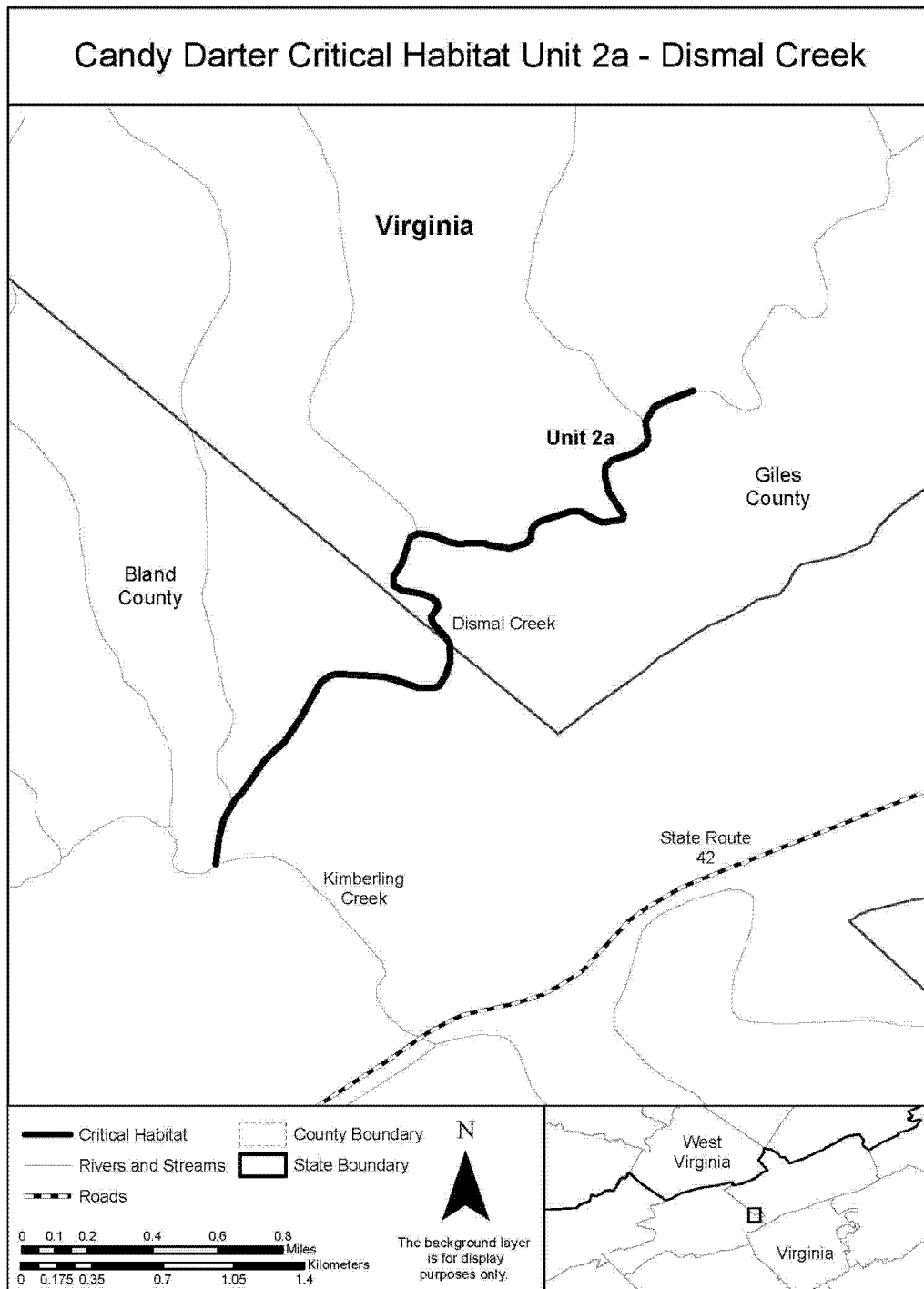
(i) *General description*: Unit 2a consists of approximately 4.2 skm (2.6 smi) of Dismal Creek from the confluence with Standrock Branch,

downstream to the confluence of Dismal Creek and Kimberling 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 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:



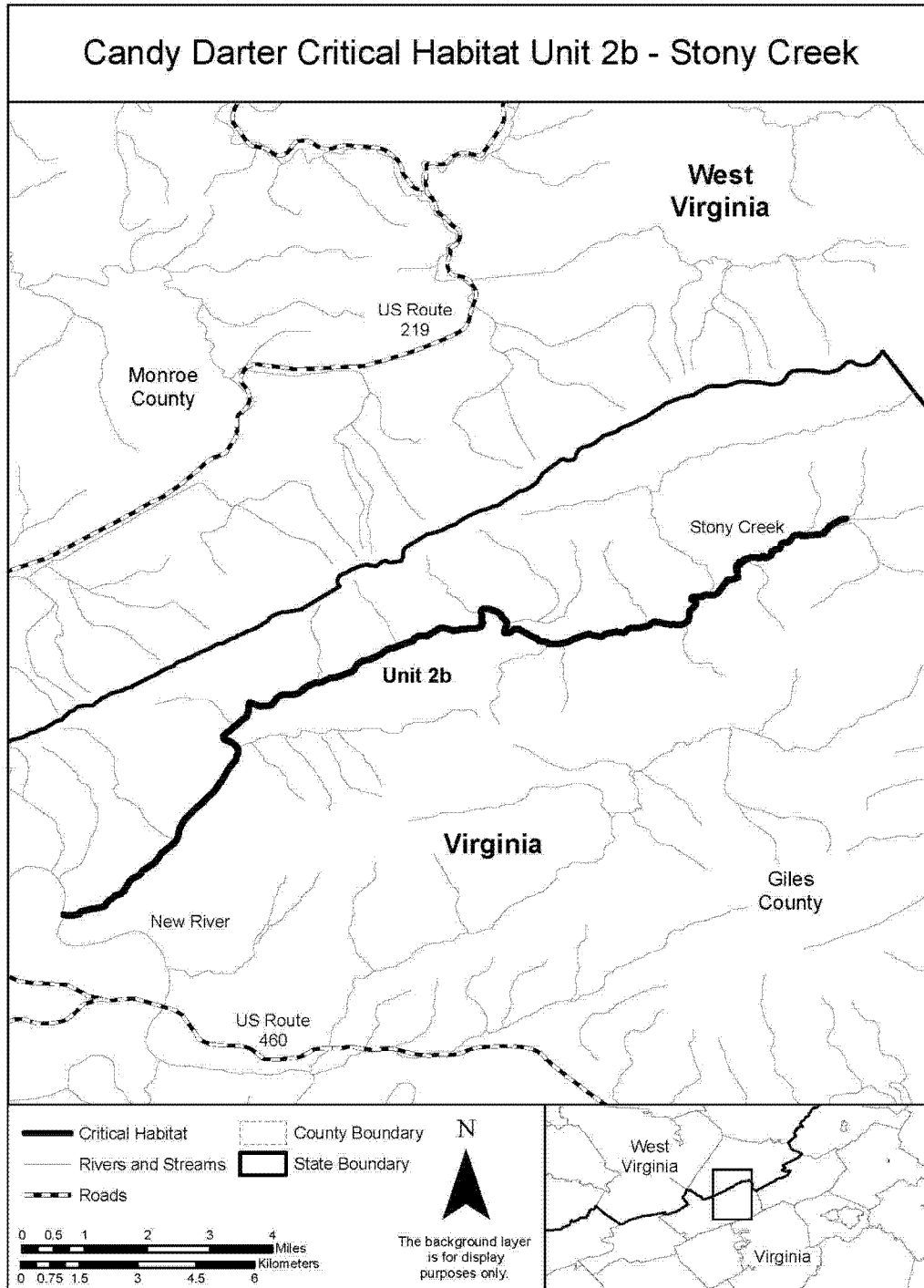
(15) *Unit 2b*: Stony Creek, Giles County, Virginia.

(i) *General description*: Unit 2b consists of approximately 31.1 skm (19.3 smi) of Stony Creek from the confluence with White Rock Branch,

downstream to the confluence with the New River. Approximately 16.1 skm (10.0 smi) of Unit 2b is within the George Washington and Jefferson National Forest, with the remainder adjacent to 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:



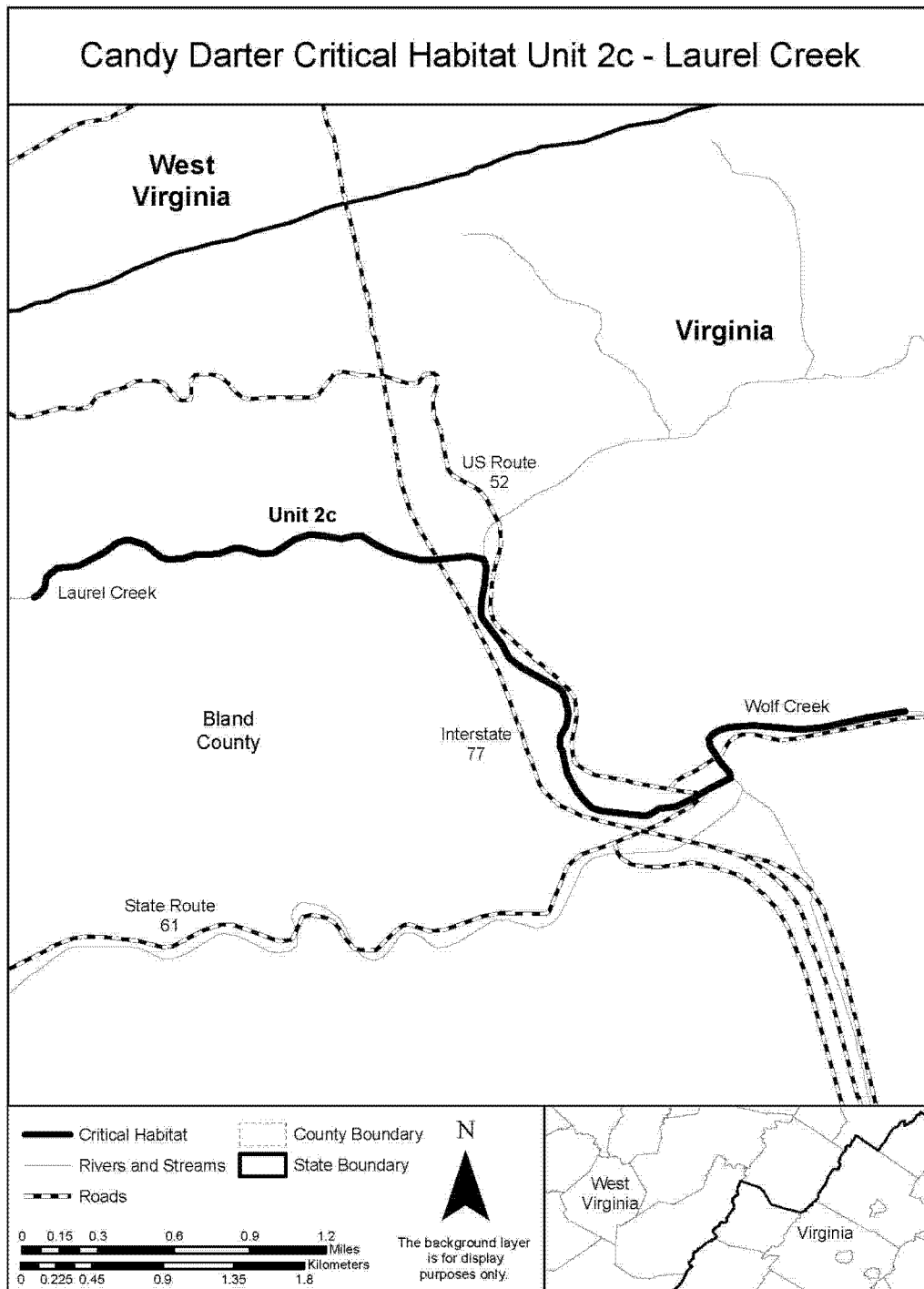
(16) *Unit 2c:* Laurel Creek, Bland County, Virginia.

(i) *General description:* Unit 2c consists of 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 and approximately 1.4 skm (0.8 smi) of Wolf Creek from the Laurel Creek confluence downstream to the stream riffle adjacent to the intersection of Wolf Creek Highway and Alder Lane. Unit 2c is

adjacent to 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:



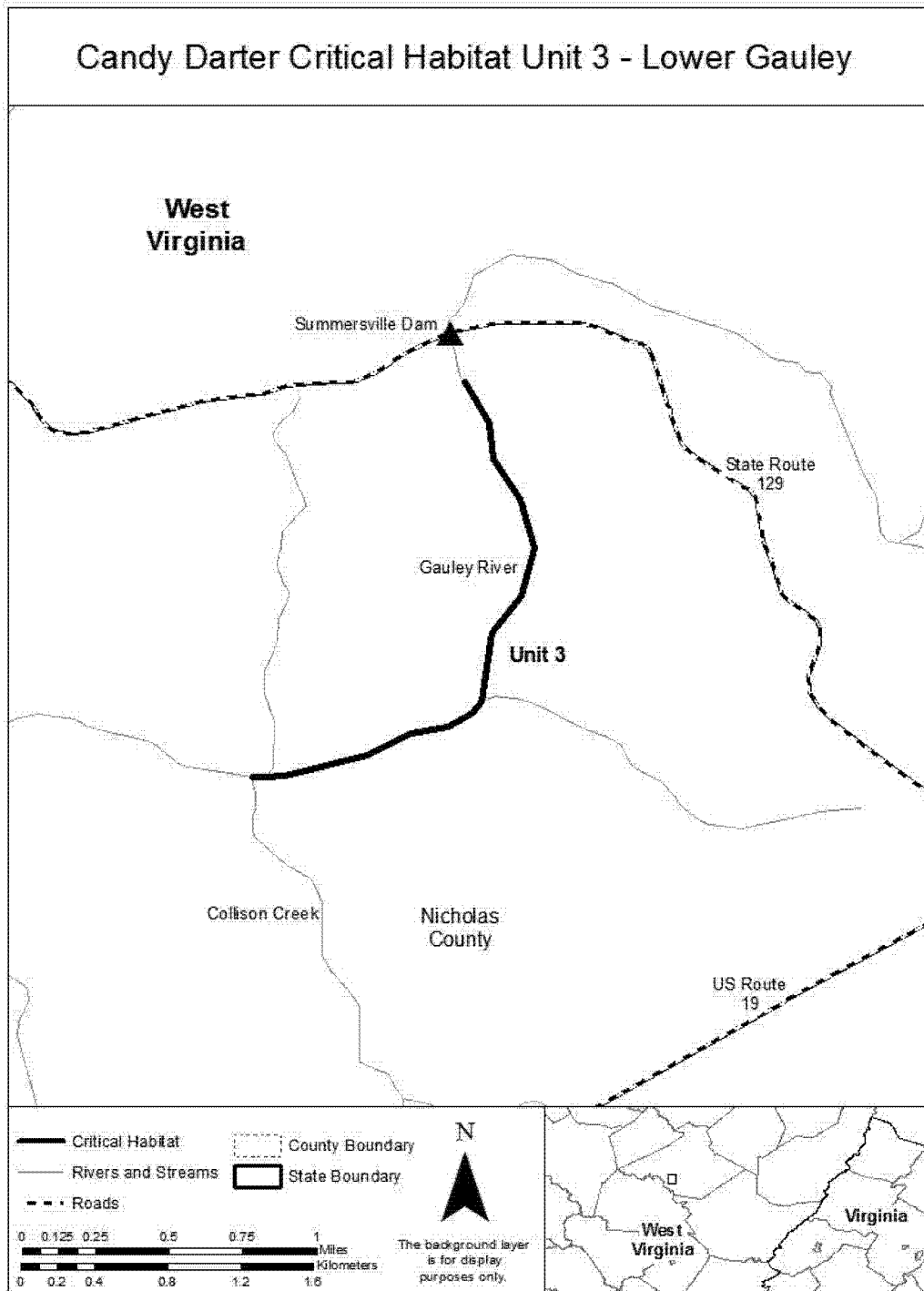
(17) *Unit 3: Lower Gauley, “Lower” Gauley River, Nicholas County, West Virginia.*

(i) *General description:* Unit 3 consists of 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:



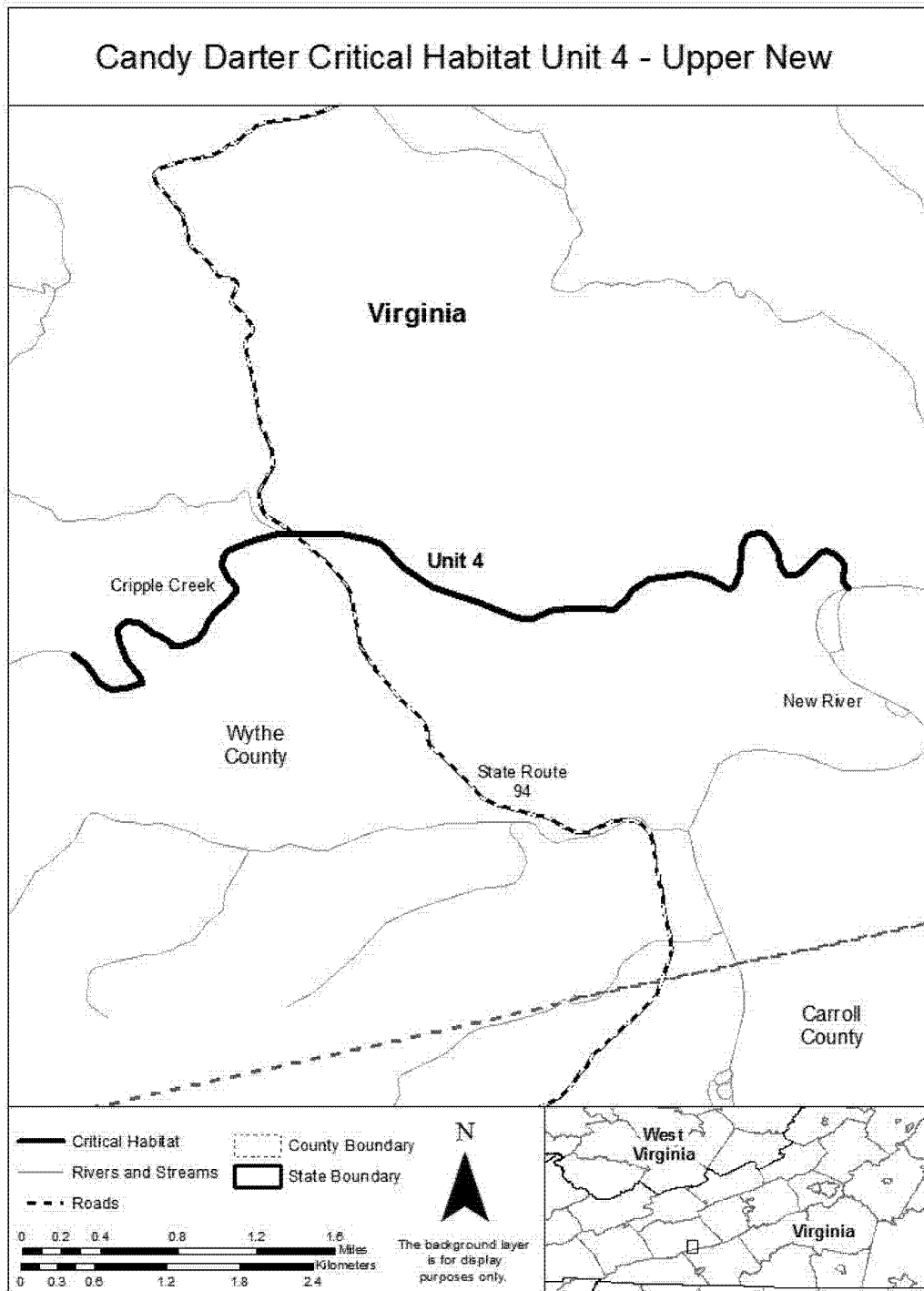
(18) *Unit 4:* Upper New, Cripple Creek, Wythe County, Virginia.

(i) *General description:* Unit 4 consists of approximately 7.9 skm (4.9 smi) of Cripple Creek from a point

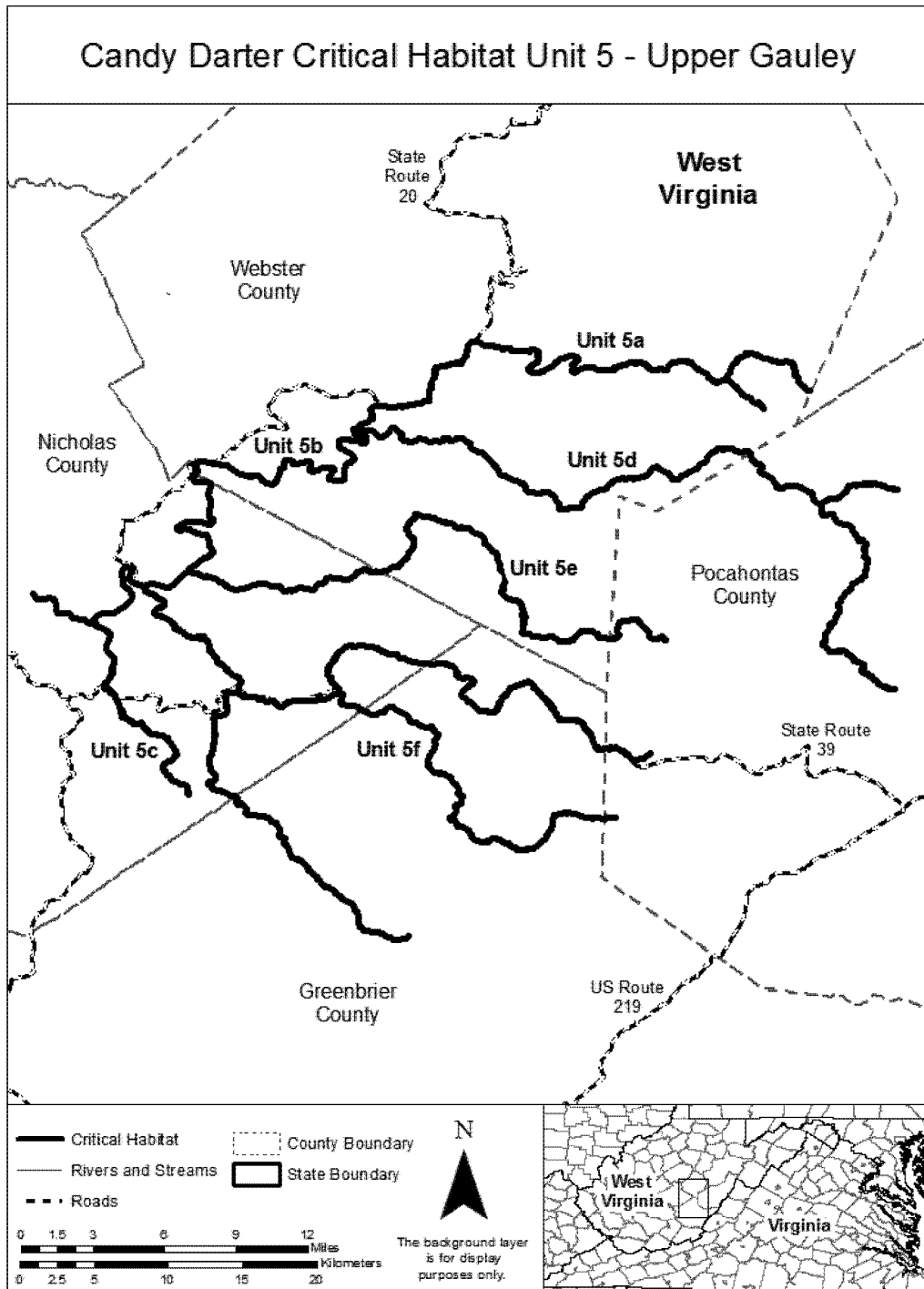
approximately (2.0 smi) upstream of the State Road 94 bridge, downstream to the confluence of Cripple Creek and the New River. The stream in Unit 4 is adjacent to private land, except for a

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 Gauley follows:



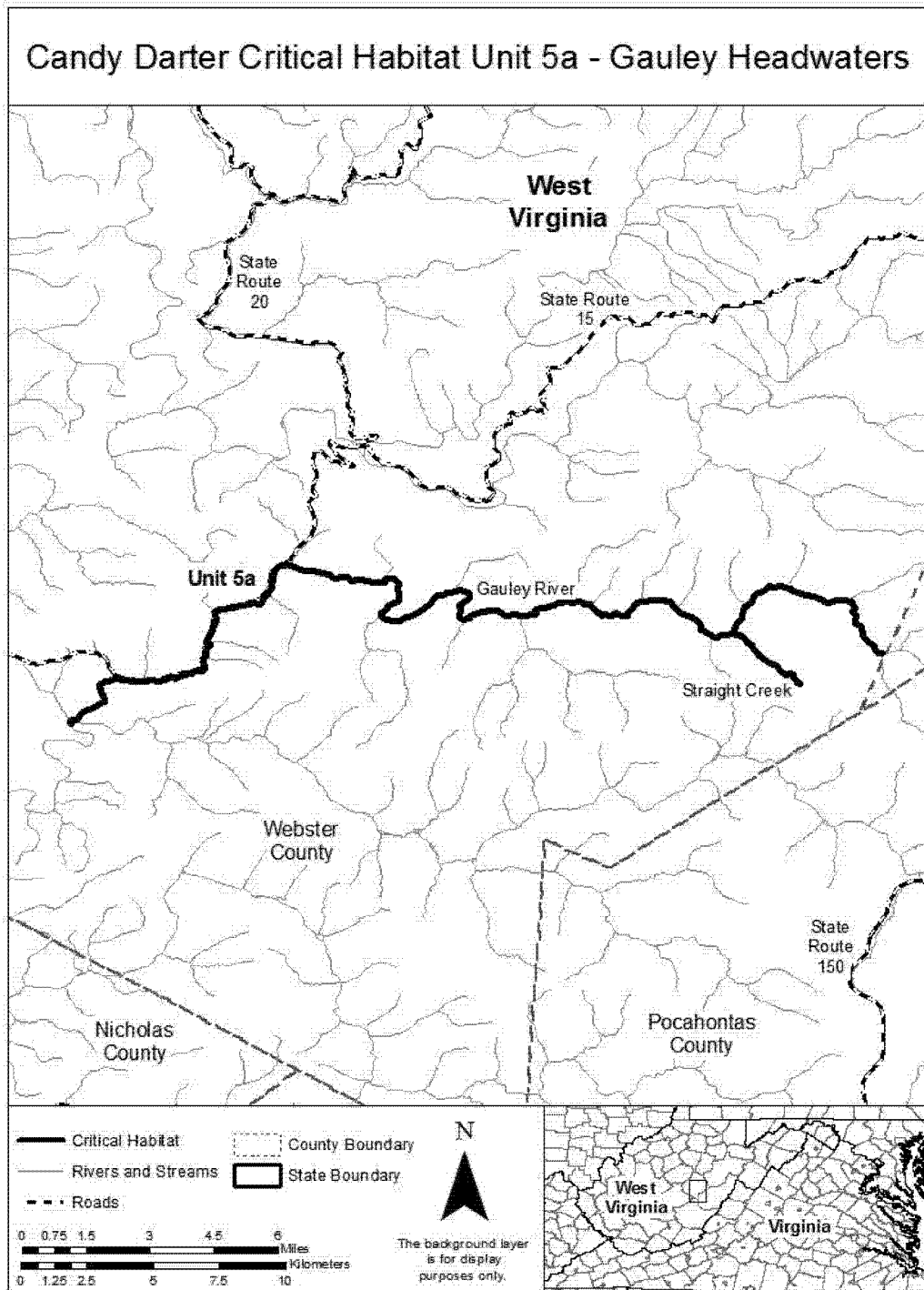
(20) *Unit 5a*: Gauley Headwaters, Webster County, West Virginia.

(i) *General description*: Unit 5a consists of approximately 37.3 skm (23.2 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 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.

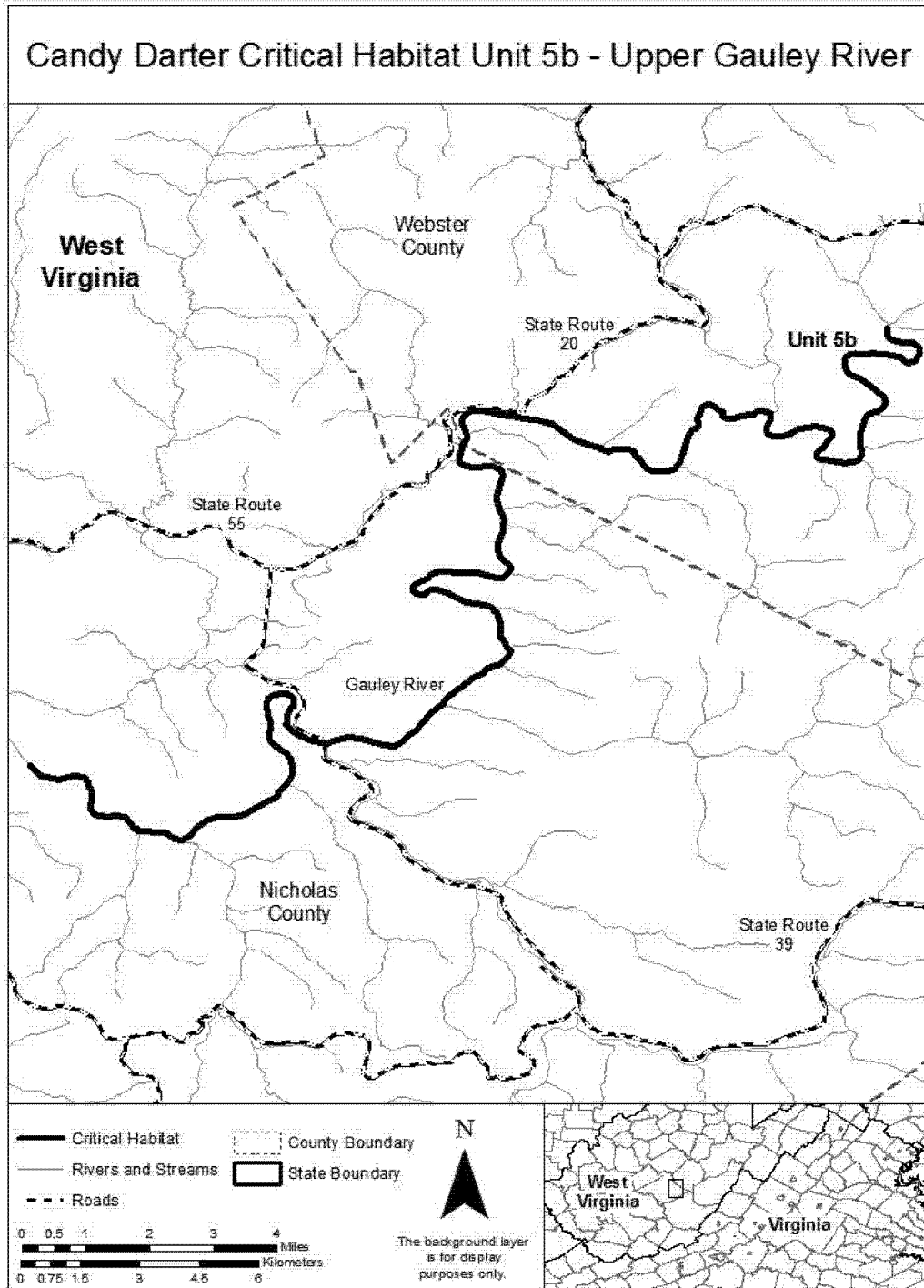
(i) *General description*: Unit 5b consists of approximately 43.8 skm (27.2 smi) of the Gauley River from the confluence of the Gauley and Williams

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 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:



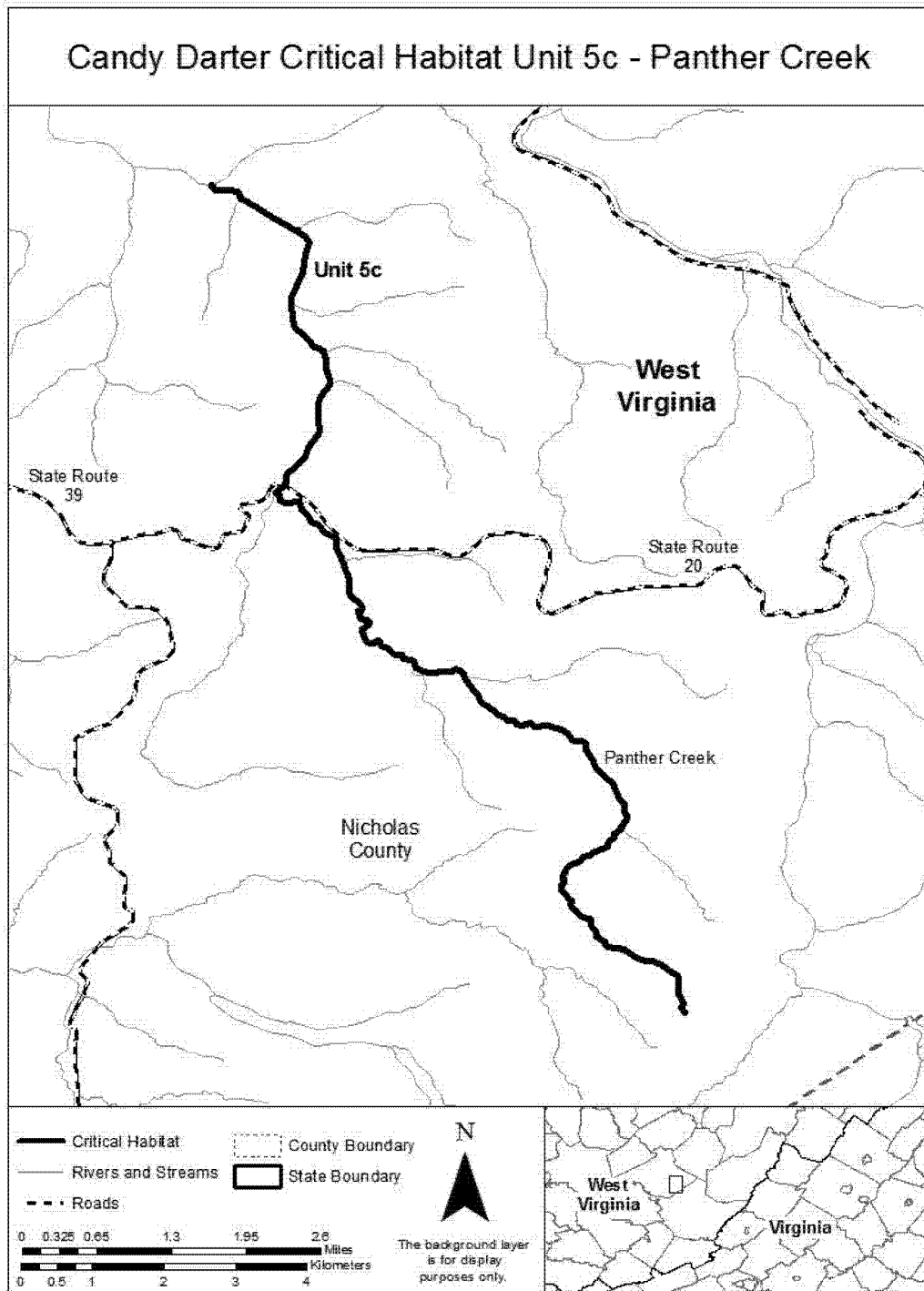
(22) *Unit 5c*: Panther Creek, Nicholas County, West Virginia.

(i) *General description*: Unit 5c consists of 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 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:



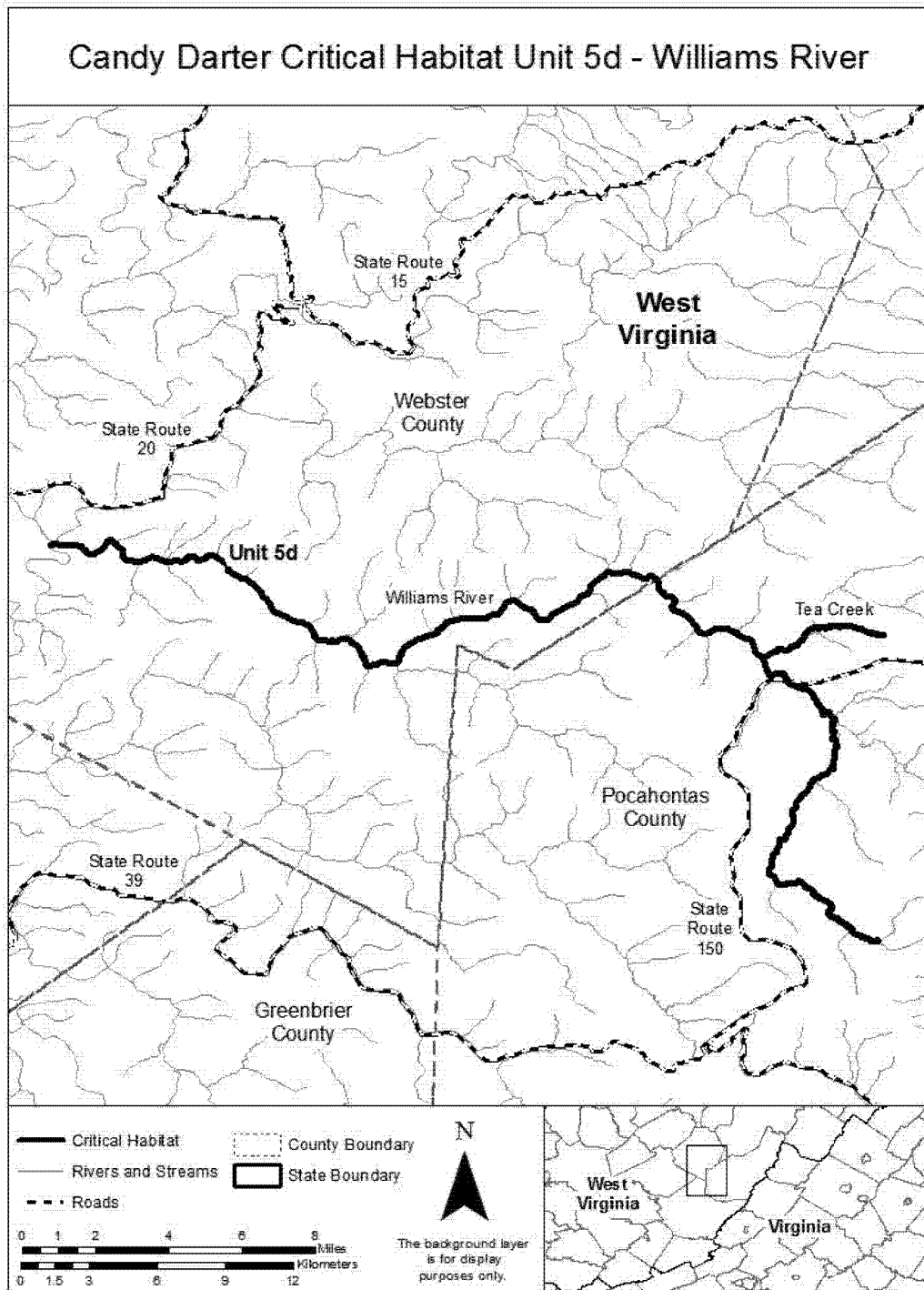
(23) *Unit 5d*: Williams River, Pocahontas and Webster Counties, West Virginia.

(i) *General description*: Unit 5d consists of 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:



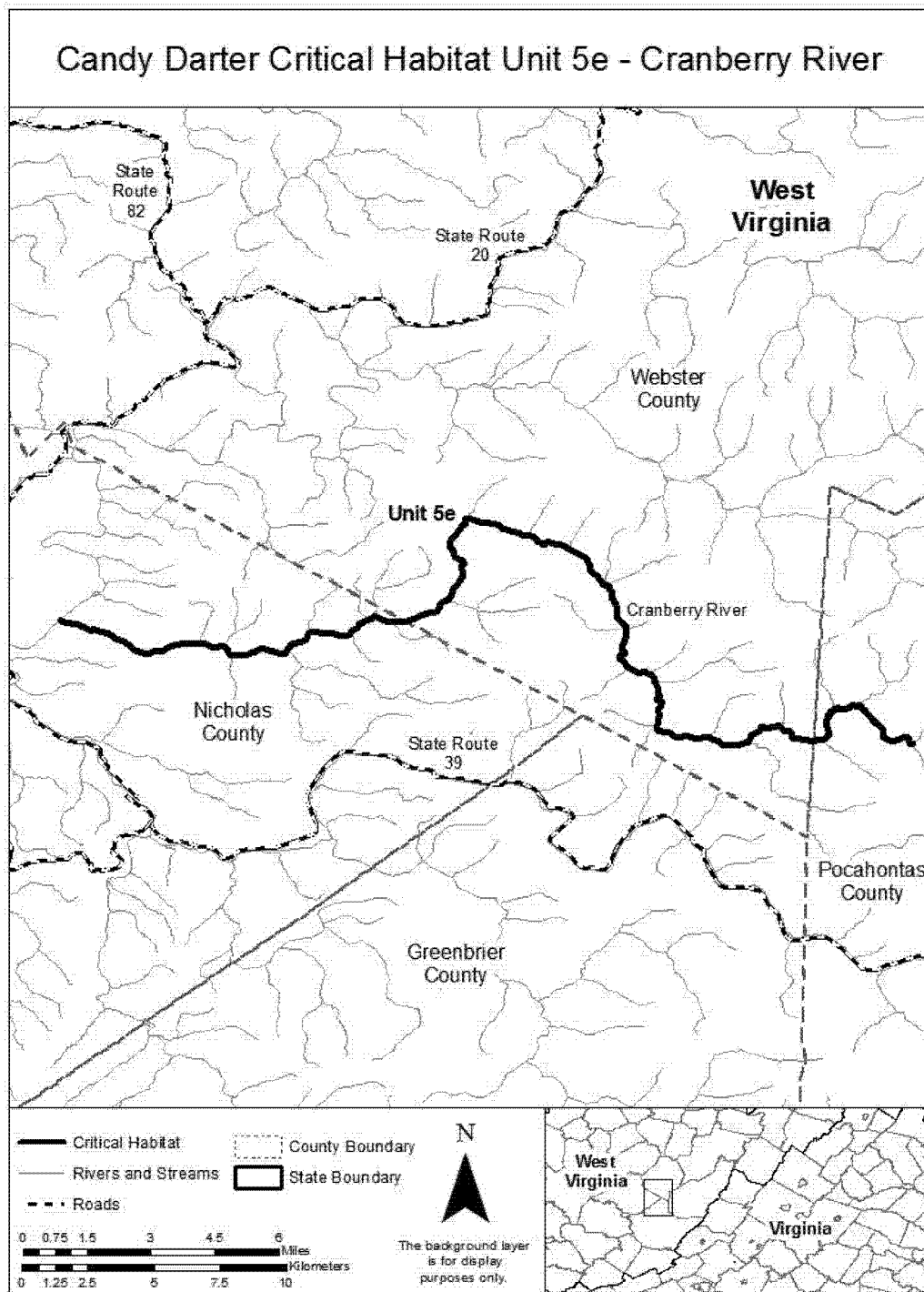
(24) *Unit 5e*: Cranberry River, Nicholas and Webster Counties, West Virginia.

(i) *General description*: Unit 5e consists of 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 consists of 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

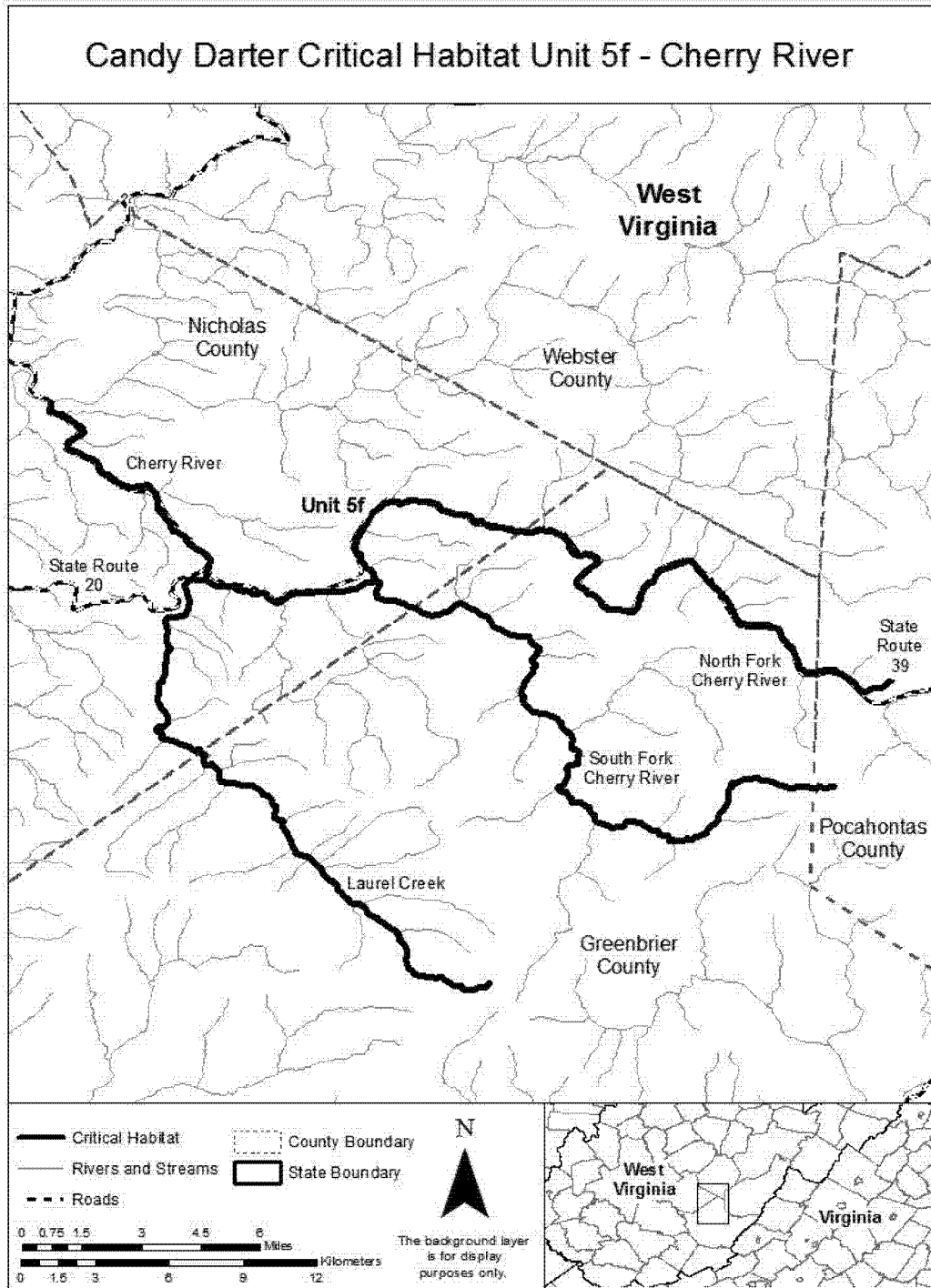
28.0 skm (17.4 smi) of the North Fork Cherry River from the Pocahontas Trail crossing, downstream to the confluence of the North and South Forks of the Cherry River; approximately 26.2 skm (16.3 smi) of the South Fork Cherry River from a point approximately 0.5 skm (0.3 smi) south of County Road 29/4 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 and the Cherry River. Approximately 29.1 skm (18.1 smi) of Unit 5f is within the

Monongahela National Forest. The remainder is adjacent to 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:



\* \* \* \* \*

**Martha Williams,**  
*Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.*

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