

occupancy, or development of public lands on the basis of violations of State or Federal acts or regulations applicable to air or water quality. Furthermore, these commenters asserted that Section 302(c) of FLPMA provides for the suspension, revocation, or cancellation of authorizations to use, occupy, or develop public lands only when violations of terms and conditions occur on public lands in connection with the exercise of rights and privileges of the use authorization. Others were concerned that penalties would be imposed for even *de minimus* violations.

Although Section 302(c) of FLPMA contains specific references to Federal and State air and water quality standards, its language is expansive. It allows enforcement of terms and conditions, "including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands * * *." The Department has concluded that these provisions of FLPMA would encompass the activities prohibited in § 4140.1 of this rule. Moreover, the Department has concluded that good stewardship of the public lands, as well as the intent and specific language of FLPMA, are served by expanding the prohibited acts section to include violations of State and Federal laws related to natural resources, and that expanding the list of prohibited acts provides the regulated community and the public with improved notice of the prohibited acts.

The final rule as adopted provides penalties where violations are more than *de minimus* and concern, in a more than remote way, the use of the public lands. The Department has addressed commenters' concerns that the provisions should be restricted to violations of terms and conditions that occur on public lands and in connection with the exercise of rights and privileges of the use authorization by adding to § 4140.1 the list of conditions formerly included under § 4170.1-3. Under § 4140.1(c) of this final rule, violations of other State or Federal laws or regulations will not constitute prohibited acts unless public land administered by BLM is involved or affected, the violation is related to grazing use authorized by a permit or lease issued by BLM, and the permittee or lessee has been convicted or otherwise found to be in violation of any of these laws or regulations by a court or by final determination of an agency charged with the administration of these laws or regulations, and no further appeals are outstanding. This consolidates in one section the list of

the types of violations and the three conditions that must be met before a violation of State, Federal, and local laws and regulations constitutes a prohibited act. This reorganization of the provisions from proposed §§ 4140.1 and 4170.1-3 into final § 4140.1 improves the clarity of the final rules by eliminating cumbersome cross-references.

A number of commenters expressed concerns about procedural protection in connection with the imposition of penalties. Under this final rule, enforcement of the penalty provisions is subject to the same Departmental appeal procedures as other types of appeals. These procedures are detailed in regulations of the Department's OHA, Title 43 of the Code of Federal Regulations, Part 4, Subpart B. These provisions provide adequate procedural safeguards, set conventional burdens of proof and provide fair enforcement of the rules. Therefore, the Department has not modified the rule language in response to these concerns.

There was also considerable comment about prohibited acts regarding transit between public and private lands, trespass, straying, and gate closure. Commenters expressed concern about whether the provisions affected the ability of landowners to protect private property or range improvements from trespass and vandalism. Others were concerned that the provisions would affect Department of Agriculture or State agency predator control activities.

Nothing in these rules prohibits landowners from protecting private property from trespass or vandalism, or prohibits the landowner from keeping their gates closed to protect private property. The final rule regarding gates is clarified by the addition of the words "during periods of livestock use." The Department does not intend this provision to apply to situations where gates are left open to give cattle access to forage and water. Closing a gate and consequently denying cattle access to needed forage or water could be covered by the provisions in § 4140.1(a)(5). Nothing in this rule is intended to prevent legitimate use of gates to move and control livestock. The provision of § 4140.1 relating to public access merely reiterates existing requirements. The intent of the provision is to prevent individuals from interfering with lawful uses of the public lands.

The provisions in subpart 4140 apply to BLM's administration of the grazing program on the public lands, and nothing in the subpart prevents the landowner from placing signs on private property to prevent trespass and destruction. Furthermore, nothing in

this provision affects Department of Agriculture or State agencies' predator control activities. However, the Department has no authority to prevent human trespass on private lands. Trespass is governed under the State laws in each State.

Stray livestock are a serious problem on public lands. In addition to being an unauthorized use of forage, stray livestock present hazards to vehicles and public land users, carry a potential to transfer disease from sick to healthy stock, disrupt other animals, and cause undesired breedings and unplanned mixtures of livestock gene pools.

It is the responsibility of the permittee to control his or her livestock. However, in evaluating violations, the authorized officer can consider factors beyond the control of the permittee or lessee. For example, the authorized officer could consider the fact that a third party, without any knowledge on the part of the permittee, had destroyed the permittee's fence and as a result livestock had strayed from authorized areas. In contrast, repeated incidents of apparently incidental strays could signify a more serious problem of range management. In such cases, the authorized officer needs authority to penalize the permittee or lessee for the problem.

Some commenters expressed the view that conservation use should not be exempted from the prohibition against failing to make substantial grazing use. Commenters' concerns about conservation use are discussed elsewhere in this preamble, especially at § 4130.2. Failure to make substantial use is discussed at § 4170.1-2.

Some commenters asked whether the rule prohibited alteration of stream courses that might be needed as part of the maintenance of improvements. The proposed and final language indicates that *customary* maintenance of diversion points is an authorized activity. Others were concerned about the provision specifying that attempted payment by a check that is not honored does not constitute a grazing authorization. In response, the language at final § 4140.1(b)(9) has been revised to specify that payment with insufficiently funded checks *on a repeated and willful basis* is a prohibited act.

Other commenters were concerned about the provisions on leasing and subleasing. Nothing in this provision prohibits *authorized* leasing or subleasing. The final rule has been amended to clarify that only unauthorized leasing or subleasing is a prohibited act. The Department understands that transactions that